

The Financial Crisis in Constitutional
Perspective:
The Dark Side of Functional Differentiation

Edited by

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LIST OF ABBREVIATIONS

CCO	Chief Compliance Officer
CDO	Collateralised Debt Obligation
CDS	Credit Default Swaps
CEO	Chief Executive Officer
CSR	Corporate Social Responsibility
DDR	<i>Deutsche Demokratische Republik</i>
DOJ	U.S. Department of Justice
DPA	Deferred Prosecution Agreement
ECB	European Central Bank
ECJ	European Court of Justice
ETUC	European Trade Union Confederation
EU	The European Union
FAO	Food and Agricultural Organisation of the United Nations
FASB	Financial Accounting Standards Board
FHA	US Federal Housing Administration
FINMA	Swiss Financial Market Supervisory Authority
FLO-CERT	Independent International Certification Agency for Fairtrade Production Processes and Products
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HUD	US Department of Housing and Urban Development
IASC	International Accounting Standards Board
IKB	<i>IKB Deutsche Industriebank AG</i>
ILO	International Labour Organisation
IMF	International Monetary Fund
INGO	International Non-Governmental Organisation
ISO	International Standards Organisation
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
RMBS	Residential Mortgage Backed Security
SEC	US Securities and Exchange Commission
SIV	Structured Investment Vehicles
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
SRSG	Special Representative of the Secretary-General
TBTF	Too big to fail
TINA	There is no Alternative
TNC	Trans-National Corporation
U.S.	The United States of America
UK	The United Kingdom
UN	United Nations
UNICESCR	United Nations International Covenant on Economic, Social and Cultural Rights
UNSR	The UN Special Representative on Business and Human Rights
US	The United States of America

List of Abbreviations

USA	The United States of America
USD	US Dollars
WHO	World Health Organisation
WTO	World Trade Organisation

INTRODUCTION

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This volume is devoted to a legal and sociological analysis of the financial crisis which broke out in the open in 2008, and asks how the crisis can be analysed in terms of systems theory. 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 it, instead, be found in more general tendencies of societal de-differentiation. Or did the crisis serve as a symptom of the incapacity of both the political and the legal systems to steer and regulate societal developments; an incapacity which might have been deepened through increased asymmetries in the level of the globalisation of different functional systems leading to an unsustainable “de-coupling” of the global markets from the wider societal context. Alternatively, the crisis can also be understood as a failure of risk perception and management for which individual and collective actors both within and outside of financial organisations bear responsibility.

Common to most of the contributions is the presumption that the causes of the crisis cannot merely be understood as a reflection of individual and organisational misbehaviour, or as a consequence of a shifting power balance between territorially organised states. Instead, the crisis reflects far more fundamental transformations of the basic structures of society in so far as the crisis can be understood as a side-effect of increased functional differentiation. This development has, however, been asymmetric in nature, in so far as the economic system has advanced “further ahead” than other functional systems. Paradoxically, this development has thus triggered the emergence of new forms of de-differentiation through the expansion of economic rationality beyond the borders of the economic system. The evolutionary emergence of such asymmetries has intensified already apparent rationality conflicts, thereby undermining both the impact and the reach of existing regulatory structures.

With regard to both the short-term and the long-term reactions another strong focal point 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 constitutional perspective.

In the first contribution, Gunther Teubner asks if 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 is not the main problem. Instead, we must look for the specific social addiction mechanisms that cause such impersonal addiction phenomena. 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 effects of which could not be achieved through either the national or transnational interventions of the world of states.

Complementary to Teubner’s contribution, Rudolf Stichweh explores to what extent a general theory of crisis within social systems can be developed. A central point is that the danger of inflationary tendencies, which are well-known in relation to the money medium within the economic system, can potentially be observed within all systems, since they all rely on constitutive symbols which can be subject to inflationary or deflationary movements. It follows that, in a multi-contextual world in which no single system possesses a structural primacy *vis-à-vis* other systems, crises not only occur within the economic and political systems, but also within other systems. The kind of spill-over effects which unfold when a crisis within one system triggers negative effects within other systems thus occurs between all functional systems and not just between the economic and the political systems and their respective environments.

The following three contributions focus on the breakdown of expectations as a central cause and characteristics of the 2008 financial crisis. Karl-Heinz Ladeur attributes the causes of the crisis to a fundamental transformation of society into a knowledge-producing network-society characterised by constant change and high levels of uncertainty. The transformation of banks away from mere intermediaries between savers and borrowers and into far more

complex risk-managing institutions is a case in point here. In such a world, the attempt to return to a unitary public ordering of the economy upon the basis of a clear-cut normative framework becomes an illusory objective. Instead of stabilising normative expectations, the law should, instead, orient itself towards the structuring of cognitive learning processes in order to minimise the possibility of systemic break-downs.

Moritz Renner goes in the opposite direction of Ladeur in his contribution. Renner explores the rule of law in the events leading to the 2008 crisis. In doing so he, too, departs from the distinction between cognitive and normative expectations, and argues that the interaction of the legal, the economic and the political system in the era of globalisation is marked by a shift from normative to cognitive expectation structures. This shift, according to Renner, has entailed a simultaneous over-complexity *and* under-complexity of the legal system: an over-complexity of the cognitive expectations which the legal system has to process, and an under-complexity of its internal normative structures. But even more important, the turn away from normative expectation structures and the simultaneous proliferation of cognitive expectations have rendered the distinction between normative and cognitive expectations itself impossible to uphold. The consequence is a breakdown of societal expectation structures, which have been largely replaced by a vague hope in the continuance of the politico-economic *status quo*.

Urs Stäheli introduces a novel approach on the same subject matter by asking to what extent an ecological and epidemiological, and thus non-causal, approach can contribute to an understanding of financial crises. Through a contrast with classical crisis semantics, Stäheli analyses what is new about recent financial epidemiology and how it is turned into a “political epidemiology” in order to govern financial crises. Stäheli stresses that financial contagion is made possible by the functional differentiation of the financial economy. It is only through the self-reference of the financial system that new forms of connectivity have become possible.

The analyses of the breakdown expectations are followed by three contributions which share the view that the financial crisis should be understood as a symptom of fundamental crisis of society as such. Hauke Brunkhorst links up with a tradition of theorising going back to Hegel and Marx, which sees modernity and crisis as co-original phenomena. He argues that contemporary social thought - through the move into a paradigm of risk - have neglected the paradigm of crisis. Brunkhorst therefore seeks to re-invent a concept of crisis which is structural in nature, and which combines functional differentiation

and social class differentiation in a manner which is capable of providing a diagnosis of the new constellation of a normatively integrated world society.

Dirk Baecker also looks into the relationship between crisis and society. In doing so, he describes crises as events belonging to the immune system of society, and determines the four culture forms of crisis typical of tribal, ancient, modern, and next society. The starting-point is, however, the paradox that a crisis is bound to happen in a society which, in all other respects, works fine. If not, society would be destroyed. This paradox translates into a coding of the events of crisis, which distinguishes the positive side of breakdown from the negative side of design. "Positive", here, means that there are some events of a crisis which are positively indicated, and "negative" means that there is reflection about these events, which puts them into the broader picture of the structure and culture of society.

In his contribution, Jean Clam explores the question of whether systems are inherently self-destructive. His thesis is that the *oecumene* of the present is a structural whole with no outside, whose quietude can only be challenged by a new type of insecurisation or crisis. Traditionally, crises have been those moments of local disorder which are bracketed by the steady ordering of regularly unfolding social processes. In contrast, the radical contingency of contemporary world society, instead, transforms crisis into a permanent feature.

The second half of the book focuses on the already observable, as well as the possible, reactions to the crisis. Marc Amstutz and Alberto Febbrajo do so by looking at regulatory responses. Amstutz understands crises as boundary disorders which occur when the closure mechanisms of one or more social systems deteriorate to such a degree that they become dysfunctional, leading to the emergence of deleterious links and dependencies between the systems involved. Such disorders, played a central role in the 2008 crisis in so far as the boundaries between the economic, political and legal systems were effectively undermined. The result is a disruption of the systems' ability to carry out normal operations and thus also to perform their designated functions within the web of society. The radical contingency of social processes, moreover, means that regulatory responses must be evolutive in nature. Regulation must be designed in a way which makes it possible to react to highly variegated and unpredictable changes. A higher degree of structural diversification in financial institutions is also desirable in so far as more specialised institutions, relying on more precise forms of programming, are likely to be better at ensuring boundary maintenance than institutions characterised by a lower level of internal coherency.

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 re-define the structural and functional borders of law menaced by the absence, or the reduced presence, of an essential social factor of inter-systemic integration, such as the state. But the traditional state-centred re-construction of social life has not yet been replaced by adequate alternatives. Consequently, transnational networks without central authorities tries, 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 pluralistic "society of societies".

In his contribution, Kolja Möller explores the kind of reactions emerging within the sphere of social movements. The striving for global social rights does not react with economic macro alternatives to the economic and financial crisis; instead, they appropriate the existing inscriptions of equality in world law in order to highlight the threats posed by global capitalism. The challenge is thus to re-contextualise the agenda of global social rights under the conditions of the global economic and financial crisis in order to establish a true alternative to the market-liberal order of the world economy.

Aldo Mascareño also emphasises the distinction between normative and cognitive expectations. He argues that normative political expectations de-differentiate the cognitively-driven operations of the financial system and over-impose a long-lasting normative conditioning upon autonomously organised cognitive procedures. For example, the "right to an affordable home" creates a pressure to provide credit to non-creditworthy clients. Against this background, he seeks to develop an ethic of contingency which is capable of confronting the normativisation of cognitive expectations.

In the final section, Chris Thornhill and Poul Kjaer contextualise the financial crisis within larger constitutional transformations. Thornhill provides a long-term historical perspective on the evolution of statehood and the ability of states to intervene in the economic system. The modern vocabulary of statehood can be observed as revolving around a paradox, in so far as it describes, projects and pre-emptively constructs a condition of statehood as an inclusive public order which, despite its reflexive utility, remains impossible to sustain in the long-term. It follows that a societal crisis unfolding outside the state, for example, in the form of an economic crisis, might lead to inter-systemic coalescence and thus to a distortion of the state if the state in question is obliged to lend an improbable or

unmanageable quantum of political power to regulate or sustain exchanges in other parts of society. An obvious example is an acute banking crisis, in which political actors internalise the responsibility for social exchanges in the monetary sub-system, and are then forced to deepen their intersection with the economy via changes to the fiscal regime. However, such interventions can only be undertaken for a very limited period of time if the internal coherency and stability of states are to be maintained.

Poul Kjaer sets forth in a similar vein by introducing an understanding of crises as a reduction in the meaning production of social systems, which can either be 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 re-inforcing structural transformations. First, there is the increased globalisation of functional systems, which has led to massive dis-locations 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 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.

Section I

THE FINANCIAL CRISIS IN A SYSTEMIC PERSPECTIVE

CHAPTER 1

A CONSTITUTIONAL MOMENT? THE LOGICS OF “HITTING THE BOTTOM”

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I. COLLECTIVE ADDICTION?

Is there such a thing as collective addiction? Do we recognise addiction as a genuine social phenomenon? What does it mean to speak of the addictive society? The usual answer would be, for example, binge drinking, or the herd instinct of the bankers before the crisis. In fact, these are social amplifiers of addictive behaviour: they influence obsessive behaviour in the form of peer-pressure, imitation, social norms or mob mentality. But what they are concerned with is, ultimately, *only* the addiction of individuals.

Through the lens of systems theory, we look for and find something rather different. It is possible that social processes, as such, might exhibit the properties of addictive behaviour quite independently of the dependence syndromes of individual human beings. Josef Ackermann is clearly not an addict, and yet *Deutsche Bank* is in urgent need of detoxification therapy. This would amount to collective addiction in the strict sense. For Alan Greenspan, its discovery was a shock:

“those of us who have looked to the self-interest of lending institutions to protect shareholder’s equity, myself included, are in a state of shocked disbelief.”¹

He would never have believed that banks would have acted against their own interests by high-risk “gambling” practices to the point of self-destruction, that rational organisations could act so irrationally, against their own interests; yet, it was this that brought Greenspan to the painful realisation that his “whole intellectual edifice”, based entirely upon rational choice, had, indeed, “collapsed”.

¹ A. Greenspan, *New York Times*, 24 October 2008.

The addiction syndrome of a collective actor would be one manifestation of genuine social addictive behaviour. Another manifestation would be communication chains that exhibit an intrinsic compulsion to growth, which would not require the involvement of a collective actor. Independently of the addiction of individuals, communications would concatenate so that they would become caught up in compulsive engagement in an activity, despite lasting self-destructive consequences. If there is such a thing as non-individual, and thus collective or communicative, compulsions to growth, then the greed of individual bankers is not the main problem. Instead, we must look for the specific social addiction mechanisms that cause such impersonal addiction phenomena.

What does this fascinating phenomenon have to do with constitutional moments? My intention is to draw a bow from the self-harming growth compulsions of social systems, over the moment of near-catastrophe, to new orientations, which cannot be effected from the outside but, rather, only through the transformation of their “inner constitution”. With Derrida, we might talk of the “extremely capillary constitutions of the discourses”, at which the transformation must direct itself; since it is they – and not the “capital constitutions” of the world of states – that regulate the inner life of the social body, down to the very finest blood vessel.² Thus: constitutions beyond the state.

These are my hypotheses:

- In order to understand the recent global financial crisis, we should not rely on factor analysis alone. Instead, we should look for the underlying self-destructive growth compulsions of information flows – in other words, for phenomena of collective addiction.
- “Hitting the bottom” refers to the constitutional moment when either a catastrophe begins, or societal forces for change of such intensity are mobilised that the “inner constitution” of the economy transforms under their pressure.
- Plain money reform is one of several examples that illustrate a capillary constitutionalisation of the global economy, the effects of which could not be

² J. Derrida, *The other handing: Reflections on today's Europe*, (Bloomington IN: Indiana University Press, 1992), p. 34.

achieved through either the national or transnational interventions of the world of states.

- The dichotomy of constitutional/unconstitutional develops into a binary meta-code within the structural coupling between the economy and law, and is ordered above both the legal code and the economic code.

II. COMPULSIONS TO GROWTH AND THE FINANCIAL CRISIS

II.1. CAUSAL FACTORS OR THE COMPULSION TO GROWTH?

A variety of regulations have been proposed in reaction to the global financial crisis: the abolition of banker bonuses, enhanced equity funds for the banks, a Tobin tax, quality control of financial products, tightened national and international state supervision of financial institutions, particularly hedge funds, tightened control of capital flows and stock market transactions, and improved rules of accounting and risk-assessment.³ Typically, these proposals are based upon factor analysis, in which individual causes are isolated, through the attribution of causality, and held responsible for the crisis. The aim of regulation, then, is to introduce counter-factors to the causal chain in order to prevent a repetition of the crisis. Their chances of success will not be disputed here; however, they do have one problem in common: *fatta la legge, trovato l'inganno*. No sooner has a law been passed than the loophole appears. The Achilles heel of such regulation is that national or international rules can always be effectively avoided; in the face of such enormous efforts at avoidance, *ex-ante* regulation is impossible.⁴

A deeper understanding of the crisis is offered by an analysis which regards the factors of factor analysis simply as interchangeable activating conditions, and which attempts to discover the underlying dynamic. This dynamic, which fuels ever newly developing avoidance strategies, should be tamed through transforming the “internal constitution” of the global financial economy. One among several instructive examples of this is provided by the so-called plain money reform currently recommended by a number of finance experts.⁵ This

³ *Der Spiegel*, 14 September 2009, 108 et seq.

⁴ W. Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy*, (Oxford: Oxford University Press, 2009), p. 236 et seq.

⁵ The classic is I. Fisher, *100% Money*, (London: Pickering & Chatto, 1997 [1935]). Today's protagonists are J. Huber, *Monetäre Modernisierung: Zur Zukunft der Geldordnung*, (Marburg: Metropolis, 2010); H.C. Binswanger, *Die Wachstumsspirale: Geld, Energie und Imagination in der Dynamik des Marktprozesses*, (Marburg: Metropolis, 2006); J. Huber & J. Robertson, *Creating New Money: A monetary reform for the information age*, (London: New Economics Foundation, 2000). See, also, H. Creutz, “Vollgeld und

reform goes right to the heart of the economic constitution – the creation of money. Money creation ceased to be the prerogative of central banks, which acted to generate a money supply through paper money not tied to the gold standard. The widespread circulation of non-cash money in current accounts, the circulation of moneyless payment transactions, the new communication technologies, and – of particular importance – the globalisation of money and capital transactions, have prised the money-creating monopoly from the hands of the national central banks.⁶ By virtue of these developments, it is now the globally-active commercial banks, which have assumed *de facto* the capacity to create money – in principle, independently of the central banks. And this is the case even if non-cash money is euphemistically referred to only as quasi-money. In Europe, the ratio of non-cash money to cash money is 4:1. In the UK, non-cash money accounts for 92% of the total. The German Federal Bank puts it as follows on its website:

“The main source of money creation today is the provision of credit guarantees by commercial banks (active money creation): the debtor is given a sight fund (sight deposit) to the value of the borrowed sum and, as a result, the money supply of the national economy is directly increased.”⁷

What is happening here is *creatio ex nihilo*. For it is absolutely not the case that the existing saving deposits of the banks cover the credit provided by commercial banks by way of non-cash money. Instead, credit is provided more or less freely according to the independent risk calculations of the individual banks. Public central banks can influence this private money creation only indirectly through the regulation of interest rates.

It is this massive creation of money by private banks that is responsible for the current excesses of the compulsion to growth in the global financial sector. It serves, through advance financing, to compel the real economy to grow to an extent that is socially harmful.

Grundeinkommen”, (2002) 133 *Zeitschrift für Sozialökonomie*, p. 14; S.A. Zarlenga, *The Lost Science of Money*, (Valatie NY: American Monetary Institute, 2002); J. Robertson, “National and International Financial Architecture: Two Proposals”, Inquiry into the Banking Crisis. Evidence Submitted to The House of Commons Select Committee on the Treasury, available at:

www.parliament.uk/parliamentary_committees/treasury_committee/tc0708pn85.cfm; B. Senf, “Bankgeheimnis Geldschöpfung”, available at: www.monetative.de/wp-content/uploads/bernd-senf-bankgeheimnis-geldschopfung-apr-09.pdf.

⁶ As in the further development of the ideas of J.A. Schumpeter, *The Theory of Economic Development*, (Cambridge MA: Harvard University Press, 1934), p. 153; A. Graziani, *The Monetary Theory of Production*, (Cambridge: Cambridge University Press, 2003), p. 82 *et seq.*

⁷ www.bundesbank.de/bildung/bildung_glossar_g.php.

At the same time, this private money creation is exploited for an unforeseen increase in self-referential financial speculation. To cite Huber:

“The banks act like every other economic actor: pro-cyclically and in their own interest, without any concept of the whole economy and without any political or social accountability. As a consequence, the creation of money by the banks proceeds pro-cyclically, overshooting the mark. In this way, extremely exaggerated business- and stock market-cycles can be created:

- in the up and up of the oversupply of money and consequent price inflation, increasingly also capital market stock price inflation (investment bubbles, asset price inflation),
- in the down and down of the crisis phase – following imploding stock market capitalisation/asset values and payment deficits – scarcity of money and monetary shrinking of the economy. The financial institutions themselves are as exposed as the state, the economy and society.”⁸

The point of the theory, however, is as follows: the alternative cannot lie with zero growth, but instead with attacking the excesses of the compulsion to increase. “Stability and zero growth are impossible in today’s monetary system.”⁹ Through the creation of value, the creation of money forces, by necessity, an increase in profits – and, in turn, the increase in profits forces further money and value creation. This results - as a matter of course - in a growth spiral. The alternative would be a shrinking of the economy, which, in the long term, would be incompatible with today’s money-centric economic system. A functioning monetised economy is reliant on a certain compulsion to grow. That said, it is not the compulsion to growth, as such, which occupies the centre-stage, but, rather, the difference between necessary growth and self-destructive growth-excesses with undesirable consequences.¹⁰

⁸ J. Huber, “Geldordnung II: Reform der Geldschöpfung. Vollgeld-Konzept und Seigniorage Reform”, available at: www.soziologie.uni-halle.de/huber/docs/geldordnung-ii-reform-der-geldschoepfung-durch-vollgeld-mai-09.pdf.

⁹ H.C. Binswanger, *Vorwärts zur Mässigung: Perspektiven einer nachhaltigen Wirtschaft*, (Hamburg: Murmann, 2009), p. 21. This argument marks the difference to theories of zero growth, which focus on the social and ecological limits of growth, i.e., scarcity of resources, aging processes and increasing state debts; see M. Miegel, *Exit - Wohlstand ohne Wachstum*, (Berlin: Propyläen, 2010).

¹⁰ Binswanger, *Vorwärts zur Mäßigung*, (Hamburg: Murmann, 2009), p. 11 *et seq.*, differentiates between a necessary compulsion to grow and a socially-destructive urge to grow.

II.2. SELF-DESTRUCTIVE GROWTH-DYNAMICS IN COMMUNICATION

This distinction between necessary growth-dynamics and pathological growth-excesses is of considerable theoretical and practical interest. If growth-inducing mechanisms cause social processes that are not, themselves, pathological, to be excessively actuated, then an analogy with individual addiction-phenomena is appropriate.¹¹ As stated above, however, the common perception of addiction syndromes as psychological problems (and, correspondingly, of therapies aimed at individuals) leads us up a blind alley. To identify genuine social equivalents of individual addictive behaviour becomes crucial. Systems-theoretical analysis may assist us in this task, and the starting-point is the strict division of psychological from social processes, both of which are accountable for the production of meaning in their own right. Luhmann's greatest achievement was to set beside the Husserlian phenomenology of consciousness an independent phenomenology of communication (not to substitute the former for the latter!). This led to a typical doubling of phenomena, which hitherto had been understood only psychologically. Memory, for example, is not only a psychological dynamic, but also a purely socially-institutionalised communicative process. Even for complexes that were understood exclusively as individual consciousness-phenomena – such as intention, strategy, interest, preference, or understanding – a distinction must be made according to whether they occur in the consciousness of the individual, or proceed as communication processes independent of consciousness.¹²

The definition of individual addiction – compulsive engagement in an activity despite lasting negative consequences – must be re-thought for social systems in general, and for collective actors in particular. Which “addiction mechanisms” are responsible for the fact that the autopoietic self-reproduction of a social system through the recursivity of system-specific operations reverts into a communicative compulsion to repetition and growth, bringing self-destructive consequences in its wake? Communication can be understood to suffer from an addiction syndrome when its irresistible attachment to exogenous factors engenders a compulsion to growth. Returning to our example, we might understand the non-cash money created *ex nihilo* by the commercial banks to be an addiction mechanism: the payment operations concatenate so that an excessive compulsion to growth is released in both the

¹¹ H.J. Freyberger, W. Schneider & R.-D. Stieglitz *Kompendium. Psychiatrie, Psychotherapie, Psychosomatische Medizin*, (11 edn) (Basel: Karger, 2002).

¹² This is particularly clear in N. Luhmann, *Social Systems*, (Stanford CA: Stanford University Press, 1995), p. 153 *et seq*; *idem*, “Zeit und Gedächtnis”, (1996) 2 *Soziale Systeme*, p. 307; *idem*, “Individuum und Gesellschaft”, (1983) 39 *Universitas*, p. 1.

financial and real economies. The increased expectations of profit inherent in the supplementary creation of money through credit guarantees by the commercial banks then cause a compulsion to grow in the real economy, which further increases the expectations of profit. This releases a dynamic which can no longer be regarded as a static economy cycle, but, instead, as a rapidly accelerating growth spiral. Parallel to this, bank loans are taken according to the dynamics of money-multiplication that are never intended to finance productive investments, but are used, instead, to purchase speculative assets. If the interest payable on the bank loan exceeds the expected increase in the value of the assets, the result is the collapse of speculation, financial crisis, and eventually economic crisis. Both communicative compulsions to growth can occur quite independently of individual greed and addictive behaviour; even addiction-resistant individuals must play along with these compulsions, to a great extent, or risk exclusion from the game. That said, it remains the case that individuals with corresponding psychological dispositions are attracted to the game, so that both individual and social addictive behaviour mutually strengthen each other.

Such a dynamic raises a fundamental question for autopoietics: How are we to conceive of the relationship between social self-reproduction and the compulsion to growth? Notions of a self-producing communication-cycle, which, so to say, flows back into itself, might appear to offer an answer; however, these are much too harmless, if not entirely misleading. The theory of autopoietic systems has already broken with the axiom of classical structuralist-functionalist theory, with the imperative of self-preservation. The connectivity (*Anschlussfähigkeit*) of recursive operations is the new imperative – autopoiesis proceeds or not, as the case may be.¹³ Yet, the disquieting question remains of whether autopoiesis is not secretly dependent upon the logic of growth. Is there an affinity between the self-reproduction of social systems and their implacable compulsion to growth? And, particularly relevant to our discussion, does the recursivity of autopoiesis have inherent tendencies, over and above such normal growth, towards a socially harmful compulsion to repeat and grow? And by what means is such a “turbo-autopoiesis” triggered? Might the infamous expansion tendencies of the function systems – the tendencies towards a comprehensive politicisation, economisation, juridification, medialisation, or medicalisation of the world – indicate such a compulsive growth-dynamics? And is it likely that a moment of excessive expectations, a type of high-risk “credit” in future communications, lies hidden in the motivations to accept a

¹³ Luhmann, *Social Systems*, note 12 *supra*, p. 30 *et seq.*

communication created by the media money, power, law, truth and love? Is it likely that the moment can only be “cashed in” with permanently higher payments, and with their reaction, in turn, on increasing “credit”-expectations, so that a necessary increase-dynamic, a growth-spiral develops? In that case, the pathological growth-spiral could no longer be regarded as a phenomenon particular to the money-medium, but, instead, as a general characteristic of function systems. Such an increase dynamic goes well beyond the acceleration cycle in modern societies diagnosed by Hartmut Rosa.¹⁴ It is not only concerned with a transformation of time-structures, contingent on social structures, ending in an acceleration-dynamics, but is also concerned with advance “payments”, generating expectations of an increase in “payments”, which, in turn, compel the next advance “payment” in an initially stable dynamic, with the tendency to tip into socially-harmful excesses.

There is, I submit, an inherent compulsion to ever higher production in function systems other than the economy – an inherent compulsion which, on the one hand, is a necessary condition of self-reproduction, but which, on the other, can be propelled by assignable growth-inducing mechanisms to the point of transition into destructive tendencies. Can the difference between “normal” growth and its “pathological” forms – in other words, their addiction-phenomena – be clearly identified? In the case of law, it is quite clear that law does not simply resolve conflicts and then rests in peace. Law itself creates conflict through its own regulations, which, in turn, require more regulation. As the example of drug-related legislation strikingly shows, through its regulatory intervention in daily life, law itself produces situations that provoke conflicts.¹⁵ And, at the same time, every norm brings with it difficulties of interpretation which cause conflicts. Ultimately, the sheer volume of norms produces internal conflicts of norms, which requires legal solutions. Is the price of the autonomy of law the fact that it necessarily contributes to an increase in conflict? Still, this would be the normal state of a moderate inflation of legal norms. What is critical, in contrast, is a type of addiction syndrome of the law in which norm production exhibits a dependency syndrome on external *stimuli* – political legislation and economic contractual mechanisms – producing, at national and transnational level, the much criticised pathologies of the excessive juridification of the world. Would these be the “legal excesses” of late

¹⁴ H. Rosa, *Beschleunigung: Die Veränderung der Temporalstrukturen in der Moderne*, (Frankfurt aM: Suhrkamp Verlag, 2005), especially p. 295 *et seq*; *idem*, “The Speed of Global Flows and the Pace of Democratic Politics”, (2005) 27 *New Political Science*, p. 445.

¹⁵ N. Luhmann, *Law as a Social System*, (Oxford: Oxford University Press, 2004), p. 139.

modernity?¹⁶ In politics, the excessive compulsions of the welfare state to grow are the obvious candidate. In science, research creates ever-deeper uncertainties, which can only be dispelled by further research, which, again, causes new uncertainties. In each of these contexts, we need to differentiate between a compulsion to growth that is necessary for continuation, and increase-excesses which threaten the normal state of things.

III. THE CONSTITUTIONAL MOMENT

III.1. HITTING THE BOTTOM

We have, then, to identify the dynamics that accelerate the growth spiral of a social sector to the point where it tips over into destructiveness by colliding with other social dynamics. Such growth accelerations of the function systems burden themselves, society and the environment with serious “consequences of their own differentiation, specialisation and high-achievement orientation”.¹⁷ Three collision fields can be identified: (1) the collision of the growth imperative of one system with the integrity of other social sub-systems; (2) collision with a comprehensive rationality of world society; and (3) the collision of the growth acceleration of a system with its own self-reproduction. The evolutionary dynamics of these three collisions certainly have the potential to blur into social catastrophes. But there is nothing necessary about the collapse, as Karl Marx postulated, and nothing necessary about Max Weber’s “iron cage” of modernity. In this light, Niklas Luhmann is more plausible: the occurrence of catastrophe is contingent. It depends on whether growth-inhibiting counter-vailing structures emerge to prevent the positive feedback catastrophe within the growth-dynamic.

The experience of near-catastrophe, as opposed to the experience of its contingency as such, may be regarded as the “constitutional moment”.¹⁸ This is not the moment when the self-destructive dynamic causes the abstract danger of a collapse to appear: that is the normal state of things. Instead, it is the moment when the collapse is directly imminent. The functionally-differentiated society appears to ignore earlier opportunities for self-correction; to ignore the fact that sensitive observers draw attention to the impending danger with warnings and incantations. The endogenous self-energising processes are so dominant that

¹⁶ As opposed to the legal excesses of modernity that Michael Kohlhaas exhibited in his violent fights against the feudal order; see H. von Kleist, *Michael Kohlhaas: A Tale from an Old Chronicle*, (New York: Melville, 2005).

¹⁷ N. Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1997), p. 802.

¹⁸ The term is used differently here, of course, from its use by B.A. Ackerman, *We the People: Transformations*, (Cambridge MA: Harvard University Press, 2000).

they allow self-correction only at the very last moment. The similarity with individual addiction phenomena is again obvious – “Hit the bottom!”. It must be one minute before midnight. Only then is there a chance that the understanding will be lucid enough, the will to change strong enough, to allow a radical change of course. And this applies not only to the economy, where warnings about the next crisis are regularly ignored. It also applies to politics, too, which does not react when experts criticise undesirable developments, but waits, instead, until the drama of a political scandal unfolds – and then reacts frantically. In science, the Kuhnian paradigm shift would seem to be a similar phenomenon, in which aberrations from the current dominant paradigm are dismissed as anomalies until the point where the “theory-catastrophe” forces a paradigm shift.

The constitutional moment is the direct experience of the crisis: the experience of a liberated social energy, yielding destructive, even self-destructive, consequences that can only be overpowered by their reflection and by the decision to self-limitation. The passage of social systems through the “dark side” of their promise of progress is ultimately no departure from the healthy normal course of things; no error to be avoided. Quite the contrary: the experience of the dark side is almost a necessary condition for the transformation of the inner constitution. It is ultimately, then, the pathologies that herald the constitutional moment: the moment in the catastrophe in which a decision is made between the total destruction of the energy and its self-limitation.

In functional differentiation, 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. But the dark side of these increase-principles potentially leads to moments of catastrophe, the constitutional moments which make collective-learning experiences of self-limitation possible. The year 1945 is the paradigm. This 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 itself. Similarly, the years 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.¹⁹

Constitutional moments are not limited to politics. 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. In many sites of society, the new constitutional question develops:

“how many inward expansions does society thereby cause, how much monetarisation, juridification, scientification, politicisation does it cause and is it able to come to terms with, and how many of these at the same time (rather than, for example, monetarisation alone)?”²⁰

In the late phase of functional differentiation, this becomes the central problem of societal constitutionalism. This is the real experience of late modernity following the triumphant victory of the autonomy of different sub-rationalities. No longer is the question, what are the institutional pre-conditions of their autonomy?, but rather, where are the limits of the expansion of the function systems? The economy is paradigmatic here, celebrating its triumphs and defeats in global turbo-capitalism.

III.2. CAPILLARY CONSTITUTIONALISATION

When the excessive growth processes of a social sub-system spin out of control, the following alternative exists: state intervention or inner constitutionalisation. Following the experiences of political totalitarianism in the last century, a permanent subordination of the sub-systems to the state is no longer a valid option. The political regulation of social processes through global regulatory regimes is much more viable; however, the meaning of such regulation is ambivalent. For what are the options today: Either the administrative steering of global communication processes, or the externally compelled self-limitation of the system’s options? If it is correct that the defence against the three possibilities of collision is central – the self-destruction of the system, environmental damage in the widest sense (endangering the integrity of the social, human and natural environments), and threats to world society – then the second option is to be preferred. This is the message of a societal constitutionalism. A global constitutional order faces the task: How can external pressure be

¹⁹ For a thorough analysis from this perspective, See C. Thornhill, “Towards a Historical Sociology of Constitutional Legitimacy”, (2008) 37 *Theory and Society*, p. 161.

²⁰ Luhmann, note 17 *supra*, p. 757.

exerted on the sub-systems of such a force that the self-limitations of their options for action will take effect in their internal processes?

Why self-limitation and not external-limitation? Does not experience teach us that self-limitation strategies put the fox in charge of the henhouse?; that excesses can only be prevented by the external exercise of control, backed by massive sanctions? But does not it also show that attempts to steer internal processes by means of external interventions are bound to misfire?²¹ Here, social constitutionalism attempts to steer a difficult path between external interventions and self-steering.²² A “hybrid constitutionalisation” is required in the sense that external social forces, which are not only state instruments of power, but also legal rules, and “civil society” countervailing powers from other contexts, media, public discussion, spontaneous protest, intellectuals, social movements, NGOs or trade union power, *etc.*, should apply such massive pressure on the function systems that internal self-limitations are configured and become truly effective. In the economy, for example, arrangements against indefensible working conditions must be found, which:

“...combine...external (countervailing) pressure – be it from the state, or unions or labour rights NGOs, comprehensive and transparent monitoring systems and a variety of ‘management systems’, interventions aimed at eliminating the root causes of poor working conditions.”²³

It is only possible to invent these limitations from within the system-specific logic, and not from outside.

“Every function system defines its own identity for itself ... through an elaborated semantics of self-ascription of meaning, of reflection, of autonomy. The dependence of the subsystems on one another means that they can no longer subject themselves

²¹ On the debate regarding the limits of political regulation, see J. Braithwaite, “Enforced Self-regulation: A New Strategy for Corporate Crime Control”, (1982) 80 *Michigan Law Review*, p. 1466; A.L. Ogus, “Rethinking Self-Regulation”, (1995) 15 *Oxford Journal of Legal Studies*, p. 97; N. Gunningham & J. Rees, “Industry Self-Regulation: An Institutional Perspective”, (1997) 19 *Law and Policy*, p. 363; I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending The Deregulation Debate*, (New York: Oxford University Press, 1992).

²² The general formulation regulation of self-regulation is the result of an extended debate regarding the chances of social steering by politics and law. See W. Hoffmann-Riem (ed), *Regulierte Selbstregulierung als Steuerungskonzept des Gewährleistungsstaates*, (Berlin: Duncker & Humblot, 2001).

²³ R. Locke, F. Quin & A. Brause, “Does Monitoring Improve Labour Standards? Lessons from Nike”, Corporate Social Responsibility Initiative, Working Paper No. 24 (John F. Kennedy School of Government, Harvard University), available at: www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_24_locke.pdf.

specifically to norms, can no longer legitimate themselves as a condition of order in relation to the whole society.”²⁴

The difficult task of mutually-aligning the function of a social system and its contribution to the environment at a sufficiently high level, can only be attempted by a system-internal reflection, which may be initiated or mandated externally, but cannot be substituted.²⁵ It is for this reason that an external political determination of transnational social sub-constitutions is not feasible. Only constitutional irritants, *i.e.*, political impulses to constitutionalise, are possible. The knowledge of which type of self-limitation can be chosen does not even exist, as such, in advance. It cannot simply be called upon, but must be internally created. The endogenous growth compulsions themselves can only be fought with endogenous growth-inhibitors. The necessary knowledge cannot be built up from an external observation point as centrally available know-how; instead, it must be built up through the co-operation of external pressures and internal processes of discovery.

High cognitive demands are nevertheless thereby made of national and international interventions by the world of states and by other external pressures, for the very reason that they cannot simply arrange behaviour, but ought, instead, to create irritations selectively.

“The state cannot intervene directly so as to achieve particular desired situations or the assessment of ‘results’; rather, it must observe the social systems, and direct its intervention more specifically at their self-transformation.”²⁶

When sub-systemic rationality develops self-destructive tendencies, external political interventions are, indeed, unavoidable; however, they need to be geared “to create new possibilities through the breaking open of self-blockades; but not to super-impose a different state rationality”.²⁷ Political-legal regulation and external social influence are only likely to succeed if they are transformed into a self-domestication of the systemic growth dynamic. This requires massive external interventions from politics, law and civil society: specifically, interventions of the type suited to translation into self-steering.

²⁴ Luhmann, note 17 *supra*, p. 745.

²⁵ *Ibid.*, note 17 *supra*, p. 757.

²⁶ K.-H. Ladeur, “Methodische Überlegungen zur gesetzlichen ‘Ausgestaltung’ der Koalitionsfreiheit”, (2006) 131 *Archiv des öffentlichen Rechts*, p. 643, at 657.

²⁷ K.-H. Ladeur, “*Abwägung*” - *Ein neues Paradigma des Verwaltungsrechts. Von der Einheit der Rechtsordnung zum Rechtspluralismus*, (Frankfurt aM: Campus, 1984), p. 60.

The task would, with a bit of luck, be to combine external political, legal and social impulses with changes to the internal constitution. Again with Derrida, changes to the “capillary constitution” itself are necessary, down to the very arteries of the communication circulation, “where their fineness displays a microscopic form” and where they cannot be touched by the influences of the “capital constitution” of the state.²⁸ It seems that Derrida was inspired here by the Foucauldian re-formulation of the concept of power: the problem of today’s societies lies not with the excesses of juridical power wielded by the political sovereign, but, instead, in the phenomenon of “capillary power”, achieved through progress in scientific disciplines and dependent on technology. This capillary power permeates the social body through to its very micro-structures.²⁹ Nobody knows how such a capillary constitutionalisation could be concretely achieved. *Ex-ante* prognoses are, in principle, impossible. And, for this reason, there is no alternative but to experiment with constitutionalisation. The application of external pressure means that the self-steering of politics, or law, or other sub-systems, creates such irritations of the focal system, that, ultimately, the external and internal programmes play out together along the desired course. And this cannot be planned for, but only experimented with.³⁰ The desired course for social sub-constitutions is, as has been said, in the limitations of the endogenous tendencies towards self-destruction and environmental damage. This is the core of the constitutional *problématique*, this difficult handling of the focal sub-system’s self-transformation and that of their environmental systems.

III.3. THE DEVIL AND BEELZEBUB

It is noteworthy that it is the political system, of all things, which has assumed a historic role as a precursor, in its own sphere, for precisely this paradoxical undertaking: subjecting its own expansion to its self-limitation. Only Beelzebub can cast out the devil! The history of the political constitutions of the nation states teaches us a lesson regarding the way in which a social system can limit its own possibilities, which is immensely increased by functional differentiation, through relying upon its own resources. It cannot be over-emphasised that

²⁸ Derrida, note 2 *supra*.

²⁹ M. Foucault, “Räderwerke des Überwachens und Strafens: Ein Gespräch mit J.-J. Brochier”, in: *idem*, (ed), *Mikrophysik der Macht*, (Berlin: Merve, 1976), p. 45.

³⁰ External attempts at irritation and internal reactions must converge in the direction of a common minimising of difference. See N. Luhmann, “Grenzen der Steuerung”, in: *idem*, *Die Wirtschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1988); *idem*, “Steuerung durch Recht? Einige klarstellende Bemerkungen”, (1990) 11 *Zeitschrift für Rechtssoziologie*, p. 137.

these self-limitations did not arise automatically by reason of functional imperatives, but only under immense external pressure, as the result of fierce constitutional battles, instead. In this auto-limitative role, the politics of the nation states has set the benchmark of how constitutions can assist a social system to limit, for itself, its own growth compulsions.

The limitations had different lines of attack, of course, depending upon the expansion tendency of the political system. As a counter-movement to political absolutism in the early modern period, the political separation of powers was intended to divide absolute power, and to restrain the sub-powers through their mutual control. The *Rechtsstaat* principles were intended to place normative limits on the prerogative of the all-powerful sovereign. Following the separation of politics, administration and justice, the politicisation tendencies within administration and justice were supposed to be restricted. And, finally, fundamental rights were intended as the great civilising achievement with which politics would abstain from politicising individual and institutional spheres of autonomy within society. In today's changed conditions, new self-limitations are added to these classical limitations. On the one hand, fierce competition among western industrialised states and the enforced modernisation politics of the developing states have transformed the threat to the natural environment into an urgent problem of the political constitution, which can only be addressed through transnational constitutionalisation. On the other hand, politics has to respond with constitutional self-limitations to the famous/infamous “growth-acceleration-laws” of the welfare state. To guarantee the independence of the central banks and to set effective limits to national debt is quite clearly to engage in matters of constitutional importance.³¹ The constitutional importance of the question of whether subsidies and other excessive state expenditures should be subjected to a test of whether they are sufficiently connected to the public welfare is, in contrast, rather more hidden. Social-scientific and political performance reviews by authorities independent of the state (similar to audit courts), which render errors visible and avoidable could be among the currently urgent constitutional self-limitations of the politics of the welfare state.

What does this mean for the constitutions of other social sub-spheres, in particular, for the economic constitution? In order to inhibit pathological compulsions to grow, *stimuli* for change, which follow the historical model of the self-limitation of politics, need to generate permanent counter-structures that will take effect in the payment cycle down to its finest

³¹ N. Luhmann, note 15 *supra*, p. 481.

capillaries. Just as in political constitutions power is used to limit power, so the system-specific medium must turn against itself. Fight fire by fire; fight power by power; fight law by law; fight money by money. Such a medial self-limitation would be the real criterion differentiating the transformation of the “inner constitution” of the economy from external political regulation.

An important achievement of constitutional law for its constitutive and limitative role is to maintain the possibility of dissensus as a pre-condition of an independent selectivity dispersed in society. According to classical *Rechtstaat* principles, this is guaranteed by the protection of property and freedom in society. Today, this is no longer sufficient. A strengthened politics of reflection is required *within the economy*, and this has to be supported by constitutional norms. Historically, it was collective-bargaining, co-determination, and the right to strike, which enabled new forms of societal dissensus.³² In today’s transnational organisations, ethical committees of conduct fulfil a similar role.³³ Societal constitutionalism sees its point of application wherever it turns the existence of a variety of “reflection-centres” within society, and, in particular, within economic institutions, into the criterion of a democratic society.³⁴ Candidates for a capillary constitutionalisation exist not only in the organised sector of the global economy, in corporations and banks, but also in its spontaneous spheres.³⁵

The politicisation of the consumer: Instead of being taken as given, individual and collective preferences are openly politicised through consumer activism, consumer campaigns, boycotts, product-criticism, eco-labelling, eco-investment, public interest litigation and other expressions of ecological sustainability. *De gustibus est disputandum!* Such politicisation represents not simply an external intervention in the self-steering

³² N. Luhmann, “Politische Verfassungen im Kontext des Gesellschaftssystems”, (1973) 12 *Der Staat*, p. 1, at 182 & note 94.

³³ From a legal-theoretical point of view, see G.-P. Calliess, *Prozedurales Recht*, (Baden-Baden: Nomos, 1999), p. 224 *et seq.*

³⁴ D. Sciulli, *Theory of Societal Constitutionalism*, (Cambridge: Cambridge University Press, 1992); *idem*, *Corporate Power in Civil Society: An Application of Societal Constitutionalism*, (New York: New York University Press, 2001); D.M. Frankford, “The Critical Potential of the Common Law Tradition: Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory by David Sciulli”, (1994) 94 *Columbia Law Review*, p. 1076.

³⁵ On the differentiation of spontaneous spheres and organised spheres of function systems and their relevance for the democratisation of (global) social sub-spheres, see G. Teubner, “Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors?”, in: K.-H. Ladeur, (ed), *Globalization and Public Governance*, (Oxford: Oxford University Press, 2003).

economy, but rather a transformation of the inner constitution, touching the most sensitive area of the circulation of money, namely, the willingness of consumers and investors to pay. And this becomes a question of constitutional importance. One problem is the political legitimization of such an “ensemble politics”.³⁶ Another problem is fundamental rights protection in the economy: how to protect the formation of social preferences against their restrictions through corporate interests. It is at this point, and for good reason, that courts developed the doctrine of the “horizontal effect of fundamental rights” – in cases of product-criticism, of the exposure to unsafe working conditions, and of ecological protests against corporate policies. These legal developments protect the fundamental rights of the economic citizen from repeated attempts by economic organisations to silence the critics of corporate policies. In the era of global information networks – keyword “company names sucks” – such fundamental rights in the economy are set to become even more important, and to require greater legal protection.³⁷ And, in the future, these constitutional rights should not be orientated one-sidedly towards market-efficiency, as is suggested by the concepts of market failure, information asymmetry or incomplete contracting,³⁸ and should, instead, be orientated towards social and ecological sustainability.

The ecologisation of corporate governance: What is meant, here, is not new managerial ethics, but, instead, a transformation of the internal company structure, compelled by external pressures from parliaments, governments, trade unions, social movements, NGOs, and the media; a transformation which limits the tendencies to speculation and the compulsions to

³⁶ Oren Perez (2010) “Private Environmental Governance as Ensemble Regulation: A Critical Examination of Sustainable Business Indexes and the New Ensemble Politics”, Bar Ilan University Public Law Working Paper 2010.

³⁷ Generally, on the economic horizontal effect of fundamental rights in the transnational sphere, see K.-H. Ladeur & L. Viellechner, “Die transnationale Expansion staatlicher Grundrechte: Zur Konstitutionalisierung globaler Privatrechtsregimes”, (2008) 46 *Archiv des Völkerrechts*, p. 42. On the protection of fundamental rights in the internet, in particular, see V. Karavas, *Digitale Grundrechte: Zur Drittwirkung der Grundrechte im Internet*, (Baden-Baden: Nomos, 2006). And, on of corporations, see G. Teubner & V. Karavas, “<http://www.CompanyNameSucks.com>: Drittwirkung der Grundrechte gegenüber ‘Privaten’ im autonomen Recht des Internet”, in: W. Hoffmann-Riem & K.-H. Ladeur (eds), *Innovationsoffene Regulierung des Internet*, (Baden-Baden: Nomos, 2003).

³⁸ In the context of international private law, such arguments are made by G. Rühl, “Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency”, in: E. Gottschalk *et al.*, (eds), *Conflict of Laws in a Globalized World*, (Cambridge: Cambridge University Press, 2007), p. 177 *et seq*; H.-B. Schäfer & K. Lantermann, “Choice of Law from an Economic Perspective”, in: J. Basedow & T. Kono (eds), *An Economic Analysis of Private International Law*, (Tübingen: Mohr Siebeck, 2006), p. 104.

grow necessarily associated with the emergence of the modern corporate structure.³⁹ Such a company constitution, orientated to sustainability, would demand respect for environmental concerns – nature, society, human life – accompanied by internal implementation and external controls.

Plain money: Finally, a plain money reform would penetrate the *arcanum* of the global financial constitution, as is proposed to combat growth-excesses:

“The most important measure, long-term, for the prevention of speculation excesses in financial markets damaging to the public good lies with putting an end to the multiple creation of money by the commercial banks. This would prevent the pro-cyclical excessive expansion and contraction of the money supply and replace it with a sustainable policy of money supply, orientated to the real economy.”⁴⁰

In other words, the addictive drug, the creation of non-cash money, must be withheld from the commercial banks. This promises to be an effective de-toxification therapy. Commercial banks should be prohibited from creating new money through current account credit, and should be limited, instead, to offering loans that are based upon existing credit reserves. The creation of non-cash money should be the sole prerogative of national and international central banks. Plain-money reform aims, therefore:

- at allowing only central banks to create all money, including cash money and non-cash money assets;
- at having this money brought into circulation through public issue, free of debt (without interest and redemption);
- at prohibiting the creation of money by the banks by way of current account credits.⁴¹

Such reform would require a simple but fundamental amendment of the law of the central banks at national, European and international level. In the Statute of the European Central Bank, the current Article 16 would be required to change as follows (as marked in italics):

³⁹ This context is referred to explicitly by Binswanger, note 9 *supra*, p. 150 *et seq.*, & p. 157 *et seq.*

⁴⁰ Huber, note 8 *supra*, p. 4.

⁴¹ *Ibid.*, note 8 *supra*; Fisher, note 5 *supra*; Binswanger, note 9 *supra*, p. 139 *et seq.*

“The Governing Council shall have the exclusive right to authorise the issue of legal tender within the Community. Legal tender shall include coins, bank notes *and sight funds*. The ECB and the national central banks may issue such forms of currency. Coins, banknotes *and sight funds* issued by the ECB and the national central banks shall be the only forms of currency to have the status of legal tender with the Community.”⁴²

There is good reason for plain money reform to be instituted from the outset at European level. Given the global mobility of capital, the reform of money creation becomes the task of an emergent transnational economic constitution. It is no longer appropriate, today, to talk of a constitutional emptiness in the transnational sphere, which needs to be constitutionalised. Not only social-science analyses of “new constitutionalism”, but also economists and commercial lawyers in their long-standing investigations of the emerging institutions in the global economy indicate the exact opposite to be the case: even today, constitutional institutions have established themselves in the transnational sphere with an astounding density.⁴³ Despite the failure of the constitutional referendum, it is now only rarely disputed that the European Union has its own independent constitutional structures.⁴⁴ But other international organisations, transnational regimes and their networks are also, in the meantime, significantly juridified; they have become part of a global – albeit thoroughly fragmented – constitutional order. The global institutions that emerged from the agreements of the 1940s – the Havana Charter, the GATT, the Bretton Woods institutions; the new arrangements of the Washington consensus – the IMF, the World Bank, the WTO; and the recently initiated public debate concerning a “global finance market constitution”, all speak the language of a real existing societal constitutionalism on a worldwide scale. It is not the

⁴² Huber & Robertson, note 5 *supra*, p. 24.

⁴³ On the new global constitutionalism, see, for example, D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*, (Cambridge: Cambridge University Press, 2008); J. Tully, “The Imperialism of Modern Constitutional Democracy”, in: N. Walker & M. Loughlin (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, (Oxford: Oxford University Press, 2007), p. 328 *et seq.* On the global economic constitution, see P. Behrens, “Weltwirtschaftsverfassung”, (2000) 19 *Jahrbuch für Neue Politische Ökonomie*, p. 5.

⁴⁴ On this debate, see J.H.H. Weiler, *The Constitution of Europe: ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration*, (Cambridge: Cambridge University Press 1999); J.H.H. Weiler & M. Wind (eds), *European Constitutionalism Beyond the State*, (Cambridge: Cambridge University Press, 2003); N. Walker, “Post-Constituent Constitutionalism: The Case of the European Union”, in: M. Loughlin & N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, (Oxford: Oxford University Press 2008).

creation *ab ovo* of new constitutions in a constitution-free globality that is at stake, but rather the transformation of an already existing transnational constitutional order.

Given the existence of transnational financial markets, plain money reform requires constitutional solutions on a transnational scale.⁴⁵ Yet, even the proponents of plain money believe the chances of a global unitary solution to be low, given the likely opposition of the leading nation-states. What appears much more realistic is that some nation states might go it alone, or that some might co-operate, at least if the states are relatively strong with a stable government, a strong economy and a stable, convertible currency. Regional solutions within economic blocks are most likely in the Eurozone, less so in the USA or Japan. Currently, the best possible solution would lie in the creation of a global financial constitutional regime through the co-operation of central banks in a “coalition of the willing”.

In what follows, my arguments will focus on plain money. This is a matter, as Huber rightly said, “of constitutional importance”⁴⁶ – though not of the political constitutions of the nation states, but rather of the constitution of the global economy. However, I do not intend to express a preference for transforming the monetary system as opposed to changing to corporate governance or to strengthening fundamental rights of consumers. Neither should plain money be presented as a cure-all for the financial crisis.⁴⁷ A plethora of external political regulations as well as internal changes to the economic constitution would be required for an adequate response to the crisis (particularly attractive candidates are the prohibition of proprietary trading for banks and the institutional division of powers between commercial banks and investment banks).⁴⁸ Instead, I intend to use plain money as an example to illustrate clearly what the current paradox of societal constitutionalism looks like: without the state, but, at the same time, highly political. Plain money reform aims at the centre of the economic constitution because it configures – “constitutes” – the self-limitation mechanisms of the economy, the economic medium, money, and the transnational cash-flows themselves: it does not attempt indirectly to regulate the economy externally by means of political power, legal rules, moral imperative, discursive persuasion, or public opinion. While it is presumed that external authorities have an important role to play in such a process of

⁴⁵ For this debate, see Huber, note 5 *supra*, sub 4.10-4.13.

⁴⁶ Huber & Robertson, note 5 *supra*, p. 38 *et seq.*

⁴⁷ On its chances of success, see Huber & Robertson, note 5 *supra*, p. 61 *et seq.*

⁴⁸ N. Roubini & S. Mihm, *Crisis Economics: A Crash Course in the Future of Finance*, (London: Penguin, 2010).

self-discipline, this role is limited to influencing the external conditions of the success of the self-limitation of money by money. In what follows, it will be shown whether, and, if so, to what extent, plain money reform involves constitutional functions, constitutional processes and constitutional structures, in a strict, rather than metaphorical, sense.

IV. PLAIN MONEY – AMENDMENT TO THE “CAPILLARY CONSTITUTION”?

IV.1. CONSTITUTIONAL FUNCTIONS: CONSTITUTIVE/LIMITATIVE

From the perspective of constitutional sociology, political constitutions have the constitutive function of protecting the autonomy of politics, first achieved in modernity, from “foreign” sources of power (religious, economic, or military). They do this by formalising the power-medium.⁴⁹ Other social sub-constitutions – the constitutions of the economy, science, the media and public health – perform the same constitutive function by securing for each sphere the relevant medial autonomy, today on a global scale. With the help of constitutive rules, each sub-constitution regulates the abstraction of a communicative medium – power, money, law or knowledge – as an autonomous social construct within the function system.⁵⁰ At the same time, the various sub-constitutions ensure, under differing historical conditions, that the society-wide effect of their media is secure. They develop organisational rules, procedures, competences and rights within the sub-system, codify the separation from the other interpenetrating social spheres and, in this way, shore up the functional differentiation of society.⁵¹

Would plain-money reform play a role in this constitutive function? The legal rules for money creation configure actors, organisational rules, competences, procedures and modes of functioning of the communication media of the economy. The decision in favour of plain money corrects the “invisible” historical transformation of the global economic constitution, which has been caused by the development of non-cash money.⁵² The

⁴⁹ Thornhill, note 19 *supra*, p. 169 *et seq.*

⁵⁰ The role of constitutive norms is, for Lindahl and Preuß, too, the opportunity to release the term “constitution” from its narrow relation with the state and to apply it to the constitution of a whole row of social institutions: H. Lindahl, “Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood”, in: M. Loughlin & N. Walker, note 43 *supra*, p. 14 *et seq.*; U.K. Preuß, “Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Promising Concept?”, in: M. Loughlin & P. Dobner (eds), *The Twilight of Constitutionalism?*, (Oxford: Oxford University Press, 2010), p. 40 *et seq.*

⁵¹ This generalises, for all sub-constitutions, Thornhill’s analyses of the political constitutions; see Thornhill note 19 *supra*, p. 169 *et seq.*

⁵² See, on this point, Binswanger note 5 *supra*, p. 114 *et seq.*; *idem*, note 9 *supra*, p. 141 *et seq.*; Huber &

introduction of paper money, as opposed to coins, had clearly been a “visible” official constitutional decision. The monopoly of the central banks with regard to money creation had been introduced through constitutional decisions, by rendering money creation a decision of the national central banks in order to create cash money. But this followed an “invisible” constitutional development. The rapid development of cashless payment transactions and, more importantly still, the globalisation of the financial markets re-located control over the supply of money from governments and central banks into the hands of globally-active private financial institutions. In the course of this creeping constitutional change, the autonomously developing money mechanism was institutionally privatised to 80%. Without any explicit political decision, the commercial banks established themselves as the real constitutional centre of money creation, marginalising the money creation of the national central banks. Now, plain-money reform places the money-creating competences of private constitutional subjects back in the hands of the public (not necessarily state organised) constitutional subjects. Thus, plain-money reform does play a role in the constitutive function of an economic constitution.

That said, the limitative constitutional function fulfilled by plain money may be more important still. Following the recent financial crisis, placing limitations on the excesses of economic commerce are high on the agenda. We could even talk of a secular displacement of constitutive constitutional functions in the direction of limitative constitutional functions. This is a necessary consequence of the global autonomous positioning of the function systems:

“We cannot pre-suppose that society will be able to exist with the environment that it creates.”⁵³

Plain-money reform participates in two antinomic thrusts which constitutionalise global markets. Following Karl Polanyi’s analysis of the transformation of modernity, we might speak here of a double movement of transnational constitutionalism: first, the expansion of sub-systems is supported by constitutive norms, and then it is inhibited by limitative norms.⁵⁴ In the development of the financial constitution, too, expansion along

Robertson note 5 *supra*, p. 38.

⁵³ Luhmann, “Steuerung durch Recht”, note 30 *supra*, p. 169.

⁵⁴ K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, (Boston MA: Beacon Press, 1991 [1944]), p. 182 *et seq.*

purely economic lines causes counter-movements on a global scale, which aim at the reconstruction of the “protective covering of cultural institutions”.

If we look at the political constitutions of the world of states, it becomes clear that their societal and ecological roles are the result of the functional differentiation into autonomous sub-systems:

“The fact that they belong to society means that all sub-systems are placed under conditions of structural compatibility with respect to their own function and ability to vary. For the political system, the constitution fulfils the function of reformulating such conditions of social compatibility for its own internal use, *i.e.*, for collective decisions.”⁵⁵

Creating structural compatibility with society in this way is not a problem particular to politics, but one which is common to all social sub-systems.⁵⁶ Similarly, the conditions of compatibility may be exacted externally but cannot be decided in their entirety from outside, since they must, to a great extent, be produced internally to the system. Considerable differences between the political constitution and other social constitutions arise with regard to the respective conditions of self-reproduction. Only politics constructs its constitution according to a pattern of power-building and consensus-building to the production of collectively-binding decisions, and only politics has to look primarily to power for its self-limitation. Other social systems organise their own constitutions and limitations according to their own internal logics – the economy *via* payment transactions, science *via* cognitive operations, and the mass media *via* to news operations. These logics shape both the constitutive and limitative rules. The original meaning of “*constitutio*”, initially a medical expression for the state of the body, ill or healthy, is still present in every constitution: engagement with the inner constitution always involves both the healthy functioning of the internal organs, and the suitability of the body for living in its environment.⁵⁷

With regard to authorities which judge whether the systems are in a healthy state, the theory of societal constitutionalism has identified “collegial institutions” in the various social sectors, which cultivate the relevant logic of actions, and has required them to be

⁵⁵ Luhmann, note 32 *supra*, p. 6.

⁵⁶ R. Prandini, “The Morphogenesis of Constitutionalism”, in: M. Loughlin & P. Dobner, note 50 *supra*, p. 312 *et seq.*

⁵⁷ Luhmann, note 32 *supra*, p. 178.

constitutionally institutionalised.⁵⁸ Collegial institutions are reflection-centres for social self-identification, in the sense both of the rationality and the normativity of the relevant social sector, and, simultaneously, of rendering it compatible with society. The collegial institutions function as a type of think-tank for the relevant constitution, which is to be understood, for its part, as the benchmark for system/environment relations.

Plain-money reform re-locates the weight of such collegial institutions from the commercial banks to the central banks. This may be regarded as a significant self-limitation of the growth compulsions of the economic payment cycle. The proponents of plain-money reform proclaim it to be an effective withdrawal therapy against the excessive addictive behaviour of the credit sector. Three expansion-limiting effects are prominent:

- 1) The expansionist tendencies of the private banks will be limited if they are prohibited from creating money *ex nihilo*. It is to be expected that the speculative use of current account credit will abate as a result.
- 2) The expansionist tendencies of the global financial markets in relation to the real economy will be limited if their relationship is regulated by the central banks and no longer by the private banks. The co-ordination of the financial and real economies will no longer be dependent on the profit motives of the commercial banks, but on the central banks' circumspect weighing-up of consequences for the global economy.
- 3) The expansionist tendencies of the economy in relation to other social sectors and the natural environment will be limited if current account credit can no longer force the increase of growth compulsions. "It is not a question of renouncing growth, but rather of minimising the exponential compulsions to grow."⁵⁹ The most important aspect of the externally compelled self-limitation is that the central banks block the socially-harmful compulsion to grow through its creation of money orientated to societal and ecological effects.⁶⁰

⁵⁸ Sciulli, *Theory of Societal Constitutionalism*, note 34 *supra*; *idem*, *Corporate Power in Civil Society*, note 34 *supra*.

⁵⁹ Binswanger note 9 *supra*, p. 12.

⁶⁰ For sources, see note 5 *supra*.

IV.2. CONSTITUTIONAL PROCESSES: DOUBLE REFLEXIVITY

If it is true that plain-money reform performs important constitutional functions *via* constitutive and limitative rules, the question remains as to whether such a reform would also institutionalise genuine constitutional processes and structures.

Though lawyers may not like to admit it, law does not play the primary role in state constitutions and other sub-constitutions. The primary aspect of constitutionalisation is always to self-constitute a social system: the self-constitution of politics, the economy, the communications media, or public health.⁶¹ Law plays a necessary, but nonetheless subsidiary, role. An exacting definition of economic constitutionalism would have to realise that constitutionalisation is primarily a social process, and only secondarily a legal process. A useful definition of social constitutions puts it as follows:

“An instrument which, in its political function, frames the body of rules and norms which establish the formal structure, decisional competences and a hierarchically based locus of authority within a given social entity at the same time as it, in its legal function, lay down principles for the structuring of conflicts between norms within such an entity. Constitutions are in this sense laying down the enabling and the limitative rules guiding social entities.”⁶²

A constitution serves, first and foremost, to self-constitute a social system. Politics, the economy, science, art, the health sector and the mass media all constitute themselves as social systems which are autonomous of one another.⁶³ Constitutional processes are an example of “double closure” in the sense suggested by Heinz von Foerster.⁶⁴ They are triggered when social systems develop a second-order closure, in addition to their operative first-order closure, by applying their operations reflexively to their operations. Science secures its autonomy when it succeeds in establishing a second level of cognition in addition to the first order operations orientated towards the binary true/false code. The first-order operations are then tested against the truth-values of the second level – the level of methodology and epistemology. Politics becomes an autonomous power-sphere of society

⁶¹ This aspect is emphasised in constitutional sociology: Prandini, note 56 *supra*, p. 316 *et seq*; Thornhill, note 19 *supra*, p. 169 *et seq*.

⁶² P.F. Kjaer, “The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law and the Political in the Transnational Space”, (2010) 2 *Wisconsin Law Review*, p. 532.

⁶³ Prandini, note 56 *supra*, p. 310.

⁶⁴ H. von Foerster, *Observing Systems*, (Seaside CA: Intersystems Publications, 1981), p. 304 *et seq*.

when it directs power processes *via* power processes, and produces a double closure of politics through the provision of electoral procedures, modes of organisation, competences, separation of powers and fundamental rights. And what about the economy? It becomes autonomous when, in the money cycle, payment operations are employed in order to control the money supply itself.⁶⁵ The sub-systems define their exterior limits and interior identities by means of this double closure; this determines their autonomy in the strict sense. This procedural reflexivity produces - for every function system - the “form, in which the medium acquires distinctiveness and autonomy”.⁶⁶

It needs to be stressed that this medial reflexivity, together with associated cognitive and normative reflections on its social identity, does not yet generate constitutions in the technical sense. It serves the purpose, in the first instance, of self-constituting systems, rather than self-constitutionalising them. Epistemology, the overpowering of power, or the monetary steering of the money supply, do not amount, as such, to a social constitution, but are reflexive operations, instead. Constituting social autonomy is not to be equated with its constitutionalisation. We should only speak of a constitution, in the narrow sense, when the sub-systemic reflexivity of a social system – be it politics, the economy, or another sector – is simultaneously supported by law, or, more precisely, by the reflexivity of law. Constitutions do not emerge until phenomena of double reflexivity appear: reflexivity of the self-constituting social system *and* reflexivity of the supportive legal system.⁶⁷

Constitutions, in the strict sense, emerge when a structural coupling of the reflexive mechanisms of law (*i.e.*, secondary rules, in which rules are applied to rules) with the reflexive mechanisms of the relevant social sector occurs. This definition shares a starting point with Luhmann’s definition, in that both assume that the state constitution involves the

⁶⁵ N. Luhmann, *Die Wissenschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1990), p. 289 *et seq*; N. Luhmann, *Die Politik der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 2000), p. 64; *idem*, *Die Wirtschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1988), p. 117 *et seq.*, 144 *et seq.*, & 209.

⁶⁶ Luhmann, note 17 *supra*, p. 373.

⁶⁷ On the double reflexivity of constitutions, see K. Ming-Sung, “Between Fragmentation and Unity: The Uneasy Relationship Between Global Administrative Law and Global Constitutionalism”, (2009) 10 *San Diego International Law Journal*, p. 439, at 465 *et seq*; A. Fischer-Lescano & G. Teubner, “Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law”, (2004) 25 *Michigan Law Journal of International Law*, p. 999; G. Teubner, “The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination”, in: R. Nickel (ed) *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, (Oslo: ARENA/RECON, 2009), p. 112 *et seq*. Kjaer also presumes double reflexivity in his definition of a transnational economic constitution: see Kjaer, note 62 *supra*.

structural coupling of politics and law.⁶⁸ But structural coupling is only a necessary, and not a sufficient, condition: a whole swathe of political-legal phenomena, such as legislation or judicial review of political decisions, amounts to structural couplings of politics and law. To define constitutions more precisely, one should determine the coupling relationship both more specifically *and* more generally. More specifically, because not every coupling of politics and law generates constitutional qualities, for example, regulative rules, which attempt to achieve political aims via law. Only the coupling of reflexive processes within both systems does so. More generally, because a constitution emerges not only in politics but also in every social system, in so far as its reflexivity couples with secondary legal norms. In addition, a particular density and permanence of the structural coupling is required before it would conform to the definition of a constitution. In other words, we would have to distinguish between a constitution and mere loose and occasional couplings of law and the social sector. Only when the structural couplings have achieved a particular density and permanence does the development path typical of a constitution appear as the institutionalised co-evolution of the two social systems. In order to identify constitutions against other instances of structural coupling, we might wish to use the term “binding institution” of law and social sub-system to refer to the former.

Every constitution requires secondary legal norms. Primary rules within a social sector result only in its juridification, and not in its constitutionalisation.⁶⁹ In fact, no social constitutions would ever be created if only primary rules, which prescribe behaviour, existed; similarly, only a straightforward juridification would result from rules aimed at conflict resolution, or rules aimed at the implementation of particular policies. The critical point is not reached until secondary norms regulate how the identification, setting, amendment, and the distribution of the competence to issue and to delegate primary norms should proceed.⁷⁰ Political or social constitutions establish themselves where these two reflexive processes connect with one another. We should only talk of a constitution when this interaction of social processes and legal processes comes into play: in the language of systems theory, when

⁶⁸ N. Luhmann, “Verfassung als evolutionäre Errungenschaft”, (1990) 9 *Rechtshistorisches Journal*, p. 176.

⁶⁹ This reacts to Dieter Grimm’s argument against a transnational constitutionalism; see D. Grimm, “Gesellschaftlicher Konstitutionalismus: Eine Kompensation für den Bedeutungsschwund der Staatsverfassung?”, in: M. Herdegen *et al.*, (eds), *Staatsrecht und Politik. Festschrift für Roman Herzog zum 75. Geburtstag*, (Munich: Beck, 2009).

⁷⁰ Primary and secondary norms in the sense proposed by H.L.A. Hart, *The Concept of Law*, (Oxford: Clarendon Press, 1961), p. 77 *et seq.*

the permanent and strict (as opposed to temporary and loose) structural couplings of a social system and the law are established. Only then do we find the curious duplication of the constitutional phenomenon: a doubling, which excludes the wide-held understanding that the legal orders and social orders will merge into a unitary constitutional phenomenon. A constitution is always the connection of two real ongoing processes. From the point of view of law, it is the production of legal norms, which is typically merged with the basic structures of the social systems. From the point of view of the social system, it is the generation of the basic structures of the social order, which simultaneously inform the law and are regulated by it. Under these conditions, it makes sense to talk, in the sociological and the legal sense, of elements of a political constitution, of an economic constitution, of a constitution of science, or of a digital constitution.⁷¹

But what is the reason behind this double reflexivity? Law enters the process of self-constituting a social system at the point where the above-mentioned closure of the social system through its own first and second order operations no longer suffices; where reflexive social processes cannot stabilise themselves; and, in particular, where they threaten to become paralysed by paradoxes. Where this is the case, the self-constituting social autonomy needs to be supported by additional closure mechanisms. Law is one of them – though not the only one. In the case of politics, the self-description “state” plays this role. “The political

⁷¹ The development of a social constitutionalism in the transnational sphere is observed by G.-P. Calliess & P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law*, (Oxford: Hart Publishing, 2010); Kjaer, note 62 *supra*, manuscript, p. 43 *et seq*; Prandini, note 56 *supra*, p. 316 *et seq*; M. Renner, *Zwingendes transnationales Recht: Elemente einer Wirtschaftsverfassung jenseits des Staates*, (Baden-Baden: Nomos, 2010 forthcoming), 4th chapter, *para.* C; L.C. Backer, “Governance Without Government OR Government Without a State?”, available at: lcbackerblog.blogspot.com/2009/06/gunther-teubner-on-complications-of.html; Ch. Joerges & F. Rödl, “Zum Funktionswandel des Kollisionsrechts II: Die kollisionsrechtliche Form einer legitimen Verfassung der postnationalen Konstellation”, in: G.-P. Callies *et al.*, (eds), *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag*, (Berlin: Walter de Gruyter, 2009), p. 767, at 775 *et seq*; K. Ming-Sung, “Between Fragmentation and Unity: The Uneasy Relationship Between Global Administrative Law and Global Constitutionalism”, (2009) 10 *San Diego International Law Journal*, p. 439, at 456 *et seq*; D. Wielsch, “Die epistemische Analyse des Rechts: Von der ökonomischen zur ökologischen Rationalität in der Rechtswissenschaft”, (2009) 64 *Juristenzeitung*, p. 67, at 69 *et seq*; Preuß, note 50 *supra*, p. 40 *et seq*; H. Brunkhorst, “Die Legitimationskrise der Weltgesellschaft: Global Rule of Law, Global Constitutionalism und Weltstaatlichkeit”, in: M. Albert & R. Stichweh (eds), *Weltstaat und Weltstaatlichkeit*, (Wiesbaden: VS Verlag für Sozialwissenschaften, 2007), p. 68 *et seq*; Tully, note 43 *supra*; A. Fischer-Lescano & G. Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts*, (Frankfurt aM: Suhrkamp Verlag, 2006), p. 53 *et seq*; Karavas, *Digitale Grundrechte*, note 37 *supra*; Schepel, H, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, (Oxford: Hart Publishing, 2005), especially p. 412 *et seq*; G. Teubner, “Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?”, in: Ch. Joerges, I.-J. Sand & G. Teubner (eds), *Transnational Governance and Constitutionalism*, (Oxford: Hart Publishing, 2004), p. 5 *et seq*; C. Walter, “Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law”, (2001) 44 *German Yearbook of International Law*, p. 170.

system is only capable of differentiation once it describes itself as ‘state’.”⁷² Without the formal limitation to a collective actor, the closure of institutionalised politics in relation to other power processes in society cannot be realised. Politics’ structural coupling with law serves a similar role in its autonomisation. Since the reflexive use of power processes on power processes is exposed to the continual fluctuations of power, legal rules must stabilise the second order operations on the acquisition and the exercise of power. Even more important is the role of law in disarming the paradoxes of political power. While the debilitating paradox of the sovereign, which binds itself is not, historically, solved by the creation of the *Rechtstaat*, it is thereby normalised.⁷³

The supportive institutions, which facilitate self-constitution vary greatly from system to system. In its achievement of autonomy, science can do without external stabilising influences almost entirely. Methodology, philosophy of science and epistemology can act by themselves to set the limits to the “empire of science”.⁷⁴ In order to guarantee the scientificity of knowledge, science does not need to describe itself as a collective – the scientific community – or even to institutionalise the incorporation of that community in parallel to the formal organisation of the state. Law plays a relatively minor role in the constitution of science. It is only necessary for the guarantees of scientific freedom, and for the formal organisation of scientific activities.

The economy, in contrast, requires massive interventions from law in order to achieve self-constitutionalisation; albeit not to the comprehensive extent characteristic of politics. As is well-known, the institutions of property, contract, competition and currency constitute the cornerstones of an economic constitution. Each of these relies on double reflexivity: on applying economic transactions to economic transactions and on applying legal rules to legal rules. Double reflexivity is particularly apparent in the financial constitution. In the banking sector, the ability to pay and the inability to pay are generated simultaneously. The banking system relies on the paradox of self-reference, on the unity of the ability and inability to pay.

⁷² N. Luhmann, “Der Staat als historischer Begriff”, in: M. Storme (ed), *Mijmeringen van een Jurist*, (Antwerp: Kluwer, 1984), p. 144.

⁷³ N. Luhmann, “Zwei Seiten des Rechtsstaates”, in: The Institute of Comparative Law in Japan (ed), *Conflict and Integration: Comparative Law in the World Today*, (Tokyo: Chuo University Press, 1989), p. 487 *et seq*; Luhmann, *Die Politik der Gesellschaft*, note 65 *supra*, p. 35 & 334 *et seq*.

⁷⁴ Illuminating on this point, see R. Stichweh, “Einheit und Differenz im Wissenschaftssystem der Moderne”, in: J. Halfmann & J. Rohbeck (eds), *Zwei Kulturen der Wissenschaft – revisited*, (Weilerswist: Velbrück, 2007).

“The banks have the core privilege of being able to sell their own debts for profit.”⁷⁵ This paradox is disarmed where payment operations become reflexive, that is, where operations of money supply are used on operations of money supply. But this reflexivity of economic operations is unstable. It has been stabilised through an internal hierarchisation of the banking sector, supported by a “hard” regulation by means of binding law. In this way, the law, with its procedural and organisational norms that regulate central banks in their relation to the commercial banks, contribute to the process of coping with the paradoxes of the economic cycle.

Coping with paradoxes by means of a constitution is precarious: the danger of the re-appearance of paradoxes always remains. The constitutionally-supported hierarchy of payment operations in the relationship between central banks and commercial banks has not excluded for good the possibility of the paralysis of the financial system.

“The logical and empirical possibility of a collapse of the whole system, a reappearance of the paradox and a total blockage of all operations by the primordial equation able to pay = unable to pay cannot thereby be excluded. It can, however, be rendered sufficiently improbable.”⁷⁶

That this is not “sufficiently improbable” was evidenced by the recent financial crisis. The excessive growth-dynamic in global financial transactions appeared to allow the possibility of an inability to pay on the part of the banking sector. Plain-money reform addresses this paradox directly with double reflexivity. Without such reform, the central banks have insufficient control of the money markets. They can only indirectly “stimulate or de-stimulate” them “by means of intervention events”.⁷⁷ They have the ability to steer the money supply indirectly by amending prime rates and thereby rendering borrowing more or less difficult. In terms of the direct steering of the money supply, they are limited to creating paper money, and have no power over the current account money that is globally dominant today. Plain-money reform transforms economic reflexivity by restricting the secondary payment operations of money creation, generated by non-cash money, to central banks. The secondary payment operations of the central banks – their money supply decisions, their creation of cash and non-cash money, their payments to the state, to citizens, or to the banks –

⁷⁵ Luhmann, *Die Wirtschaft der Gesellschaft*, note 65 *supra*, p. 145.

⁷⁶ *Ibid.*, p. 146.

⁷⁷ *Ibid.*, p. 117.

are applied reflexively to the primary payment operations (buying and lending). Plain-money reform transforms juridical reflexivity, by prohibiting financial banks, *via* secondary rules, from creating money through credit account money, and by establishing a monopoly over the money creation of the central banks. Through the restriction of money-creating competences, law apprehends the limitative function of an economic constitution and, at the same time, stabilises the self-reflexive relations of the payment operations, which, without being legally anchored in this way, would again disperse.

IV.3. CONSTITUTIONAL STRUCTURES: A BINARY META-CODE

In the end, the Gretchen question is whether plain-money reform also creates specific constitutional structures capable of channelling the constitutional functions and processes outlined above. Constitutional lawyers disagree on this point, acknowledging genuine constitutional phenomena only in the nation state, and greeting the idea of a transnational or even a social constitutionalism with scepticism.⁷⁸ What goes under the name of “constitutionalisation” in public or private global orders is thought only to be the juridification of social spheres, partly by international law and partly privately and autonomously – certainly not the creation of constitutions.

In order to identify truly constitutional structures, we must move beyond the understanding of constitutions referred to thus far as the structural coupling of law and social systems.⁷⁹ The endpoint of constitutionalisation - be it in politics, science or other social sectors - is not reached until an independent constitutional code - a binary meta-code - develops within the very structural coupling of law and the relevant social system: until, moreover, the internal processes of the system orientate themselves towards that code. The constitutional code is binary. It oscillates between the values “constitutional/unconstitutional”. And it functions at the meta-level, for the reason that it subjects decisions that have already been tested as legal/illegal, to an additional test, namely, whether they correspond to constitutional requirements. What emerges here is the hierarchy between simple law and constitutional law, “the law of laws”, typical of all constitutions – for the constitutions of states, of other function systems, of organisations and of networks. The constitutional code (constitutional/unconstitutional) is ranked above the legal code (legal/illegal). The *pointe* of the meta-code lies, however, in its hybridity: it is not only

⁷⁸ Grimm, note 69 *supra*.

⁷⁹ Luhmann, note 68 *supra*.

ranked above the legal code, but, at the same time, also above the binary code of the relevant social system. It exposes its binary-encoded operations to the additional test of whether or not they conform to the principles of public responsibility of the social system.

This connection between structural coupling and its hybrid meta-code can most readily be observed in the state constitutions of modernity. There, the distinction constitutional/unconstitutional is explicitly adopted as the binary meta-code of law and of politics, *i.e.*, of two, for their part, binary coded systems. Through this meta coding, law and politics do not merge into one single system, and the constitution itself does not develop into an autonomous social system.

The constitution of the global economy also operates with such a hybrid meta-code. It serves as a fictitious unitary formula for two quite different constitutional operations within the economy. The meta-code requires that it be ranked above the legal - as well as the economic - binary code. In each of the two sides of the economic constitution, the meta-code generates different meanings according, in each case, to whether it is attempting to control the economic code-operations or the legal code-operations. On its economic side, it serves the reflection of the societal function of the payment operations and searches for forms of economic activity that are environmentally viable. On its legal side, it institutes the separation of simple law from superior constitutional law, and judges legal acts according to whether they correspond to constitutional values and principles.

Although the constitutional code presents itself for the economy as the one and only *distinction directrice* “constitutional/unconstitutional”, it operates either as an economic meta-code or as a legal meta-code, depending on the context. Here, we have an interesting example of an “essentially contested concept”, characterised by the fact that the same term is interpreted in different and highly controversial ways in different contexts.⁸⁰ The Janus-headed character of the meta-code has to do with the above-mentioned fact that the economic constitution (as the structural coupling of two social systems closed off from one another, economy and law) is not, in itself, a social system, but a distinct discursive process either within the law or within the economy. Constitutional operations - *i.e.*, the decisions and arguments of central banks, on the one hand, and constitutional courts, on the other - do not

⁸⁰ This much discussed expression originates with W.B. Gallie, “Essentially Contested Concepts”, (1956) 56 *Proceedings of the Aristotelian Society*, p. 167. In our context, it is used to indicate that different social systems use the term “constitution” and, at the same time, ascribe to this term rather different meanings.

merge the two systems into a single economic constitution, but remain, instead, tied to their respective operational contexts, to the law or to the economy. Correspondingly, the distinction “code-compliant/code-non-compliant” is only a common umbrella formula for all possible constitutional decisions and arguments, capable of assuming completely different meanings according to their respective context. The constitutional code is an observation scheme, which takes on different forms in both law and the economy.

These differences necessarily influence distinct programmes, which emerge under the direction of the constitutional code in both legal and in economic practice. These two types of programmes irritate one another to the point where they cause a specific co-evolutionary path of legal and economic structures within the economic constitution.⁸¹ Where the differential legal/illegal is subordinate to the meta-code of the economic constitution, a re-entry of the distinction law/economy into the legal system occurs. Fundamental principles of the economic system are re-constructed as legal constitutional principles (according to the particular historical situation: property, contract, competition, social market economy or ecological sustainability). Law “translates” the fundamental principles of the economy into legal principles, and concretises them as legal rules of constitutional law. Here, we find the reason why constitutional law cannot be reduced to certain decision-making procedures, but, instead, demands substantive legitimation through inner constitutional principles. Without this re-entry of the fundamental principles of the focal social system into the legal system, this would be incomprehensible or, worse, would be conceived as “natural law” in the age of positivism. Whether and, if so, how constitutional law is bound to the values of the relevant social system is clearly not pre-determined by natural law. Rather, it is the historically variable result of reflexive processes in the constitutionalised social system, re-constructed in law as an *ensemble* of constitutional principles.⁸²

⁸¹ On such a connection between structural coupling and co-evolution, using the example of the production regime, see G. Teubner, “Eigensinnige Produktionsregimes: Zur Ko-evolution von Wirtschaft und Recht in den varieties of capitalism”, (1999) 5 *Soziale Systeme*, p. 7. More generally on the co-evolution of law and the economy, see M. Amstutz, *Evolutorisches Wirtschaftsrecht: Vorstudien zum Recht und seiner Methode in den Diskurskollisionen der Marktgeseellschaft*, (Baden-Baden: Nomos, 2001).

⁸² Here, we find the explanation for Kumm’s important hypothesis that (transnational) constitutional law must legitimate itself by means of internal constitutional principles, and not just by means of procedures. Kumm is unable to explain, however, how these principles, for their part, legitimate themselves. This requires recourse to the reflexive practices in the social system itself. The removal of paradoxes by means of a constitution again takes effect here. See M. Kumm, “The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia”, in: P. Dobner & M. Loughlin, note 50 *supra*, p. 214 *et seq.*

In the opposite direction, something comparable occurs: the meta-code allows the re-entry of law into the economic system (again, historically variable: mandatory rules of contract law, the social obligations of property, the limits of competition, rule of law principles in economic decisions or fundamental rights within corporations). Thereby, constitutional law binds economic operations.

The mutual re-entry opens two different “imaginary spaces” of the economic constitution;⁸³ two different (but inter-related) constitutional programmes, one in the economy, one in law, which are both orientated, albeit separately, towards the constitutional code. This double meaning is particularly apparent in property and contract, in the traditional institutions of the economic constitution. Economically, property means the interruption of demands for consensus for particular communication results. Legally, property is defined as a subjective right, for example, in Germany in Articles 903 and 906 of the Civil Code and Article 14 of the Constitution. And, although they are closely inter-related, an economic transaction cannot be identified with a legal contract. Transaction and contract are not just two sides of the same coin, but are distinct social phenomena, instead.⁸⁴ The economic constitution, as such, can be understood as one language game with a particular double structure under the control of the *distinction-directrice* of a meta-code. But the language game does not strengthen into an independent social system with its own unitary language acts, structures and boundaries. Rather, it forms what one can call a “binding institution” in which law and the economy are closely coupled structurally, and permanently irritate one another. A “bi-linguality” thereby develops, requiring continual efforts at “translation”.

Now, plain-money reform would transform constitutional programmes both in the law *and* in the economy. In the economic context, it would formulate anew the public principles of money creation for the central banks: To which ends should the central banks direct the creation of money: at combating inflation, or at limiting excessive growth compulsions? In the legal context, it would transform the legal principles of the economic constitution: under a plain-money regime, money creation by the private banks would not just be simply illegal, it would be economically unconstitutional.

⁸³ On the connection between re-entry and imaginary space, see G. Spencer Brown, *Laws of Form*, (New York: Julian Press, 1972), p. 56 *et seq.*, p. 69 *et seq.*

⁸⁴ On the double character of institutions in the structural coupling of law and the economy, see G. Teubner, “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies”, (1998) 61 *Modern Law Review*, p. 11 *et seq.*

To summarise, plain money reform would reach deep into the capillary constitution of the global economy. In all three respects, it corresponds to the definition of a constitution outlined above. First, plain money fulfils constitutional functions, constitutive and, particularly, limitative. Second, it takes part in the double reflexivity of the legal and the economic system by issuing rules governing money creation. Third, it subjects the activities of commercial and central banks to the hybrid meta-code of the economic constitution by transforming economic, as well as legal, constitutional programmes.

V. THE POLITICS OF SOCIETAL CONSTITUTIONALISM

IV.1. CONSTITUTIONALISATION BY THE STATE?

But does social constitutionalism aiming at extensive autonomy of the social sub-systems not imply an extensive de-politicisation of society?⁸⁵ In that case, is the constitutionalisation of the economy, for our purposes through the introduction of plain money, not, in itself, a politically explosive concern? To both questions, the definitive answer is, yes and no. As indicated above, societal constitutions are paradoxical phenomena. They are not part of the political constitution of society but, at the same time, they are highly political social concerns. The paradox can be solved with the help of a double conception of the political. This is understood in a variety of ways,⁸⁶ but here, the double meaning of the political is understood as follows. First, by “the political” is meant institutionalised politics: the political system of the world of states. In relation to this notion, the social sub-constitutions “go the distance”; they require extensive autonomy against the political constitution. And, with regard to the participation of the political system in the process of the social sub-constitutions, particular “political restraint” is required. Second, the concept can also indicate the political in society outside institutionalised politics. In other words, it can indicate the politicisation of the economy itself and of other social spheres; the politics of reflection on the social identity of the social system involved. In this respect, the particular social constitutions are highly political, but they are beyond the state.⁸⁷

⁸⁵ This is the most important critique raised against societal constitutionalism, emphasised in particular by Brunkhorst, in “Legitimationskrise der Weltgesellschaft”, in: M. Albert & R. Stichweh (eds), *Weltstaat und Weltstaatlichkeit*, (Wiesbaden: VS Verlag für Sozialwissenschaften, 2007), p. 76 *et seq.* Other authors use the critique flatly to deny the existence of constitutions outside the state: see, for example, R. Wahl, “In Defence of ‘Constitution’”, in: M. Loughlin & P. Dobner, note 50 *supra*, p. 240 *et seq.*

⁸⁶ On the extensive debate regarding *le politique* and *la politique*, see E. Christodoulidis, “Against Substitution: The Constitutional Thinking of Dissensus”, in: M. Loughlin & N. Walker, note 43 *supra*, p. 191 *et seq.*

⁸⁷ Kjaer, note 62 *supra*, manuscript, p. 33 *et seq.*, attempts a careful explanation of the political dimensions of

Let us return to plain money. Jefferson demanded as early as 1813, “that the right to issue money should be taken from the banks and restored to the people”.⁸⁸ But who are “the people” when it comes to money? How can the creation of money be restored to the people? After all that has been said, the answer can only be that money creation belongs in the public sphere, though not in the domain of the state. Ought we to subject the creation of money to state control? - No. Ought we to render it to the public sphere? - Yes. By the public sphere, what is meant in this context is not an intermediate sphere between state and society.⁸⁹ An accurate definition of “the public sphere” today requires that the public/private distinction as a means of de-limiting social sectors be de-constructed and simultaneously re-constructed within each of these social sectors.⁹⁰ Money creation is clearly among the most important public functions of the economy. It belongs in the public infrastructure of the economic sector. It is a public good. Money creation is a genuine component of the constitution of the economy because it takes part in determining the public function of the economy. It follows, then, that money creation ought to be removed from the private profit-oriented commercial banks and restored to the monopoly of a public, though non-state, institution, namely, the central bank.

But why should the political constitution not assume control of this task of regulating the internal structures of social sub-spheres?⁹¹ This was already discussed above in the context of internal *versus* external regulation. Now, the matter raises itself as an aspect of democratic theory, as the collective accountability of democratic politics to society. If it is ultimately the greatest privilege of the democratic sovereign to grant a constitution to society, why favour the auto-constitutionalisation of social sectors and not a political dictate? The answer can only be alluded. The basic social structures of modernity make it necessary to re-

the social sub-constitutions.

⁸⁸ T. Jefferson, “Thomas Jefferson to John Wayles Eppes, June 24, 1813”, in: P.L. Ford (ed), *The Works of Thomas Jefferson. Federal Edition*, (New York: G.P. Putnam’s Sons, 1813).

⁸⁹ H. Ridder, *Die soziale Ordnung des Grundgesetzes*, (Opladen: Westdeutscher Verlag, 1975); A. Rinken, “Geschichte und heutige Valenz des Öffentlichen”, in: G. Winter (ed) *Das Öffentliche heute. Kolloquium zu Ehren von Alfred Rinken*, (Baden-Baden: Nomos, 2002).

⁹⁰ On this point, in more detail, see G. Teubner, “State Policies in Private Law? Comment on Hanoch Dogan”, (2008) 56 *The American Journal of Comparative Law*, p. 835; G. Teubner, “After Privatisation? The Many Autonomies of Private Law”, (1998) 51 *Current Legal Problems*, p. 393.

⁹¹ This would be the consequence of conceptions of constitutionalisation, which admit a variety of social sub-constitutions, but then postulate a primacy of the political constitution: see, for example, Joerges & Rödl, “Funktionswandel des Kollisionsrechts”, note 71 *supra*, p. 767, at 775 *et seq.* For the nation state, this might be more or less realistic, but it is no longer so for transnational relations: see, for example, Kjaer, note 62 *supra*, manuscript, p. 9.

define the relationship between representation, participation and reflection. In the functionally-differentiated society, the political constitution cannot fulfil the role of defining the fundamental principles of other sub-systems without causing a problematical de-differentiation – as occurred in practice in the totalitarian regimes of the Twentieth century.⁹²

In modernity, society can be constitutionalised only in such a way that every sub-system acts reflexively to develop its own constitutional principle for itself, and these cannot be prescribed by politics. Such de-centered reflexivity is necessary since the *maiores partes* no longer represent the whole, while the *minores partes* participate, as was the case in the old society. Instead, modern society regards participation and representation as identical and, at the same time, abolishes them. We must give up the notion that, in the state, politics represents society and that other social spheres – people or sub-spheres – participate therein. No social sub-system, not even politics, can represent the whole society. Instead, it is characteristic of the condition of development that:

“... psychic and social systems must develop their own reflexive processes of structure selection – processes of thinking about thinking, or of loving love, of researching into research, regulating regulation, financing the use of money or overpowering the powerful.”⁹³

And its democratic legitimisation must, indeed, come up in relation to society as a whole – though it need not proceed through the channels of institutionalised politics.⁹⁴ However, on this, space does not allow me to elaborate further.⁹⁵ It must suffice to point to participation of the general public in the decision-making of transnational private regimes.⁹⁶ For example, the Aarhus Convention made an impact by declaring three principles of public participation: (1) access to information; (2) public participation in decision-making procedures; and (3) access to justice in environmental matters. The collaboration of the administrative apparatus of public and private regimes is thereby:

⁹² On this point from a constitutional-theoretical perspective, see Thornhill, note 19 *supra*, p. 188 *et seq.*

⁹³ Luhmann, note 17, *supra*, p. 372.

⁹⁴ This would correspond with the views of the early Habermas, who after a fundamental critique of parliamentarianism, called for the democratic potential of societal processes outside institutionalised politics to be tested. Apparently, this insight has been lost by the later Habermas (and his followers: J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, (Cambridge: Polity Press, 1992), last chapter.

⁹⁵ S. Bredt is informative here; see *idem*, *Die demokratische Legitimation unabhängiger Institutionen: Vom funktionalen zum politikfeldbezogenen Demokratieprinzip*, (Tübingen: Mohr Siebeck, 2006), p. 248 *et seq.*

⁹⁶ For details on public consultation in cases of Corporate Social Responsibility, see Perez, note 36 *supra*.

“to be integrated into the creation of forms of action in the social substrate, that is, in the global economy itself (and not its political system, *i.e.*, the international community [of states]). Similarly decision-making (in the legislative, executive and juridical apparatuses) and discussion (in the global sub-publics) have to be structurally coupled with one another, such that the democratic-theoretically meaningful duality of spontaneous- and organised spheres of the creation of the social constitution can be established.”⁹⁷

IV.2. IN THE SHADOW OF POLITICS

The state should not prescribe the constitution of the economy and other social sub-systems, but it should produce constitutional irritations for them. As has been stated above, institutionalised politics, together with other actors, particularly civil-societal actors, must exert massive external pressure in order to compel changes in the capillaries of the payment cycle of the economy. This would be the appropriate division of labour. Social systems have the best constitutional chances where they can develop their own constitutions in the shadow of politics.⁹⁸

In this context, Moritz Renner proposed that the economic constitution should be conceived of not only as binding the economy and the law, but also as a trilateral structural coupling of economy, law and politics.⁹⁹ Indeed, numerous structural couplings of institutionalised politics and the economy and law do exist, for example, the taxation system or the lobbying of economic organisations. Typically, however, these do not become concentrated into what we called above “binding institutions”, as is emblematic of constitutions in comparison to all other structural couplings. If we look closer at how politics works its way into economic constitutions, then we can see that there is, in truth, no real trilateral coupling, but, instead, two sets of bilateral coupling: one in the relationship of economy/law, involving the institutions referred to above, property, contract, competition and currency, and the other in the relationship of law/politics involving constitutional legislation and adjudication. In the relationship of politics/economy, the existing structural couplings are not so strict that they assume the quality of binding institutions. The constitutionally relevant

⁹⁷ A. Fischer-Lescano & M. Renner, “Europäisches Verwaltungsrecht und Völkerrecht”, in: J.P. Terhechte (ed), *Verwaltungsrecht in der Europäischen Union*, (Baden-Baden: Nomos, 2010 (forthcoming)); on spontaneous and organisational spheres, see Teubner, note 35 *supra*.

⁹⁸ This formulation is close to the position adopted by Grimm, note 69 *supra*, p. 81, who allows societal constitutionalism a limited chance of success only “in the shadow of public power”. Nevertheless, there remain important differences in assessing the primacy of institutionalised politics.

⁹⁹ Renner, note 71 *supra*, ch. 3 para. B II.

political interventions are never directly performed as a conversion of power into money, but are, instead, almost always indirectly performed via the legal system by way of legislative acts. And even these do not create a permanent binding in the institutionalisation of constitutions, but only an occasional one, which is being dissolved again by the de-coupling of the economy from politics. Political interventions in the economic constitution, which do, of course, exist, ought not to be understood, then, as genuine operations of a binding institution, but as external constitutional impulses, instead.

The most important external impulses from politics are released during the foundational act of the relevant constitution, but are usually transmitted by the legal system. To establish a financial constitution would require political impulses, which would have to work their way into the internal structure of the economy. Generally, it is the case that an autonomous economy requires a strong political system. The *Mafiosi* conditions in Russia after 1989 offer ample illustration of the negative effects that are produced when a capitalist economy is introduced by a "big bang" without rule of law constraints. To date, transnational politics has reacted most convincingly when, in the moment of the financial crisis, an international co-ordination of "first aid" measures was put into effect. To that extent, it can be concluded that social constitutions are politically imposed. However, the internal reconstruction of the political impulses is decisive for the sustained functioning of a specific constitution. Without this, the constitutional irritations of politics and society fade out. But it is also true that, without them, there is no chance of a sustained transformation of the economic constitution. It is not the "big decision", the mythical foundational act, that is relevant for the existence of a constitution, but rather "long standing chains of communicative acts, bound to one another, of the successful anchoring of a constitution as the 'highest authority'".¹⁰⁰ The political irritations decisions should be absorbed in such a way that they are channelled into the capillaries of the payment cycle. Only then can a specific constitution "come into force" beyond its formal validity. The political impulse limits itself to the formation act and fundamental changes; over and above this, high constitutional autonomy is required in relation to politics.

The phrase, "in the shadow of politics" has an additional meaning. Societal constitutionalism always depends on law; Law, for its part, depends on the physical

¹⁰⁰ T. Vesting, "Politische Verfassung? Der moderne (liberale) Verfassungsbegriff und seine systemtheoretische Rekonstruktion", in: G.-P. Callies *et al.*, note 71 *supra*, p. 613.

monopoly that politics has over power. Economic and social sanctions alone are not sufficient to stabilise the constitutional norms. Plain-money reform, too, requires politically-backed legal sanctions in order to prohibit, as forgery, the unauthorised creation of money by commercial banks, and to counter-act avoidance strategies.¹⁰¹ However, such political support does not transform the economic constitution into a state constitution. It is only the instruments of state power which law mediates, de-politicises, and places at the disposal of the economic constitution.

Yet the shadow must remain a shadow. The high autonomy of the central banks in relation to politics is essential. Discretionary interventions by politics in concrete decisions regarding money creation must be excluded. The political independence of the central banks is, indeed, a requirement of constitutional importance.¹⁰² The reason why the power games of institutionalised politics must be excluded from money creation is the acute danger of inflation that arises as the typical long-term temptation of politics and, in particular, democratic politics. “Where democratic governments have unlimited political power in respect of money, it is impossible to resist inflationary pressures.”¹⁰³ Unusually, this observation of Friedrich von Hayek’s is correct, though the conclusion that he draws from it, that the creation of money must be totally privatised, is not.

IV.3. POLITICISING THE ECONOMY

In contrast, the politicisation of the economy itself is high on the agenda of societal constitutionalism. Above, we have already seen the political dynamic released in the market by the politicisation of consumer preferences, and by the ecologisation of corporate governance.¹⁰⁴ With a monopoly on the creation of money, the central banks perform an important political role. Politicising the economy means intense reflections on the social consequences of the extension or limitation of the money supply, undertaken by science and the general public, consumers and corporations, ending in the decisions of the central banks. Here, it is fiercely discussed and finally decided whether, in a concrete situation, the growth

¹⁰¹ On questions of detail regarding avoidance and means of combating it, see Huber & Robertson, note 5 *supra*, p. 51 *et seq.*

¹⁰² See, also, Binswanger, note 9 *supra*, p. 147; Huber, note 5 *supra*, sub 4.3; Huber & Robertson, note 5 *supra*, p. 38 *et seq.*

¹⁰³ F.A. von Hayek, *Denationalization of Money: An Analysis of the Theory and Practice of Concurrent Currencies*, (London: Institute of Economic Affairs, 1978), p. 22 *et seq.*

¹⁰⁴ Currently strengthened to an extraordinary political dynamic outside of institutionalised politics, this must cause authors such as Brunkhorst or Wahl to re-consider their vehement criticism of social constitutionalism, that it de-politicises society: Brunkhorst, note 71 *supra*, p. 76 *et seq.*; Wahl, note 85 *supra*, p. 240 *et seq.*

compulsions released by the creation of money are excessive or not. The political decision of whether to submit the financial system to withdrawal therapy cannot be allowed to depend on private profit motives. It can only be decided by the central banks, orientating themselves with exclusive reference to the monetary system and its compatibility with the whole society.

Clearly, central banks make wide-ranging political decisions regarding the creation of money. But they do not, thereby, become part of the political system. They do not participate in the production of power and consensus to make collective decisions. Nor are they part of the power-cycle of politics, which runs from the public through the parliament, the administration, the interest-groups and back again to the public. Their position can most readily be compared with that of constitutional courts, which stand right at the hierarchical peak of the legal system, and are responsible for making highly-political decisions without thereby becoming part of the political system.¹⁰⁵ The “Guardians of the constitution” – this is the appropriate metaphor. And just as constitutional assemblies and constitutional courts are the guardians of the political constitution, so the central banks and the constitutional courts are the guardians of the economic constitution. And their constitutional politics requires a high degree of autonomy.

Central bankers tend to present themselves as apolitical experts, strictly bound by their mandate when taking decisions *lege artis*. It is, nonetheless, obvious that central banks make genuinely-political decisions within the economic system. Decisions regarding the supply of money cannot be reduced to a straightforward technocratic implementation of arithmetical calculations. Central banks have a great deal of political discretion; they are exposed to the risk of great uncertainty; they are reliant on deliberative justifications before the public; and they are responsible for the correctness of their decisions. This is the eminent political content of reflexive processes within the economy, which balance the relation between social function and contribution to the environment. For this reason, a politics of money *independent* of institutionalised politics must be transparent and accountable.

¹⁰⁵ As a matter of fact, where they are highly dependent on politics, they transform themselves into hybrid institutions. Then, the central banks practice a double politics. Their promise of an independent reflection-politics is contradicted by the fact that they are enmeshed in the power games of the political system. Thus, they are similar to the politicised constitutional courts that commonly exist where the separation of powers is not sufficiently developed.

Yet, the taboo must not be broken.¹⁰⁶ No discretionary interventions on the part of the political system! Even if that system disposes of higher democratic legitimation. The autonomy of the central banks in respect of politics is a necessary pre-condition of the functioning of the plain-money reform. Alongside the traditional executive, legislative and judicative powers, the central banks act, as a neologism nicely puts it, as the “monetative” power, as the constitutional institution of the economic system.¹⁰⁷ Here, the meaning of an autonomous financial constitution is revealed, which must control its own logic and cannot, despite its highly political character, be delivered by institutionalised politics. The analogy with constitutional courts is, again, appropriate. This is a principle not of the political, but of the *societal* separation of powers.

While decisions on money creation as such are the exclusive prerogative of the central banks, the related question of how the profits generated by money creation should be used is clearly a matter for the political system. Whether these quite considerable sums (accrued, to date, by the commercial banks without any *quid pro quo*) should be paid to the Treasury, made available to the banking system, or used to finance tax cuts or individual earnings, is not a question for the central banks, but for the political process.¹⁰⁸

The dynamics of external political impulses and the internal politics of the “capillary constitution” are, as we stated above, not an automatic consequence of functional imperatives. They develop only in crisis phases, and are themselves caused by excessive growth compulsions. These are the constitutional moments, when social energies will be activated of such intensity that catastrophe will be averted. From a historical point of view, it is clear that the Great Depression in 1929 was such a moment. Then, the nation states were faced with a constitutional decision: to abolish the autonomy of the economy *via* the totalitarian politics of either a socialist or fascist inclination, or to inaugurate the “New Deal” and the welfare state as a limitative constitutionalisation of the national economies. And today? Was the banking crisis of 2008 system relevant? Was it so threatening that it amounted to a new constitutional moment, now of the global economy, raising its self-limitation through a global financial constitution within the realm of the possible? Or had

¹⁰⁶ K.-H. Ladeur, “Die Autonomie der Bundesbank: Ein Beispiel für die institutionelle Verarbeitung von Ungewissheitsentscheidungen”, (1992) 3 *Staatswissenschaften und Staatspraxis*, p. 486.

¹⁰⁷ Senf, note 5 *supra*; Binswanger, note 9 *supra*, p. 147.

¹⁰⁸ Binswanger, note 9 *supra*, p. 147 *et seq.*

“the bottom” not yet been reached? Will the fading of the crisis herald the global return of the old addictive behaviour, which is untreatable with nation-state withdrawal cures?

CHAPTER 2

TOWARDS A GENERAL THEORY OF FUNCTION SYSTEM CRISES

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I. FUNCTIONAL DIFFERENTIATION AND ECONOMIC CRISES

In contemporary sociological research and theorising, a certain acceptance of the idea of functional differentiation is to be observed.¹ That is, there is a convergence in postulating a horizontal order of function systems. From this, follows the conclusion that there is no such thing as a structural primacy of one function system towards all the other function systems in world society. There are primacies to be perceived. But these are local or situational primacies which change from place to place and from situation to situation. In the process of writing this chapter, for example, I have to establish a situation in which a primacy of scientific relevancies is operative. Otherwise, I would be unable to finish the chapter or endanger its scientific quality and validity. But it is obvious that such a primacy is strictly limited by other primacies waiting in its vicinity.

There exists a significant number of function systems in world society. It is easy to identify at least ten of them: politics, the economy, law, religion, science, education, intimate relations and families, art, sports, the mass media, and the health/illness complex. Each of them establishes its own communicative domain and legitimately claims a primacy in its own domain. For each of these function systems, there are ideas and theories as to how they normally operate and what the operations and procedures characteristic of them actually are. But mainly, there are no theories about those disturbances of operations which one might call a function system crisis. Clearly, there exists much writing on political crises, for example, on the loss of legitimacy suffered by a government and other political actors in a given political

¹ See, for a recent debate on the prevalence of functional differentiation, Richard Münch, “Die Weltgesellschaft im Spannungsfeld von funktionaler, stratifikatorischer und segmentärer Differenzierung”, in: Gert Albert & Steffen Sigmund (eds), *Soziologische Theorie kontrovers* (Special issue, KZfSS) (Wiesbaden: Verlag für Sozialwissenschaften, 2010), and Rudolf Stichweh, “Funktionale Differenzierung der Weltgesellschaft”, in: *ibid.*

domain. And we have even more theory and writing on economic crises, *i.e.*, disturbances in money, credit, capital and other core variables of economic operations.

But there is an obvious lack of ideas on crises in other functional domains - and a lack of explicit theorising on what a crisis in a specific functional domain means for all the other function systems in a functionally-differentiated world society. If there only existed political and economic crises, this would somehow conflict with the idea of a horizontal societal order in which no clear pre-eminence of specific function systems can be postulated. If a crisis is, among other things, a way of disturbing operations in other function systems, too - a prevalence of political and economic crises would mean an asymmetrical ability to produce constraints and irritations for other function systems, and such a primacy in negativity would somehow call into question the postulate of a horizontal order of functional heterogeneity.

Of course, there exists much informal knowledge on crises in other functional contexts. Late medieval Europe has often been described as having been shaped by devastating epidemics (pestilence, leprosy), that is to say, by crises of health that had a significant influence on all the other realms of social life. And the Reformation means not just the emergence of a new set of religious beliefs. It has often - and justly - been seen as a crisis of European religious beliefs, and, as such, it had - once more - significant impact on other functional contexts, from art and science to politics and the economy. Clearly, these two cases differ greatly: in the case of late medieval epidemics, we primarily have to deal with a lack of health institutions, which is at the basis of the devastating influence of the epidemics. It is more a societal crisis based upon the environmental impact on a society which is not protected by adaptive (health) institutions of its own.² In the case of the Reformation, we observe a deep crisis of the most traditional and the most extensive institutional set of contemporary European society.

Both examples demonstrate that there are no good reasons to restrict oneself to the observation of economic and political crises. Therefore, the aim of this chapter will be to experiment with some formulations which could lead us towards a general theory of function system crises. This theory would not only have to cover all the function systems of contemporary society and elucidate their proneness to crisis (Section II). It would also have

² An obvious parallel is the European colonisation of North- and South-America in which up to 97% of the indigenous population was killed by pathogens against which there were no protections either by health institutions or by acquired immunity: See Charles C. Mann. *1491. New Revelations of the Americas Before Columbus*. (New York: Vintage Books, 2006).

to look at the structural couplings between function systems in order to be able to understand the mechanisms which transfer the consequences of crises to other function systems (Section III). Finally, we will study “ghostwriting” as a mechanism which may induce crises by coupling the operations of a system to extraneous sources (Section IV).

II. ELEMENTS OF A THEORY OF FUNCTION SYSTEM CRISES

II.1. CORE DIMENSIONS OF FUNCTION SYSTEMS

The first hypothesis for which I wish to argue in the following is that there are *crisis tendencies* and *crisis forms* of their own in all the function systems of modern society. Therefore, it would be useful to have a general frame for crisis theories, which can afterwards be specified and historicised by doing research on different function systems. In the next step, we will then have to look at structural couplings between function systems and the transfer of effects.

Six components or aspects of any function system will be included in the focus of the argument to be presented here. I will first describe them in a general and abstract form, and then try to understand them better by analysing three examples:

1. Constitutive symbols

All function systems are based upon symbols, which are constitutive of their processes. Money in its economic import and power as a political symbol are good examples of this. It is not supposed here that there exists only one class of constitutive symbols in a concrete function system. There may arise plural forms of symbolisation.

2. Standards for symbol production

Symbols are coupled to function system standards which regulate the production and the distribution of symbols.

3. Motivations regarding symbols

Participants (inclusion addresses) in function systems have to be motivated to access and to strive for symbols. Social processes by which these motivations are both brought about and are regulated probably exist. Therefore, motives are only secondarily states in psychic systems. Primarily, they belong to a cultural repertoire of motives, which is transformed in processes of socio-cultural evolution.

4. Integrity and corruption of standards

Function systems may be able to ensure the integrity of their standards in their daily operations. However, on the other hand, practices which can be perceived as a corruption of the standards of the respective function systems may arise.

5. Inflation and deflation of symbols

One prominent manifestation of crises in function systems consists of the processes of inflation and deflation in its constitutive symbols. These inflationary and deflationary processes depend on the rise and decline of symbols (compared to other symbols), on changes in standards, on the dynamics of motives, and on the integrity or corruption of standards. Inflationary and deflationary processes are then to be seen as a composite result of these partial processes.

6. Influence and trust as general symbols

With regard to all inflationary and deflationary processes, we can point to two very general resources which are relevant in every function system, and which are affected by inflationary/deflationary processes: influence, *i.e.*, our ability to motivate others to do something which they would not have done without our influence - and *trust* as a highly generalised pre-condition of influence.

II.2. HIGHER EDUCATION AS A CASE

One first illustration that I will try out consists of an application of this analytical schema to the system of higher education. Although higher education is not a function system in its own right, it is an ever more prominent sub-system of the global function system of education. For the first time in history, higher education has become a major social system in the last fifty years, including, since around the year 2000, more than 100 million people, which is two hundred times the number of a hundred years earlier.³

The constitutive symbols of higher education (Component 1 in Section II.1) are partly substantive, partly formal. There are, on the one hand, educational ideals or symbols which connect the operations of higher education with an anticipated way of life by symbolising the value added by higher education - for example, the education of a “gentleman”, “character

³ See Evan Schofer & John W. Meyer, “The Worldwide Expansion of Higher Education in the Twentieth Century”, (2005) 70 *American Sociological Review*, pp. 898–920; John W. Meyer & Evan Schofer, “The University in Europe and the World”: Twentieth Century Expansion”, in: Georg Krücken, Anna Kosmützky & Marc Torka (eds), *Towards a Multiversity? Universities Between Global Trends and National Traditions*, (Bielefeld: Transcript, 2007), pp. 45-62.

formation”, “civility”, “*Bildung*”, “expertise” - and so on. And there are, on the other hand, the formal, quantitative symbols of success in higher education: admission, inclusion, credits, grades, degrees, and certificates. Both types of symbols have to be connected to standards which regulate the ascription and distribution of symbols (Component 2). Standards may be handled in a strict and rigorous way, or they can be applied pluralistically and liberally. Thirdly, looking at students in higher education, they may be strongly motivated to obtain access to higher educational symbols, or they may look at them as only being one component of a complex career strategy with shifting evaluations regarding the value of the individual constituents of such a strategical mixture (Component 3). Higher education systems can be based upon a strong belief in the integrity of its standards (Component 4), or they can be prone to a corruption of standards, if, for example, public universities practice “diploma washing” of “unclean” degrees conferred by private universities, as seems to be a routine practice in present-day Romania.⁴ From the interaction of these different aspects of the production and distribution of constitutive symbols, inflationary or deflationary processes in systems of higher education can follow (Component 5) and it seems plausible that these inflationary or deflationary processes are an adequate operationalisation of what a crisis in higher education may mean.⁵ And it can easily be seen that, from these inflationary and deflationary processes in higher education, consequences for other function systems will result.

II.3. ROMAN CATHOLICISM AND SANCTITY AS A CONSTITUTIVE SYMBOL

My second example regards the production of saints and angels in Roman Catholicism. It can easily be seen that Roman Catholicism is a kind of religion which is not exclusively based upon strong Unitarian symbols (beliefs in a monotheistic god). If there is not enough trust in God, if monotheism might result in a deflationary spiral of loss of belief, for a Catholic, it is better to introduce further religious symbols to cater for publics who could not sufficiently trust a monotheistic God. In Edward C. Banfield and Laura F Banfield’s *The Moral Basis of a Backward Society*,⁶ which is an ethnographic study of a village in *Campania* in 1955, there is

⁴ See Oana Dan, “Diplomas of Private University Grads Stamped as Illegal”, (2009) *Evenimentul zilei*, July 15, available at: <http://www.evz.ro>. Many other corrupt practices exist in other university systems - see Section IV on thesis ghostwriting.

⁵ A similar theory was first proposed by Talcott Parsons & Gerald M. Platt, “Dynamic Process in the University System: The Nature of the Crisis”, in: *The American University*, (Cambridge MA: Harvard University Press, 1974), pp. 304-345.

⁶ Edward C. Banfield & Laura F. Banfield, *The Moral Basis of a Backward Society*, (New York: Free Press,

an interesting story about local inhabitants who believe that a firm patron/client-link exists between God/Jesus and the local priest. Therefore, normal people have nothing to expect from God/Jesus, and they will only pray at altars devoted to saints whom they believe to be clearly outside of this patron/client-linkage.

The supply of saints and angels in Roman Catholicism is somehow similar to the money supply in the economy. In both cases, we have to deal with symbols which are constitutive of a specific functional sphere, and we need a well-controlled process of the quantitative expansion of symbols both to support and to allow growth and inclusion processes in the respective functional sphere. Roman Catholicism no longer produces angels, as far as I know.⁷ But it has intensified the production of saints in recent times.⁸ For fifteen hundred years, Catholic saints were primarily a local or regional phenomenon. From 1592, the canonisation of saints definitely became a global decision-process in which, after a complicated procedure, the final decision is taken by the pope himself. From 1592 to 1846, only 64 new saints were made; to these, 70 were added until 1903; from 1903 to 1963, a further 77 were created. Most of these saints were of European origin, although their sanctity had no regional limitations. And then, after *Vaticanum II*, for the first time in history, we have to deal with the production of saints for a World Church in a new, more inclusive understanding of this term.⁹ Paul VI adds 84 saints in 15 years; and John Paul II canonises 482 saints in 27 years, which is a significantly bigger number than had been consecrated in the preceding 400 years (Component 1).

There are strict procedures and standards in such a canonisation process. The core institution is a papal congregation which does its work in Rome and is surrounded by experts, especially medical consultants who do research into miracles (which have to have been effected by the prospective saint after his or her death) and which function as the most important condition for canonisation (Component 2).

1958), pp. 123-126.

⁷ But, of course, it made use of angels in earlier times. For the usage of angels – for example “armed archangels” as symbols of military prowess - in colonial paintings in the Seventeenth and Eighteenth century High Andes there is an interesting analysis in Fernando Valenzuela, *Painting as a Form of Communication in Colonial Central Andes: Variations on the Form of Ornamental Art in Early World Society*. Ph.D. Dissertation, University of Lucerne, 2009.

⁸ These and the following data are taken from the very interesting article of Agathe Bienfait, “Zeichen und Wunder. Über die Funktion der Selig- und Heiligsprechungen in der katholischen Kirche”, (2006) 58 *Kölner Zeitschrift für Soziologie und Sozialpsychologie*, pp. 1-22.

⁹ See, on *Vaticanum II* and its communicative inclusion effects, Bernhard Fresacher, *Kommunikation. Verheissungen und Grenzen eines theologischen Leitbegriffs*, (Freiburg i.B: Herder, 2006), Chapter II.

Furthermore, you need motives among the population for having new saints. These motives play a strong role in the canonisation process. They are institutionalised in the form of a certain type of fame (*fama sanctitatis*), which has to exist for some time and by which someone is already respected and worshipped as a saint long before this status is formally conferred on him or her. This means that by believing someone to be a saint and by wanting him or her to have this status, you can cause this person really to become a saint. This mechanism of *fama*, which functions as a pre-condition, is an interesting instrument of equilibrating the supply and demand of saints - by neither making unnecessary saints, nor by denying the status to someone whom many people think that he or she deserves it (Component 3).

Where do the saints come from? The regional distribution of saints gives us an impression of the global distribution of motives. More than half of the 482 saints that John Paul II canonised came from three Asian countries (Vietnam, Korea and China, 276). There exists a strong European group with Spain, Italy and France (137 saints), and there is Mexico with 28 saints. Then, Japan and Poland follow, each with 9 saints. Official church ideology formulates this process as “inculturation”, as a way of incorporating local ways and usages into the universalism of the Roman church.

As far as we know, no corruption of standards accompanied this expansion of the production of saints (Component 4). “Inculturation” functions as the model which allows a cultural diversity of production conditions for saints without necessarily falling prey to corrupting compromises. If this is true and if we take into account that this production of symbols of sanctity accompanies the growth and the globalisation of the Catholic church as an ever more inclusive world church, it may be the case that this is a story of a slightly inflationary growth process, but an inflationary process which, until now, did not produce a crisis or a speculative bubble of sainthood. Thus, this story is not a crisis story, but a story of a strongly hierarchical organisation which succeeds in steering its own growth process in a way which prevents inflation and deflation.

II.4. THE GREAT DEPRESSION (1929-1933)

It should be possible to give descriptions of all the function systems in present-day world society in a way that enables us to make use of the list of elementary constituents of system processes given here. And, with regard to each of these elementary constituents, disturbances could arise from which a crisis in the respective function system might result.

Probably, the biggest crisis in Twentieth century society was the so-called Great Depression of 1929-1933. Besides the two world wars (and, by the way, closely connected to both of them), it was by far the most momentous, most consequential event of Twentieth century history. I will illustrate its extent with a few figures referring to the economic discontinuities between 1929 and 1933. In these four years, the real Gross Domestic Product (GDP) of the four major economies (USA, Great Britain, Germany, France) shrank by 25%; unemployment among the male population in these countries rose to 25%; wages were cut by 33%; commodity prices shrank by 50% and consumer prices by 30%. Bank credit in the USA was reduced by 40%, and, in many other countries, the whole banking system collapsed.¹⁰

Behind this economic and financial crisis, which had repercussions in all the other function systems of society, there were, possibly, two major factors. First, after World War I, the most important political powers never succeeded in finding a solution to the two main sources of debt: reparations (in the case of Germany) and war credits (in the case of Great Britain and France). From this, an over-indebtedness resulted which, in the German case, first led to the catastrophic hyper-inflation of the early 1920s, and then, in 1928/9, after the German return to a fixed parity, to the impossibility of re-financing short-term debt (after a rise in the American interest rate) and finally to the default of the German state. This first major factor (the inability to solve the debt problem) was, in the first instance, more an ongoing political crisis - of lack of trust and enmity - which transferred its effects into the economic sphere. Secondly, in terms of the economic and financial system, the most important error after 1918 was the belief in, and the return to, the gold standard.¹¹ The gold standard tied the constitutive symbol of the economic system (money) to a completely unrealistic standard (the promise of exchangeability of money into gold via a fixed parity). This had worked before 1914 as the economic growth of the world economy and new findings of gold (in South Africa and elsewhere) were accidentally in step with one another. But this was never the case after 1918. The fixed parity to gold made it impossible to devalue currencies in the Great Depression, and the slide into deflation in all the major economies after 1929 resulted from this. And the imbalance in the distribution of gold (too much gold flowing to the USA) was one of the main reasons for the American federal bank to maintain a

¹⁰ These numbers in Liaquat Ahamed, *Lords of Finance. The Bankers Who Broke the World*, (New York: The Penguin Press, 2009), p. 497.

¹¹ On this, see Barry Eichengreen, *Golden Fetters. The Gold Standard and the Great Depression 1919 – 1939*, (Oxford-New York: Oxford University Press, 1995) and Ahamed, note 10 *supra*.

low interest rate for too long, which resulted in the speculative bubble at Wall Street, which crashed in 1929.

III. STRUCTURAL COUPLINGS BETWEEN FUNCTION SYSTEMS AND THE TRANSFER OF CRISES

After looking at crisis phenomena in some function systems, we have to analyse more precisely the transfer of functional crises to other function systems. In a first approximation, we will postulate that, between function systems, there is often an interruption of the interdependencies to be observed. If this is the case, a crisis in one of the function systems of society may arise, without any consequences in other specific function systems. A crisis of political legitimacy need not have any influence on the belief in religious symbols.

But there are at least two other possibilities. On the one hand, it often happens that a crisis in one of the function systems of society increases the attractiveness of the symbols and the motives for participation in other function systems. Since the year 1800, at least, it has been observed in many countries that an economic crisis regularly intensifies the attractiveness of higher education in universities and colleges.¹² People either simply “wait” in higher educational institutions until the labour market offers opportunities again, or they try to invest in knowledge in order to improve their chances in economic action contexts. The same phenomenon may be registered with regard to political crises. In the United States, World War II as well as the Korean War had the effect that there was a significant dip in the male university population for some years. Young men who fought in war could not study at the same time. But, during the Vietnam War, it was exactly the other way around. There arose a crisis of political legitimacy which had the consequence that young men were no longer willing to fight for their country in a war that was perceived to be unjust. This led to a spectacular boost of college-going rates for young men as college was the best way of escaping or, at least, of deferring the draft.¹³ A still more extreme phenomenon of the same type can, possibly, be found in the artistic, intellectual and scientific flourishing of the

¹² See, for Germany, Frank R. Pfetsch, *Zur Entwicklung der Wissenschaftspolitik in Deutschland, 1750-1914*, (Berlin: Duncker & Humblot, 1974), Ch. 4, “Wissenschaftsentwicklung und wirtschaftliches Wachstum in historischer Sicht”.

¹³ See the numbers and graphs in Claudia Goldin & Lawrence F. Katz, *The Race between Education and Technology*, (Cambridge MA-London: The Belknap Press of Harvard University Press, 2008), pp. 248-251.

Weimar Republic in the midst of a catastrophic economic and political crisis going on with only short periods of normality and growth between 1919 and 1933.¹⁴

The other possibility is the transfer of crisis tendencies from one function system to the processes of symbol production and the formation of motives in another function system. This pre-supposes structured dependencies among the production and evaluation of symbols which are already present before the crisis. One example of this might be found in the inter-relation between biomedical publications in the system of science and the fate of pharmaceutical companies in the economy. This is a well-known case of a structural coupling between function systems, and it can easily be seen that a published result regarding the therapeutic efficiency of a certain substance or macro-molecule may reduce the stock market valuation of a pharmaceutical company within a few hours by billions or even tens of billions of dollars. This is an instructive case of a really consequential structural coupling between function systems. But one might object that there is no crisis. In science, a negative result (the refutation of a hypothesis regarding the efficiency of a substance) is no crisis, but simply normal science.¹⁵ And the same is true for the economy, in which the event described induces a crisis only for one company, but means an improvement in the situation of the competitors of this company. I will return to this example in the final part of this chapter (Section IV).

Another test case may again be found in the development of schooling and higher education. There is, in Twentieth century-thinking, a direct symbolic path from the credentials conferred by educational institutions to the language of “Human Capital” as the substantive resource built up in this way, and finally the economic relevance of the presence or absence of this resource.

In the Twentieth century, one can best study this inter-relationship by looking at the American constellation. In the USA, one can observe a very continuous build-up of secondary schools and higher education establishments from 1890 to 1970.¹⁶ In this eighty-year period, the average length of schooling of an American male or female rises from 6.5

¹⁴ In some respects, present-day Berlin recreates the same paradox as formulated by its present mayor (Klaus Wowereit): “poor, but sexy”.

¹⁵ Only in the professionalisation theory of Ulrich Oevermann professional work in science is understood as doing work on a crisis; see Ulrich Oevermann, “Theoretische Skizze einer revidierten Theorie professionalisierten Handelns”, in: Arno Combe & Werner Helsper (eds), *Pädagogische Professionalität. Untersuchungen zum Typus professionalisierten Handelns*, (Frankfurt a.M: Suhrkamp Verlag, 1996), pp. 70-182. But then “crisis” is a permanent state of the system which makes from “crisis” a “concept without a difference” (“differenzloser Begriff”) in an understanding Niklas Luhmann proposed.

¹⁶ The following is mainly based on the analysis in Goldin & Katz, note 13 *supra*.

years to 14 years with a very continuous rate of increase around 0.8 years per decade. In 1890, *circa* 3% of an age group succeeded in finishing high school. In 1970, the figure is around 80%.

Over this period of eighty years, one might speak of a continuous slight inflation of credentials conferred by educational institutions. This was correlated to a continuously-rising economic demand for qualified personnel, which means that, in this eighty-year period, one observes increases in salary which are relatively evenly distributed throughout the population. At the same time - and the inflation of credentials is probably the reason behind it - inequality declined in this period in a way that it never did before or after this time in the United States.

After 1970, there is no further growth of higher education or there is only a growth process which is much slower than it was in the preceding eighty years (the average length of schooling only grows by 0.5 years in more than thirty years). At the same time, there is an enormous rise in the cost of American higher education. In the last 25 years, consumer prices rose by 100%; health costs by a little bit more than 200%, and the average costs of a college education by 440%. This means college becomes too expensive for many Americans, and students have to look for paid employment parallel to their academic studies. In the same period, graduation rates (Bachelor diplomas) at American colleges decline. At present, less than 50% of the students who begin a college education finish their studies with a college degree, although the wage differentials between students who attend “some” college only, and students who finish college are significant ($> 50\%$).¹⁷ Finally, for many young people, the enormous costs of college are a reason not to choose the college which operates on an intellectual level adequate to their talents. By this personal under-investment in higher education, students compromise their own future economic chances. The crisis of education to be observed here may be the main reasons for the enormous increase of societal inequalities which occurred in the United States after 1970, and it may be one of the reasons why the US loses in economic competitiveness after 1970.

How do we resume this brief sketch, which does not claim to be an adequate or even an exhaustive analysis of the American experience in higher education and the economy in the last hundred years? What is remarkable is that, from the trends that I have pointed to, no

¹⁷ See, on these developments, David Leonhardt, “Colleges are failing in Graduation rates, *New York Times*, 9 September 2009, p. B1; *idem*, “The Way We Live Now. The College Calculation”, *New York Times*, 27 September 2009, p. MM13.

clear causal primacy of the economy or the system of higher education is to be derived. The structural coupling of education and the economy looks more like an oscillatory movement of impulses between these two function systems in which, in a first period, coupled growth processes between these two systems brought about the rise of an extraordinary higher education system and an extremely dynamic economy, whereas, in a second period, we seem to be confronted with coupled crises in both of these systems, crisis tendencies which have not been clearly diagnosed in the case of higher education because of the enormous advantage which the USA had achieved in this system at around 1970.

IV. GHOSTWRITING

I will conclude this chapter with an analysis of a remarkable case of structural coupling which has not been analysed in a comparative perspective until now. In a well-known metaphor, I call this phenomenon “ghostwriting”. By ghostwriting, I mean an operation introduced into a system by a source which is, in relevant aspects, external to the system, and which tries to obscure the fact that it is the actual author of this operation. It is a “ghost” behind the “writing” appearing in a system, and “writing” means the operative practice of which a system consists.

Ghostwriting, in this sense, is again a phenomenon which occurs in plural function systems. It is always somehow related to structural coupling (because it is about the unknown “authors” of an operation); it sometimes has to do with “corruption” (non-observance of standards that the system otherwise proclaims) - and we have to look for a link to function system crises. I will compare some examples.

The most obvious candidate is literature. There, it very often occurs that someone who has to tell something is coupled to another person who knows *how* to do the telling of the story, and, by this competence, becomes the ghostwriter of the first person.¹⁸ This is a very common practice which is normally not tainted by a feeling of illegitimacy. It is more a coupling of experiences and competences, both of which are necessary to produce an interesting result.

The situation is different in the film industry, in which much “enforced ghostwriting” is going on, which often means that the job of working on the script of a film is taken from

¹⁸ See Bob Olson: “Ghostwriting is when someone writes something for a client while the client gets the credit for writing it”, (available at: <http://www.ofspirit.com/interviews-ghostwriting.htm>).

the original author and given to others who are supposed to change the story in a direction which the film director or other core participants want it to go.¹⁹ In this case, ghostwriting is an indicator of the collective and collaborative character of film-making, an industry in which nobody can claim the sole authorship for a product in the end. Problems of integrity and of the corruption of standards do arise, but they are internal to an industry which is often more a service industry than an art form. In the film industry, at any point in time, there will be observers who perceive a crisis and a complete loss of standards, but, on more than one occasion, successive observers have re-interpreted this crisis of the film industry and of the film as an art form in an unexpected turn of events as an artistic breakthrough.²⁰

A third important case is that of “academic ghostwriting” in higher education. In this case, there is no legitimacy to it, and probably it is not only illegitimate but mainly illegal, too. But, nevertheless, academic ghostwriters freely advertise their services on the internet and they like to give interviews on their activities to magazines, clearly looking at this as a kind of advertisement for their services. You rarely find articles on academic ghostwriting in the press, but you do find these articles in student magazines,²¹ pointing to the probability that students know more about the phenomenon than their professors, who are focused on discovering plagiarism. However, one does not know the quantitative relevance of academic ghostwriting as no research seems to exist on it.²²

Does the presence of academic ghostwriting say something about a “crisis” in higher education? The first part of the answer will be negative. The rise of academic ghostwriting tells us something about the societal relevance of higher education. Higher education today is such an important institution that you have to participate in it and even need an academic

¹⁹ An interesting example is the film “*The Way We Were*”, (Sydney Pollack, 1973) in which an author (Robert Redford) loses his integrity and his Trotskyist wife (Barbara Streisand) at the moment in which he accepts to do the ghostwriting (going in the direction that investors expect him to do) on his film script himself. The script for this film by Pollack came from a book by Arthur Laurents who himself for some time lost the control over “his” film script and only later came back as his temporary substitutes (eleven authors - among them Francis Ford Coppola!) did not succeed in solving the structural problems of the script (David Thomson, “*Have You Seen ...?*” *A Personal Introduction to 1,000 Films*, (New York: Alfred A. Knopf, 2008), p. 957).

²⁰ See, on the distaste and revulsion with which “*Psycho*” was received at first, Raymond Durnat, *The Strange Case of Alfred Hitchcock, or The Plain Man's Hitchcock*, (Cambridge MA: The MIT Press, 1980), pp. 322-333.

²¹ See, recently, Nina Fargahi, “Musenkuss vom Geist”, (2010) 31 *Studiversum*, pp. 24-26.

²² “AcadWrite”, which seems to be the market leader in German-speaking countries, claims 250 authors and 2,500 customers; Oxbridge Research Group purports to have 2,000 experts from Cambridge University and Oxford University as its collaborators which, if it were true, means that the persons doing the cheating and the persons ratifying the results are sometimes the same persons.

degree to be able to hope for a successful career in your life. If you are not able to write the thesis that you need yourself, there might be good reasons to buy it on a market on which theses written by ghostwriters are offered. And there is at least one other relevant circumstance. Even under the conditions of mass higher education, many universities and colleges are not willing to compromise their standards even though their population has changed drastically in the last decades. From this, there arises a probability that there are ever more students who would never be able to fulfil the expectations coupled to a classical academic thesis. This is one more reason why the demand for academic ghostwriting should rise as a side-effect of the expansion of, and social inclusion into, higher education. But, at the same time - and this is the second part of the answer to the question regarding a crisis in higher education - this hypothesis points to a kind of anomie in higher education: a discrepancy between the standards maintained and the abilities and competences available for doing something in conformity with the standards. As soon as this discrepancy and anomie endangers the trust in the certified results of academic study, a serious crisis regarding the societal acceptance of the institutions of higher education might result. In these risks may be found the reason why higher educational institutions rarely speak about ghostwriting. They may succeed and they have effective instruments to uncover plagiarism, but academic ghostwriting is much more difficult to detect and to prove, and is, therefore, a much greater potential danger for the societal reputation of higher education.²³

I conclude with a last example of ghostwriting, which I already pointed to above in some remarks on the inter-relationship of publications in science and the stock market valuations of pharmaceutical companies. This coupling has been intensified in the last two decades by financial analysts shifting their focus of observation from the present profit and performance of the companies, to the expectations of future profits based upon the drug pipeline of pharmaceutical companies. That is to say, even financial analysts have learned to read scientific publications (or, at least, reports about scientific publications) and to derive from the information contained within some predictions regarding the future of the companies that they observe.

Parallel to this, an industry of “contract research organisations” emerged, which today organises most clinical trial research, “publication planning firms”, which handle the whole

²³ This could instructively be compared to another interesting case of ghostwriting which I will not analyse in this essay: the doping crisis in some professional sports - especially in professional cycling - which in this system, too, often is dealt with in simply not speaking about it (see Alberto Contador).

biomedical publication process for pharmaceutical companies,²⁴ and “medical education and communications companies”, which are, among other things, intensively involved in the “ghostwriting” of scientific papers.²⁵ These recent developments come on the back of a culture of extensive and extraordinary gift-giving²⁶ which, for some time, has already pervaded the interface of biomedical science and medical and pharmaceutical firms. The core terms are “ghost management” (of the publication process) and “ghostwriting” of many papers, especially reviews done by writing specialists in communication firms. The finished papers are given to reputed scientists (“key opinion leaders”), who then publish the papers, often without changing a word and without mentioning the communication firm that is behind such a publication.²⁷ There are at least two competing interpretations of this. One interpretation points to the increasingly collaborative character of the process of research and publication (similar to what we said about the film industry). This implies a new definition of authorship. The author now primarily confers his or her scientific authority on a result which has been prepared and produced by many others.²⁸ The alternative view stresses the secrecy of many aspects of the process and the money involved in it.²⁹ In this view, scientific ghostwriting, in particular, destroys scientific integrity and substitutes it with strategies of deceiving both medical practitioners and patients, often with catastrophic outcomes in terms of therapeutical results. From this, a crisis of medical credibility is supposed to arise.

There is a third function system involved in these interactions: this is the function system of law. In the United States, in particular, litigation often arises from the experience of

²⁴ Sismondo 2009 identifies more than 50 firms offering their publication planning services on the Internet, some of them having hundreds of employees.

²⁵ Leemon McHenry cites a survey which identified 182 medical education and communications companies operating in the United States; see *idem*, “Of Sophists and Spin-Doctors: Industry-Sponsored Ghostwriting and the Crisis of Academic Medicine”, (2010) 10 *Mens Sana Monographs*, pp. 129-145.

²⁶ This is the term Richard Horton uses in “The Dawn of McScience”, (2004) 51 *New York Review of Books*, pp. 7-9.

²⁷ See Natasha Singer, “Medical Papers by Ghostwriters Pushed Therapy”, *New York Times*, 5 August 2009, p. A1; *idem*, “Senator Moves to Block Medical Ghostwriting.”, *New York Times*, 19 August 2009, p. B1; McHenry 2010.

²⁸ Sergio Sismondo comes near to this view in: “Ghosts in the Machine: Publication Planning in the Medical Sciences”, (2009) 39 *Social Studies of Science*, pp. 171-198.

²⁹ See Edwin A.M. Gale, “Between Two Cultures: The Expert Clinician and the Pharmaceutical Industry”, (2003) 3, *Clinical Medicine*, pp. 538-541, at 540-1: “An expert is hired for his opinion. The expert clinician moves too easily across the invisible divide between opinion and advocacy. His value lies in his reputation for independence and integrity, but these qualities cannot be marketed without the risk of compromising them. There is too much secrecy at the interface of industry and academic medicine and too much money going across it.”

unsuccessful medical treatments, and sometimes the competitors of pharmaceutical companies opt for litigation with regard to the claims of effectiveness made by other companies. Most of what we now know about the shady sides of medical ghostwriting comes from the evidence which was presented in such legal contexts.³⁰ Critical writers on medical ghostwriting today, in some cases, are the consultants of law firms, which may mean that financial interests are involved on both sides of the controversy.

There is undoubtedly the risk of a crisis of scientific credibility implied in these practices of biomedical ghostwriting. And, in this case, we have significant evidence of changing crisis perceptions in another function system (the changeover in financial analysis to the critical evaluation of the prospective futures of pharmaceutical companies) which underlies new practices in science, which could devalue the very symbols and standards that are constitutive of the system of science. As a result, we can see something about the probabilities of a crisis in science being induced by changing risk perceptions in another function system of present-day society.

³⁰ There are other sources. Brendan Borrell (“Using Forensics to Reveal Medical Ghostwriting”; available at: <http://www.reuters.com/article/idUSTRE58A3B20090911>) reports on a journal editor who found unnamed, additional authors of scientific papers via the metadata incorporated into Word files. But, at the same time, this editor states that, in more recent papers, work has often been done on the metadata saying something about the secrecy preferred by the communication specialists of companies.

Section II

DYNAMICS

Section II.1

The Breakdown of Expectations

CHAPTER 3

THE FINANCIAL MARKET CRISIS – A CASE OF NETWORK FAILURE?

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I. INTRODUCTION: CAPITALISM – PANIC - CATASTROPHE

Is the financial market crisis the practical refutation of what has been called “neo-liberalism” in Europe, or, a bit more precisely, the dominance of the “neo-cons” in the US? Can it be described as a catastrophic consequence of the alleged withdrawal of the state from regulation in the public interest? Is it really adequate to sum up a critique of this political and economic trend as playing down “as much as possible the role of public intervention” and forwarding a conception of “social order that is enforced either entirely by itself or, at most, by civil law courts”?¹ Should this really be the turning-point for a new policy of re-regulation in order to tackle the rise of big government?

The critique in the US has already drawn attention to the fact that neo-con politics was, in reality, a combination of support for new “financial industries” *and* big government. This policy version seems to be a perverse combination of the “capture” of “independent agencies” by interest groups and an interventionist policy of the state. The contributions that originate from the public sector which have re-inforced the – under-estimated – risks of new “financial products” can be located in both the monetary policy *and* the uncritical support of the expansion of private consumption and of buying houses upon the basis of mortgage financed credit. In Germany, it is of particular interest that the broad public sector of the banking system, which was meant to introduce a counter-vailing element of public intervention and stability, has, in fact, deepened the crisis and done nothing to mitigate it.

The number of books and articles that are flooding bookshops with explanations after the fact are, in effect, signalling a crisis of “short-termism”, which is also blamed for the breakdown of the markets. And the left parties in Europe have not contributed anything

¹ W. Streeck, *Re-Forming Capitalism. Institutional Change in the German Political Economy*, (Oxford: Oxford University Press, 2010), p. 156.

meaningful to an analysis of the financial risk in advance, either. It was more focused on the globalising of financial markets as a risk to the interventionist nation state and the injustice that was seen in the widening gap between the rich and the poor in capitalist countries: the profits that were accumulated on the financial markets should have been more evenly distributed, instead of satisfying the “greed” of bankers. The ironic outcry “all the money evaporates”² is a symptom of the fact that, apparently, it is mainly the rich that have suffered from the financial markets crisis, a development that irritates public discussion and leads to a concentration on the investment bankers themselves, who seem to have been the only ones that can be identified as those who have profited from short-termism excessively.

Clearly, the causes of the crisis cannot be reduced to the “greed” of individuals alone.

All these sobering remarks should not be understood as defying the “catastrophism”, it *was* a catastrophe; however, as will be shown in this chapter, it will be extremely difficult to learn from it, or to prevent similar crises in the future, except by switching to a new type of catastrophe provoked by public interventionism, which could easily lead to a constellation in which “all the poverty evaporates” – as is well-known, poverty has been transformed into a statistical phenomenon of cleavages. If we are all poor, there is no more “poverty”.

As legal theorists, we are clearly in an awkward position: we have to reflect on the legal structures and norms that are meant to allow for the maintenance of some kind of collective order and stability in the realm of economic transactions that we do not understand well. However, this is nothing but a mere consequence of the evolution of society and the change of order from the identity of tradition to the processing of differences. This fundamental development, which can be analysed quite easily, is still hard to accept. From its inception, the capitalist type of order was based upon the pre-supposition that “no one was explicitly in charge of an entrepreneurial economy”.³ This intriguing constellation has to be held invisible: the phenomena of panic that emerge from necessity in situations of a deep economic crisis⁴ may be interpreted as the paradoxical effects of the spreading insight that

² J. Arnoldi, *Alles Geld verdampft. Finanzkrisen in der Weltrisikogesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 2009).

³ J. Appleby, *The Relentless Revolution: A History of Capitalism*, (New York: Norton & Company, 2010), p. 248.

⁴ R.J. Caballero & P. Kurlat, “The ‘Surprising’ Origin and Nature of Financial Crises: A Macroeconomic Policy Proposal”, MIT Dept. of Economics Working Papers 09/24, 2009; for the financial markets, see M. Dewatripont, J.C. Rochet, & J. Tirole, *Balancing the Banks. Global Lessons from the Financial Crisis*, (Princeton NJ: Princeton University Press, 2010), p. 4.

there is a lack of control, and that everybody has to take care of himself or herself – and, in following his or her own interest, he or she deepens the crisis by destroying trust as a paradoxical self-transcending requirement of a self-organising society that cannot orient itself on the repetition of the “given” reality or the “given” number of persons that are known to be reliable, but who are, on abstract expectations, supported by societal institutions alone.

II. “NOBODY IN CHARGE OF THE COLLECTIVE ORDER” – AND THE NON-INSTRUMENTAL CHARACTER OF POSITIVE LAW

This lack of the “givens” of a liberal collective order is also the basis of “positive law”, a term which underwent a silent transformation in the late Nineteenth century: “positive”, in a liberal sense, is not a law that has been “willed” by a legislator – this is a historical understanding that can, in continental Europe, be attributed to the conflict between the *ancien régimes* and the parliamentary power that passed into the hands of the citizens. However, in a deeper sense, “positive” is a law that – as one might re-phrase the above-mentioned quotation from the recent book by *Joyce Appleby* – is “non-instrumental”, in the sense that it refers to a “relationship in terms of rules”.⁵ These rules are de-coupled from substantive values and allow for co-ordination among agents who pursue their self-chosen goals. This assumption raises a lot of criticism about the collective and social character of personality – a criticism which does, however, miss the point. Clearly, the individual is not - in a meaningful sense - to be pre-supposed to be the creator of his or her own self. Individuality is, itself, a social form that underlies permanent change.⁶ The non-instrumentality of the “positive” law and its corresponding conception of individual freedom do not provoke the “voluntary disposition of self-interested economic actors” as Streeck⁷ puts it. They pre-suppose an acentric society, whose collective order resides in the permanent emergence of innovations that establishes a “play of ideas”,⁸ a pool of variety that contains an excess of possibilities over the reality generated from the practices of co-operation, competition, imitation, and experimentation in

⁵ M. Oakeshott, *On Human Conduct*, (Oxford: Oxford University Press, 1975), p. 140; T. Nardin, *The Philosophy of Michael Oakeshott*, (University Park PA: Pennsylvania State University Press, 2001), p. 202; see, also, E.F. McClennen: “Rationality and Rules”, in: P.D. Danielson (ed), *Modeling Rationality, Morality and Evolution*, (Oxford-New York: Oxford University Press, 1998), p. 13.

⁶ See, generally, M. Schroer, *Das Individuum der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 2003); J.C. Kaufmann, *L'invention de soi: Une Théorie de l'identité*, (Paris: Armand Colin, 2004); K.J. Gergen, *The Saturated Self: Dilemmas of Identity in Contemporary Life*, (New York: Basic Books, 1992); J. Finkelstein, *The Art of Self-Invention*, (London-New York: Tauris I B, 2007).

⁷ Streeck, note 1 *supra*, p. 156.

⁸ Appleby, note 3 *supra*, p. 156.

society. The positivism of positive law cannot be reduced to the volition of the legislator; it refers to a functionalism of the “normal”, which “works” after the decline of the transcendental order.⁹ Clearly, this process of “normalisation” not only generates spontaneously, but also in a reflexive form of second order observation of the rules and patterns of its own infrastructure, meta-rules and stabilising institutions (which may not be able to avoid lock-in effects) or varieties of framing and re-organising knowledge as a pool of variety for societal operations.

However, it is most important to underline that the individual as a merely “self-interested economic actor” is primarily not a myth of liberal society, but of its critics. This can be demonstrated by referring to the present discussion on the protection of the “commons” of culture against private appropriation in the digital world and its equivalent in the genetic engineering. The relationship between privately-owned knowledge and the “intellectual commons” is a permanent problem of liberal society, but one should not overlook the collective, albeit distributed, character of the core of the “common knowledge” of society, which was characterised by open access and, only to a limited extent, restricted by patent law. In the economic order of the liberal society, a “culture of improvement”,¹⁰ which was always open to knowledge transfer, is enshrined. This possibility was, to a large extent, not only accepted as unavoidable, but also as being productive for the permanent generation of technological innovation and competition. Such a process does not exclude “public intervention” – to the contrary, it is clear that the public knowledge infrastructure in countries such as Germany in the Nineteenth century had a positive impact on their culture of innovation.

Against this background, the close relationship between social practice and positive law, which was emphasised by Michael Oakeshott, in particular, finds its theoretical contours:¹¹ as long as the practices – especially those based upon economic and technical experience – can be regarded as “non-instrumental” in the above-mentioned sense, the difference between practice rules generated spontaneously in the societal process of self-organisation and “positive” law is only relative. In the following section, the self-

⁹ B. Waldenfels, *Verfremdung der Moderne. Phänomenologische Grenzgänge*, (Göttingen: Wallstein, 2001), p. 135.

¹⁰ R. Friedel, *A Culture of Improvement: Technology in the Western Millennium*, (Cambridge MA: The MIT Press, 2007).

¹¹ Nardin, note 5 *supra*, p. 202.

transcendence of the law itself which emerges from the permanent “unrest” in the processes of its “application” will be related to the accompanying transformations in the knowledge basis and the set of practical rules which organises the economic processes of production and innovation in particular.

III. POSITIVE LAW AND ITS COGNITIVE BASIS

III.1. LEGAL NORMS – FACTUAL NORMS – THE COGNITIVE INFRASTRUCTURE OF THE LAW

The abstraction process of the new “positive” law which transcended the close relationships between normative and factual “bindingness” does not abolish the dependence of the legal order on a cognitive and informational infrastructure that consists of a generative network of patterns of action, co-operative conventions, practices of co-ordination, common probability assumptions¹² *etc.*, within which it functions as a kind of “knot”. The legal order and its continuous process of concretisation is linked to a set of rules of relevance¹³ which, in a controlled manner, processes the flow of information needed for its adaptation to new challenges. The autonomisation of the legal order seemed to have broken this link, but this was only a superficial observation of the transformation which had taken place. Legal norms can only produce their organisational and structuring effects by channelling thought and action upon the basis of “open-textured clusters of ideas”¹⁴ which can be pre-supposed. Looking back to the generative achievements of German legal positivism, one may assume that this inter-relationship between normativity and fact in the early Nineteenth century was characterised by close-knit fragmented webs of local practices, while the new attitude of “pure” legal self-construction of “will relationships” beyond the binding forces of habits and conventions provoked a corresponding repercussion within the world of facts: a wave of abstractions and systematicity, which intruded upon the knowledge base, occurred in the everyday transactions between economic actors and industrial producers.¹⁵ This co-evolution of the factual knowledge basis contributed to a process of inter-local exchange and a generalisation of the patterns of economic behaviour, technical knowledge, and rules of

¹² S. Atran, *In Gods We Trust: The Evolutionary Landscapes of Religion*, (Oxford: Oxford University Press, 2005), p. 235.

¹³ D. Sperber & D. Wilson, *Relevance: Communication and Cognition*, (Oxford: Blackwell Publishing, 1986).

¹⁴ Atran, note 12 *supra*, p. 212 & 251.

¹⁵ K.-H. Ladeur, “Coping with Uncertainty: Ecological Risk and the Concept of Self-Organisation”, in: G. Teubner, L. Farmer & D. Murphy (eds), *Environmental Law and Ecological Responsibility*, (Chichester: Wiley, 1999), p. 299.

relevance for the evaluation of risks and pay-offs. When it comes to the evaluation of technical risks, a process of homogenisation and standardisation of the social knowledge infrastructure can be observed from a public law perspective. Not only did public law refer to practical experience in its definition of the limits to be imposed on technical industrial production, but the state also actively intervened in the generation and stabilisation of the general knowledge base which might be used by private and public actors alike. In early processes of fragmented (proto-) industrial technical production, a network of knowledge had been generated on a practical case-to-case basis. This can be said both for the ways of manufacturing new products and for the risks to be taken into consideration as the side-effects of the new innovative ways of production. New information on promising methods of construction and ways to avoid losses and risks spread slowly and developed in a haphazard way, because production processes were locally-based and thus experience was fragmented as well. In the process of early industrialisation, safety information did not easily reach small factories. In this period, for example, in Prussia, the state government initiated private self-organisation of industrial producers in order to raise the level of technical information by improving the exchange of knowledge and the formulation of both standards of production and risk reduction.¹⁶ Later on, the “*Technische Überwachungsvereine*”, private organisations for the control of technical risks,¹⁷ which, to this day, still have a hybrid private and public function in the self-regulation of industries, were installed. They continued the public efforts in a more efficient way after the state had succeeded in breaking up the traditional limitations of society’s knowledge base. The same is true for the diffusion of information on the building of houses, including safety rules and patterns of architectural design.¹⁸ The knowledge generated in this field had also been restricted to regional information networks.

III.2. LEGAL NORMATIVITY AND THE NORMATIVITY OF EXPERIENCE

A liberal legal order – which the positivistic doctrine also claimed to have established – always had to pre-suppose and take into account the fact that normativity, even if it had attained a more abstract level, is dependent upon the societal processes of the normalisation

¹⁶ I. vom Feld (2003), “Vertrauen ist gut – Kontrolle ist besser? – Dampfkesselüberwachung in Preußen zwischen Fremdsteuerung und Selbststeuerung 1870-1914”, in: B. Feldner *et al.* (eds), *Ad fontes. Europäisches Forum Junger Rechtshistorikerinnen und Rechtshistoriker*, (Frankfurt aM: Peter Lang, 2003), p. 121; J. Mokyr, *The Gifts of Athena. Historical Origins of the Knowledge Economy*, (Princeton NJ: Princeton University Press, 2004).

¹⁷ M. Več, *Recht und Normierung in der industriellen Revolution*, (Frankfurt aM: Klostermann, 2006).

¹⁸ R. Strecke, *Anfänge und Innovation der preußischen Bauverwaltung. Von D. Gilly zu F. Schinkel*, (Cologne: Böhlau, 2000).

of establishing practical conventions and behavioural patterns,¹⁹ and, at the same time, intervenes in the processes going on in the networks of the inter-relationships in which these norms are implied, as opposed to explicit legal norms. Normativity pre-supposes a “pre-commitment”,²⁰ which refers to the adaptation to the constraints and expectations that are generated by private processes of co-operation and co-ordination, and come to form a public-private knowledge base. Such a common knowledge base is needed in a society that uses norms and conventions in order to bind a new type of uncertainty which cannot be eliminated or reduced to chance. The new construction of an autonomous law which took its distance from the old inter-twinement of facts and norms had, at the same time, to pre-suppose that the practical network of legal relationships and conventions implied in society²¹ would be able to process a new, more abstract and more variable knowledge base (“experience”) to be established beyond local fragmentation.²² In addition, the new rules of relevance which could re-organise the patterns of inter-relationships that impose connection constraints and possibilities in society had to be generated. The self-organisation of rules of practice which process new, practical possibilities of action determines the “facts” which the legal system has to refer to in decision-making procedures, and which are, at the same time, re-inforced by legal decisions. This is due to the fact that public and private action, even after the shift to a more abstract legal order has taken place, always act upon the basis of linkages between past or future actions, in groups of actions (“plans”) which have to bind uncertainty with reference to rules, conventions and expectations. Conventional and normative rules alike limit the recourse to “good arguments” which seem to impose themselves by the “forceless force” (Jürgen Habermas) of reflection about each action taken in isolation. The legal system, in contrast, is not completely closed to moral or other arguments drawn from specific situations,

¹⁹ C. Chauviré, *Le moment anthropologique de Wittgenstein*, (Paris: Editions Kimé, 2004); R. Hardin, *Indeterminacy and Society*, (Princeton NJ: Princeton University Press, 2003); *idem*, “Street-level Epistemology and Democratic Participation”, in: J.P. Fishkin & P. Lassett (eds), *Debating Deliberative Democracy*, (Malden MA-New York: Wiley and Blackwell, 2003), p. 163.

²⁰ M.E. Bratman, *Faces of Intention*, (Cambridge: Cambridge University Press, 1999) 4; Atran, note 12 *supra*, p. 234 & 25.

²¹ O. Favereau, “Règles, organisation et apprentissage collectif”, in: A Orléan (ed), *Analyse économique des conventions*, (Paris: Presses Universitaires de France, 1994), p. 113; *idem*, O. Biencourt & F. Eymard-Duvernay, “Where Do Markets Come From? – From (Quality) Conventions”, in: O. Favereau & E. Lazega (eds), *Conventions and Structures in Economic Organisation: Markets, Hierarchies and Networks*, (Cheltenham: Edward Elgar Publishing, 2002), p. 213; for the conceptualisation of networks, see F.B. Simon, *Einführung in die systemische Wirtschaftstheorie*, (Heidelberg: Carl Auer Systeme Verlag, 2009), p. 89 *et seq.*

²² L. Jaume, *La liberté et la loi*, (Paris: Fayard, 2000), p. 181.

but these arguments do have to fit into the “rationality of rules”, which allows for a kind of “management of rules”, even with regard to non-legal patterns and conventions, and which also has to take the pre-commitments and the stability of expectations into consideration. By fulfilling this function, the legal system can also take a cognitive role which consists of the establishment of both the patterns of action and the rules of expectations. At the same time, the practical rules of action and co-ordination create rules of relevance which contribute to the process of the self-stabilisation of normativity. A liberal legal order regards the processing of inter-relationships within society as the real “subject” of the law. Freedom, in this perspective, is the potential of individuals, by their continuous processing of decisions within networks of parallel and sequential strategies, to create and shape the “landscape” within which they move.²³ This image might provide us with an idea of what it means for society to create uncertainty by generating innovations which have, again and again, to be bound by new decisions and rules. Uncertainty, in this view, is not a lack of knowledge, which can be remedied, but is, instead, the inescapable consequence of the process of the self-creation of society beyond tradition,²⁴ which has to be accepted as a pre-condition of societal operations.

Both the new form of co-ordination of general law and a more dynamic and more abstract knowledge base of society are a contribution to the “management of rules”, which is the task of the legal system. The characteristics of this new paradigm of the autonomous legal system can come to the fore if this conception is confronted with Jean-Jacques Rousseau’s idea of the “democratic immediacy” of the law:²⁵ democratic legal acts, according to Rousseau, do not refer to the openness of “will relationships” or to their co-ordination with the network of constraints and possibilities generated by the heterarchical inter-relationships between individuals, but, instead, claim, from a hierarchical position, to be able to be constrained to transform, first and foremost, the plurality of the individuals into a homogeneous body of a “people”.²⁶ This body alone has the potential to incarnate the

²³ P.M. Allen, “Modelling the Co-evolution of Communications and Socio-Economic Structure”, (1997) 15 *Prometheus: Critical Studies in Innovation*, p. 83 & 91; *idem*, “Modelling Complex Economic Evolution”, (1998) 9 *Selbstorganisation. Jahrbuch für Komplexität in den Natur-, Sozial- und Geisteswissenschaften*, p. 47.

²⁴ N. Luhmann, *Erkenntnis als Konstruktion*, (Bern: Benteli, 1988).

²⁵ P. Rosanvallon, *Le monde politique français. La société civile contre le jacobinisme*, (Paris: Seuil, 2006), p. 71.

²⁶ *Ibid.*, note 25 *supra*, p. 73.

common interest, which is clearly separated from the particular inter-relationships between individuals.

III.3. THE LEGAL SYSTEM AND THE COGNITIVE INFRASTRUCTURE OF THE WELFARE STATE

The evolution of the welfare state, which came to its culmination only after World War II, led to new institutions and to clearing procedures that established a new layer of co-ordination between public normativity and the societal mechanisms of channelling cognitive and regulatory standards. The pre-condition of this evolution is to be seen in the organisational potential of big firms and in the standardised production processes which created new types of knowledge, and provoked the rise of new “meta-norms” that processed the exchange between facts and norms on the new layer of normativity devoted to collective phenomena. These processes of knowledge management found their repercussions in a set of pluralistic institutions of “publicity” which established itself between the rules of society at large and the sphere of the state. In addition to this new evolutionary step of the legal system towards a “secondary modelling” of the liberal order, a set of “rules of conflict” for the management of the co-ordination of different types of rules (individualistic *versus* collective) had to be introduced: there are, on the one hand, domains that underlie the rules of the liberal order, or separate domains governed by collective rules and conventions; but, at the same time, there are *also* overlapping domains for which co-ordination or priority rules have to be found (for example, within individualistic rules of liability, problems of the collective attribution of responsibility re-appear; this applies to product liability). New types of rules and judgments evolve, which try to balance the liberal individualistic rationality against the new collective logic. However, taken together, the elements of this new paradigm for the management of rules form a functional equivalent to the prior model of the co-ordination of facts and norms which evolved in the Nineteenth century; both establish complex models of exchange between legal norms, and between both explicit *and* implicit types of knowledge which were linked to the rise of new collective actors and the collective phenomena that they had to manage. The knowledge base is increasingly processed and channelled by representative groups, organisations and a homogenising technical infrastructure which goes beyond the open processes of self-co-ordination among individuals and small organisations, as used to be the case in the liberal order.²⁷ However, the linkage of normativity and facts is reproduced in

²⁷ E. Brousseau, “Néo-institutionnalisme et Evolutionnisme: Quelles convergences?”, (1999) 35 *Economies et sociétés*, p. 5.

a more reflexive form and on a higher level than before. The process of the standardisation of knowledge and practices no longer follows a stable general domain of practices, but includes a more prospective proactive element which includes the harmonisation of competing interests.²⁸ This applies, in particular, to the process of collective-bargaining in industrial relations. This type of co-operation not only follows a logic of collective distribution, it also includes a vital interest in the standardisation of work, payment methods, professional requirements, training on the job, *etc.* In this respect, collective-bargaining follows the logic of the co-ordination of facts and norms in as much as it generates the standardised elements which can become the object of normative stabilisation.

IV. THE POSTMODERN TRANSFORMATION OF THE LINKS BETWEEN THE LEGAL SYSTEM AND ITS COGNITIVE INFRASTRUCTURE

IV.1. THE NEW LOGIC OF INTRA- AND INTER-ORGANISATIONAL NETWORKS

For a couple of years, a new development has been observed which might be attributed to a new paradigm of co-ordination between cognitive and normative rules. One might talk about a “tertiary re-modelling” of the liberal version of this inter-twinement. The still increasing acceleration of the production and use of scientific information in complex technological environments has led to a new wave of transformations, which curbs the hitherto attained level of stabilisation of the co-ordination with legal requirements. Once again, the representation of a clear separation of normative rule (which pre-supposes a stable concept of order²⁹) and its concrete application is put to the test,³⁰ and this goes so far as to assume that the whole idea of the universality of public order has lost its sense; the crumbling of a universal order is reflected by the crisis of the idea of a unitary “subject”: such a “subject” is no longer imaginable *vis-à-vis* the heterogeneity and the fragmentation of the networks of inter-relationships that define the multiplicity of its positions as “knots” to which the changing legal values are attributed and can no longer be integrated into an overarching conception of a general law. Under these conditions, the state can neither be constructed as the representative of a stable idea of the common interest, as in the liberal order of the past, nor as the mediator of exchange processes among representative “encompassing” groups and organisations with their own internal and external co-operative stable cognitive infrastructure.

²⁸ Biencourt & Eymard-Duvernay, “Where Do Markets Come From? – From (Quality) Conventions”, note 21 *supra*.

²⁹ See, generally, B. Waldenfels, *Der Stachel des Fremden*, (Frankfurt aM: Suhrkamp Verlag, 1990).

³⁰ J.M. Guéhenno, *The End of the Nation State*, (Minneapolis MN: University of Minnesota Press, 1995), p. 49; *idem*, “Demokratie am Wendepunkt”, (1998) 43 *Internationale Politik* No 4, p. 13.

The groundbreaking transformation which takes place in postmodern societies can be characterised as the process of change of the “great all-embracing order into several orders”,³¹ which, from the outset, have to be regarded as self-transcending, limited in their reach, with mobile and flexible limits which allow for disruptive change (as opposed to the continuous processes of the accumulation of experience). It is not just the accelerating process of technological innovation which is at stake. The modes of production of knowledge themselves undergo a deep transformation: the knowledge-generating practical networks of the past were open and well-distributed, did not aim at explicit goals, and their operations were incremental and evolutionary. This property allowed for a stable mode of coupling with normativity, which could process its own self-observation by general doctrine (“Dogmatik”). The new versions of uncertainty generated by the dynamic of self-transformation of knowledge production can be characterised as being “procedural” in the sense of H.A. Simon:³² it is a type of uncertainty which, from the outset, is reproduced in a reflexive mode that does not suppress its self-transcending character in a paradoxical way. Uncertainty is, from the outset, integrated in the complex settings in which it is produced, and which have to be organised in a way which allows for productive operation with its phenomena by introducing new reflexive moments of design, of modelling of self-revision, and of monitoring.³³ There the idea of the best decision no longer exists, only that of a satisfying decision. The knowledge generation itself is no longer incremental and continuous, but goal-oriented and experimental. Knowledge “gaps” cannot be filled, but they are an unavoidable element of the new experimental logic. Information processes can be disruptive, in as much as they lead to breakdowns of the established technologies and to the steep rise of new ones. Individuals are much more aware of the inter-twinement of changing options and re-designing or transforming the whole option domain.³⁴ In other words, individuals and organisations are operating far from equilibrium. Risk and ignorance of the consequences of

³¹ Waldenfels, note 29 *supra*, p. 19.

³² H.A. Simon, “From Substantive to Procedural Rationality”, in: *idem*, *Models of Bounded Rationality*, Vol. 2 (Cambridge MA: The MIT Press, 1982), p. 56.

³³ Luhmann, note 24 *supra*, p. 10; Allen, note 23 *supra* (1998), p. 83 & 88; see, generally, G. Balandier, *Le désordre*, (Paris: Fayard, 1988); for the “control” of financial markets, see, in particular, E. Esposito, *Die Zukunft der Futures. Die Zeit des Geldes in Finanzwelt und Gesellschaft*, (Heidelberg: Carl Auer, 2010), pp. 272-276.

³⁴ Allen, note 23 *supra* (1997), p. 83 & 88; Favereau, “Règles, organisation et apprentissage collectif”, note 21 *supra*; Brousseau, note 27 *supra*; D. Dequech, “Fundamental Uncertainty and Ambiguity”, (2000) 26 *Eastern Economic Journal*, p. 41; *idem*, “Bounded rationality, Institutions, and Uncertainty”, (2001) 35 *Journal of Economic Issues*, p. 911.

new technological “paths” are no longer to be managed by the incremental introduction of their use, but have to be integrated into the process of decision-making and be processed by new decision techniques. At the same time, knowledge itself is pluralised, its hierarchical structure (based upon the separation of general scientific “laws” and specific technical application) is undermined by both the parallel-processed multiplicity of experiments and modelling procedures and their consequences: an increasing set of specialised information which can no longer be systematised by general meta-rules.³⁵ This leads to the phenomenon that only those persons who produce the information (and have a practical interest in its use) have the professional *capabilities* to reflect the pre-conditions of its modelisation, while it is not accessible to researchers who take a more detached look at new ideas. Technical information itself disrupts option domains and does not merely add a new option within a stable field of development. This evolution undermines even the relationship between implicit (practical)³⁶ and explicit (systematised and codified) knowledge.³⁷ New techniques have to be developed which systematically try to generate new explicit knowledge from implicit rules of practice using computer programmes for different types of “data mining” or organisational management reform beyond stable separation between general management and the specific execution of programmes.

IV.2. THE EMERGENCE OF “EPISTEMIC COMMUNITIES” AND NETWORKS OF KNOWLEDGE PRODUCTION

In the liberal order, the paradigm of generality and the universality of legal norms had presupposed the existence and productivity of multiple “practical communities” of producers, engineers, practitioners, *etc.*, which did not pursue a common project,³⁸ but spontaneously contributed, by trial and error processes, to a common knowledge basis (“experience”). Its evolution was subject to generalisations of different types, such as cognitive (schools, universities) and organisational types (private conversation circles, standardisation, *etc.*). In contrast to their predecessors, the new “epistemic communities” are goal-oriented, although,

³⁵ Guéhenno, note 30 *supra*, p. 16.

³⁶ M. Polanyi, *Personal Knowledge: Towards a Post-critical Philosophy*, (London: Routledge, 1958).

³⁷ P. Cohendet, F. Kern, B. Mehmanpazir & F. Munier, “Routines, Structures of Governance and Knowledge Creating Processes”, in: J. Lesourne & A. Orléan (eds), *Advances in Self-Organisation and Evolutionary Economics*, (London: Economica, 1998), p. 77; this evolution causes the devaluation of unqualified work; see M. Balconi “Tacitness, Codification of Technological Knowledge and the Organisation of Liberty”, (2002) 31 *Research Policy*, p. 357.

³⁸ R. Arena, “Relations inter-entreprises et communautés médiatisées – une analyse préliminaire”, (2003) 113 *Revue d'Economie Politique*, Special Number, p. 209 & 211; P. Cohendet & P. Llerena, “Routines and Incentives: The Role of Communities in Firms”, (2003) 12 *Industrial and Corporate Change*, p. 271.

at the same time, they can no longer pre-suppose access to a broad general knowledge.³⁹ Projects are more complex than in the past; they have to generate and experiment with more possibilities. This is the basis for new paradoxical forms of co-operation between competitors who create research-oriented joint-ventures with the prospect of sharing knowledge which, at a later stage, is used in different forms for competition. This form of co-operation demonstrates the new hybrid form of an inter-twinement of general and specific knowledge in projects, a form which undermines the hierarchical separations characteristic of the knowledge systems of the past. Clearly, this approach creates not only new possibilities but also new risks, because these knowledge “clusters” are less accessible to observation and evaluation from outside: “control knowledge” can, in many respects, be generated only within such “epistemic communities” and not be collected from detached expertise.⁴⁰ Many technological projects, today, can no longer be analysed in advance because it is only by practical development, and not by observation from outside, that the required knowledge can be accessed.

IV.3. LAW AND KNOWLEDGE GENERATION IN THE “NETWORK ECONOMY”

The problem that is linked to the changing character of knowledge generation is exacerbated by the development of the “network economy” which emerges as a result of the increasing importance of informational products and services. The “epistemic communities”⁴¹ which have evolved in this new domain are not only confronted with the problems of high technology in general, but also with the basic legal rules of separation between the knowledge which can be appropriated by private firms (patentable information) and the knowledge which has to become part of the general pool of variety accessible to everybody. This problem also translates into customer relationships: on the one hand, the “object” of selling cannot be defined clearly (copying), while, on the other, customers are increasingly integrated into the process of the development of software and other intelligent products whose use creates new information which can be re-introduced into the production

³⁹ P. Cohendet & F. Meyer-Krahmer, “The Theoretical and Policy Implications of Knowledge Codification”, (2001) 30 *Research Policy*, p. 1563.

⁴⁰ P.E. Tetlock, *Expert Political Judgment. How good is it? How can we know?*, (Princeton NJ: Princeton University Press, 2005), p. 217; see, for the construction of evaluation as “second order knowledge”, R. Stichweh, “Wissensgesellschaft und Wissenssystem”, (2004) 30 *Schweizerische Zeitschrift für Soziologie*, p. 147 & 155.

⁴¹ B. Conein, “Communautés épistémiques et réseaux cognitifs”, (2001) 113 *Revue d'Economie Politique*, Special Issue, p. 138.

processes.⁴² In addition, producers have to bear in mind their contribution to, and dependence on, the social conditions of the use of the new information technologies: there are no longer clear-cut technological evolutionary paths which limit the range of possibilities for the future. The social and informational infrastructure of a society has to be open for the adoption of new products and services – and this is a problem which goes far beyond the question of economic resources. Computerisation also changes the forms of co-operation with subsidiary firms: there is no longer the alternative of the exchange of products or the organisational integration of the producer. The internal and external relationships of firms are no longer clearly separated; relational long-term contracts allow for far-reaching integration by constructing overlapping networks for intense exchanges of information. The introduction of digital television and video also demonstrates the problems of flexibility for the definition of stable functions in the chain of distribution: the “intelligence” can be shifted to different levels of the processing network. The roles of cable operators, producers of end-use devices, telecommunication providers, content providers and customers is no longer established or fixed from the outset. This evolution renders the process of standardisation much more complex than it was in the past, and this creates a major problem for the formulation of an adequate role for public authorities.

M. Bourreau and M. Gensollen⁴³ have called the new emerging markets for complex information technology “meta-markets”, the institutional infrastructure of which is uncertain – beyond the “normal” risks of market strategies. This is one of the phenomena of the network economy, which undermines the stability of the institutions in which the technologies are embedded. The same is true for the “factory system” which had played a major role in the diffusion of knowledge in modern production systems.⁴⁴

The law will have a role to play in this arena of disruptive technologies, but this will only be possible by opting for variable public-private network organisations which might structure learning processes without following clear public goals. There is no room for “steering” technologies, only for introducing reflexive elements into open processes of self-organisation. At the same time, a re-formulated role for a mediating function of the legal

⁴² A.O. Costello & T.G. Costello, “Defining Property Rights: The Case of Knowledge-based Resources”, (2005) 47 *California Management Review*, p. 143.

⁴³ M. Bourreau & M. Gensollen, “Communautés d’expériences et concurrence entre sites de biens culturels”, (2004) 114 *Revue d’Economie Politique*, p. 61.

⁴⁴ Mokyr, note 16 *supra*.

system has to be defined: the state and the legal system should follow some “meta-rules” or principles, which could re-formulate the public interest at a much more abstract level than in the past.⁴⁵ To a certain extent, this can be regarded as a functional equivalent of the cognitive-normative inter-relationship that existed between facts and normativity in the past: the close link between experience and rule-based law in the liberal society corresponds to more abstract relationships between the experimental logic of the society of intra- and inter-organisational networks, on the one hand, and the mediating role of law and public administration, on the other, which refers to diversity as a principle of the self-organisation of knowledge generation, learns how to tell productive from unproductive forms of co-operation, avoids lock-ins in network formation,⁴⁶ and re-introduces new options with a view to buffering uncertainty by generating flexibility. In this sense, the state would primarily focus on the societal responsibility to produce knowledge for public and private decision-making – as was the case in the “society of individuals”. At the same time, the state would both have to observe *and* reflect the meta-rules of knowledge generation as such – including the necessity to create procedures for the *ex post* control of the viability of the mode of self-transcendence of the societal knowledge basis, and the *ex post* monitoring of complex (private and public) decision-making in conditions of uncertainty in particular.

Postmodern law has to confine its role to the stimulation of the emergent knowledge processes which are increasingly distributed over heterogeneous overlapping networks of epistemic communities. They form the basis of a new collective form of systemic intelligence which does not follow a stable trajectory, but is, instead, involved in a discontinuous process of self-irritation. This experimental logic is a challenge for both the legal and the administrative systems, which have to develop their own “*eigenvalue*” by adopting a more heterarchical procedural approach. As was the case in the past, public forms of governance will have to play an important mediating role if the potential creativity of the new systemic collective intelligence is to be liberated.⁴⁷ As will be shown later, one of the weaknesses of public-private co-operation in financial market regulation was the reliance on the aggregation

⁴⁵ For the changing role of the state, see F. Moreau, “The Role of the State in Evolutionary Economics”, (2004) 28 *Cambridge Journal of Economics*, p. 847.

⁴⁶ G. Teubner, “So ich aber die Teufel mit Beelzebub austreibe, ...Zur Diabolik des Netzversagens”, in: I. Augsberg (ed), *Ungewissheit als Chance*, (Tübingen: Mohr, 2010), p. 109.

⁴⁷ For an advanced cooperative form of financial market regulation, see T. Strulick & M. Kussin, “Finanzmarktregulierung und Wissenspolitik, Basel II – Die aufsichtsrechtliche Konstitution kollektiver Intelligenz?”, (2005) 26 *Zeitschrift für Rechtssoziologie*, p. 101.

of knowledge generated in the banks, which were regarded as units with an intimate knowledge of the design and management of risk strategies, whereas, in fact, it can no longer be pre-supposed that the risk knowledge is easily accessible to top management anymore.

V. THE “SOCIETY OF NETWORKS” – CORPORATE GOVERNANCE – BANKING SYSTEM

V.1. THE FRAGMENTATION OF THE KNOWLEDGE SYSTEM

From a legal theory perspective, the new shift towards the “society of networks” and its transformed knowledge basis can, first of all, be observed in its impact on the transformation of corporate governance in particular. The transformation of the banking system through the emergence of investment banking is a repercussion of the general change of the financial markets, which are - as a consequence of a silent process of experimentation - being transformed into general institutions of managing and optimising risk at a societal level,⁴⁸ whereas, in the past, the key function of the banking sector was much more concrete and could be described as the “intermediation between savers and borrowers”.⁴⁹

At the same time, the structure of corporations in general, and the banking sector in particular, are permanently changing.⁵⁰ This is already an indication of the complexity of the task of regulating such a dynamic sector. The regulatory model of the “society of organisations”, which finds its model in the American independent agency, relied on being embedded in a number of big and stable organisations which manage the process of knowledge generation in co-operation with the administrators: the “independence” of the agency was a consequence of the political will to insulate agencies from the more general political influence of the traditional majoritarian institutions (parliament). The recent trend towards “regulated self-regulation” or “negotiated regulation”⁵¹ is not just the expression of a political will to “neo-liberalism”, but also of a new paradigm of the organisation of knowledge, practical rule, patterns, *etc.*, in economic organisations (corporations in

⁴⁸ See, generally, the insightful study by D. Baecker, *Womit handeln Banken? Eine Untersuchung zur Risikoverarbeitung in der Wirtschaft*, (Frankfurt aM: Suhrkamp Verlag, 2007), (2nd ed./1st ed. 1991).

⁴⁹ A. Nesvetailova, “The Crisis of Invented Money: Liquidity Illusion and the Global Credit Melt-Down”, (2010) 11 *Theoretical Inquiries in Law*, p. 125 & 132.

⁵⁰ H. James, *The Creation and Destruction of Value*, (Cambridge MA-London: Harvard University Press, 2009), p. 272.

⁵¹ O. Lobel, “The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought”, (2004) 89 *Minnesota Law Review*, p. 342.

particular). The hierarchically managed firm as the model of the “society of organisations”,⁵² has a hierarchical structure that allows for the separation of general knowledge, rules and strategies. Its “organisational framing” of the knowledge processes was the pre-condition of the cognitive paradigms in the changed environment of reflexive processes of the irritation of innovation and experimentation. It allowed for the bundling of “representative knowledge” in the institutions of the corporatist political system, it differentiated general knowledge and “best available” knowledge and established a variety of technological, managerial, labour standards, *etc.*

The new trend towards self-regulation is a symptom of the increasing fragmentation of the knowledge basis and the generation of its practice and management rules also within corporations. Corporations have become learning organisations⁵³ which maintain the limit between the inside and the outside more permeably than in the past. Conceptions such as the “fractal firm” or “total quality management”, “just-in-time production” and joint-ventures or the paradoxical mode of “co-opetition” symbolise this new trend towards hybridisation,⁵⁴ which undermines the paradigm that had integrated a variety of private and public institutions of knowledge-framing for decision-making processes in private and public organisations. In the new literature on the “power of networks”,⁵⁵ the flexible relationships among persons is epitomised, whereas, in the internet-related discussion, the spontaneous creativity of co-operation beyond the hitherto established limits of organisation, the protection of knowledge by copyright, and public supervision, is hailed as a new communitarian way of communicating and producing.⁵⁶ One may doubt whether, in the near future, a fundamental transformation to small rapidly self-changing production units in a flexible network of co-ordination will gain prominence. However, a silent process of transformation towards more network-like forms of both production and knowledge generation can be observed.

⁵² C. Perrow, “A Society of Organisations”, (1991) 20 *Theory and Society*, p. 725.

⁵³ I. Nonaka & H. Takeuchi, *The Knowledge Creating Company: How Japanese Companies Create the Dynamics of Innovation*, (New York: Oxford University Press, 1995).

⁵⁴ G. Teubner, “Coincidentia Oppositorum: Hybrid Networks Beyond Contract and Organisation”. Storrs Lectures at Yale Law School 2003, in: M. Amstutz and *idem* (eds), *Networks: Legal Issues of Multilateral Cooperation*, (Oxford: Hart Publishing, 2009), p. 3.

⁵⁵ D.S. Grewal, *Network Power. The Social Dynamics of Globalization*, (New Haven CT: Yale University Press, 2008).

⁵⁶ Y. Benkler, *The Wealth of Networks: How Social Production Transforms Production and Freedom*, (New Haven CT: Yale University Press, 2006).

V.2. FRAGMENTED KNOWLEDGE SYSTEMS AND THE UNITY OF THE ORGANISATION

In the perspective developed here, the network both as a new form of knowledge production and as a complementary element in economic organisation is given preference. The increasing importance of knowledge does not mean that the network society⁵⁷ is just more “fluid” or that a process of dis-embedding production processes is to be observed.⁵⁸ The concept of “the network should be used in a more specific way so as to draw attention to the emergence of heterarchical modular production and aggregation of sophisticated knowledge. This approach to the concept of the network might also help to mitigate the limits of systems theory in the conceptual integration of the hybrid forms of communication beyond the organisation as a concept⁵⁹ for the construction of linkages in cross-border communication between social systems. To date, the opening of the systems theory to the concept of networks appears to be marginal in a double sense: it is more or less reduced to a form of personal co-ordination which is said to mitigate the hard rationality of functional differentiation.⁶⁰

The new model organisation in the production of automobiles, for example, is *Toyota*, with its fabulous quality control system⁶¹ that had eliminated errors almost completely. The shock of the recent recall of defective cars (brake pedal) demonstrates that even the dynamic learning organisation and its heterarchical flexible network structure which shifts decision-making competences to changing and overlapping hybrid networks is not beyond doubt. Apparently, the new network model has not been adequately adapted to the much more demanding conditions of global production and of technology.

From a more general perspective regarding the new form of “network co-ordination”⁶² in corporations, one could venture the hypothesis that the productivity of the

⁵⁷ M. Castells, *The Rise of the Network Society*, Vol 1 (Oxford-Malden MA: Blackwell Publishing, 2000).

⁵⁸ K. Knorr Cetina, “How Are Global Markets Global? The Architecture of a Flow World”, in: *eadem* & A. Preda (eds), *The Sociology of Financial Markets*, (Cambridge: Cambridge University Press, 2005), p. 38, 54 & 56.

⁵⁹ See N. Luhmann, *Organisation und Entscheidung*, (Opladen: Westdeutscher Verlag, 2000), p. 228, 385 *et seq.*, & 407 *et seq.*

⁶⁰ N. Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1997), p. 806 *et seq.*, & 811; see, also, the contributions in M. Bommers & V. Tacke, *Netzwerke in der funktional differenzierten Gesellschaft*, (Wiesbaden: Verlag für Sozialwissenschaften, forthcoming 2010).

⁶¹ *Frankfurter Allgemeine Zeitung*, 22/02/2010, p. 12.

⁶² R. Rosen, “Risk Management and Corporate Governance: The Case of Enron”, (2003) 35 *Connecticut Law Review*, p. 1157 & 1163.

heterarchical bridging approach is accompanied by an increasing difficulty to preserve the unity of the corporation.⁶³ This produces a new version of an old problem, the missing coupling between the management and the ownership of firms.⁶⁴ Increasingly, the integration of the overlapping networks within firms, especially in firms using highly-complex technological or economic knowledge-management by the top level of the corporation, can no longer draw on hierarchy as a management resource for the integration of a corporate business strategy, because the specialised knowledge of professional “epistemic communities” both within and between corporations is not easily accessible to top managers, not to mention to the owners or to supervisory boards.⁶⁵

The classical bureaucratic organisation of the Nineteenth century had a complex hierarchical structure which consisted of different layers of control and transmission of instructions to the lower levels. Nowadays, the organisational structure is much flatter and more fragmented;⁶⁶ the organisation undergoes a permanent process of re-definition,⁶⁷ and the technological and professional knowledge basis is in a flux.⁶⁸ This development is reinforced by the multiple “legacies” between banks and firms that complicate internal communication. Many banks apparently had difficulties in presenting an up-to-date picture of their firm-wide links with other economic actors, and, even within banks, the actors were sometimes not aware that different units had marked assets at different prices.⁶⁹

V.3. THE UNITY OF THE INVESTMENT BANK AT RISK

This seems to be particularly relevant not only for the integration of decision-making procedures by top managers, but also for the heterarchical co-ordination between “self-

⁶³ The unity of the bureaucratic organisation was established by “discipline”, a “duty of office” as a personal devotion to the “office”; see M. Weber, *Wirtschaft und Gesellschaft*, 5th ed. (Tübingen: Mohr, 1980), p. 78, 128 & 681; G.A. Akerlof & R.E. Kranton, *Identity Economics: How Our Identities Shape Our Work, Wages, and Wellbeing*, (Princeton NJ: Princeton University Press, 2010), p. 58 *et seq.*

⁶⁴ P. Davidson, “Alternative Explanations of the Operation of a Capitalist Economy”, (2009) 52 *Challenge*, p. 5.

⁶⁵ The management of the (public) *HSH Nordbank* admitted in a hearing of a parliamentary commission of the Land Schleswig-Holstein that the minutes of the directors’ meetings had not adequately been integrated into the minutes and not been communicated properly to the departments in some important cases (SPIEGEL.online/22-02-2010): this problem which is played down as a procedural one seems to be symptomatic for the complexity of communication in “high financial” organisations in particular.

⁶⁶ James, note 50 *supra*, p. 273.

⁶⁷ D. Baecker, *Postheroisches Management. Ein Vademecum*, (Berlin: Merve, 1994), p. 46.

⁶⁸ James, note 50 *supra*, p. 275.

⁶⁹ *The Economist*, 13/02/2010 “Report on financial risk”, p. 7.

managing” professional- and project-oriented networks.⁷⁰ The problem can be demonstrated for the case of risk-management strategies, which have to conceive intra-organisational bridging concepts and to couple the internal strategies and cognitive models to the cross-border linkage to the processing of the risks in the environment. With regard to the former problem, insiders have reported a tendency to co-opt the more intelligent risk managers (whose pay used to be lower) to the operative network⁷¹ which formulated the financial business plans, whereas the top management, in many banks, tended to play only the role of a moderator. With regard to the professional epistemic communities that process the highly sophisticated mathematical models for the new “financial products”, a further problematical mechanism can be observed: whereas the specificities of the modelling have been treated as secrets, the general approach to modelling the new forms of financial risk and the securitisation of sub-prime mortgages and insurance strategies, as such, have spread, more by contagion than by individual or organised experimentation and variation, thus leading to a paradoxical effect of uniformity that contributed to the catastrophic expansion of the crisis.⁷² This so-called informational “cascade effect”⁷³ seems to be an additional element of the catastrophe: the dynamic “play of ideas” that was described as being one of the strengths of the liberal order pre-supposes that there is not only a theoretical possibility, but also a practice of observation and variation upon the basis of distributed knowledge. This pattern is corrupted by the contagion effect, which prevents mutual control by observation. This dynamic of contagion corresponds, on the one hand, to the missing control by top management that did not understand the models,⁷⁴ and, on the other, to the internal dynamic of a professional network whose participants reciprocally tend to re-inforce patterns of

⁷⁰ Rosen, note 62 *supra*, p. 1164.

⁷¹ See *The Economist* 13/02/2010, “Special report on financial risk”, 8; also Dewatripont *et al.*, note 4 *supra*, p. 21.

⁷² R. Shiller, *The New Financial Order: Risk in the 21st Century*, (Princeton NJ: Princeton University Press, 2003) 37; *idem*, *The Subprime Solution: How Today’s Global Financial Crisis Happened, and What to Do about it*, (Princeton NJ: Princeton University Press, 2008), p. 41 & 121; L.R. Wray, “The Rise and Fall of Money Manager Capitalism: A Minskian Approach”, (2009) 33 *Cambridge Journal of Economics*, p. 807 & 820; J. Morgan, “The Limits of Central Bank Policy: Economic Crisis and the Challenge of Effective Solutions”, (2009) 33 *Cambridge Journal of Economics*, p. 581 & 588; D. Beunza & D. Stark, “How to Recognize Opportunities: Heterarchical Search in a Trading Room”, in: Knorr Cetina & Preda (eds), note 58 *supra*, p. 84 & 92 *et seq*; for the effect of “contagion”, see Dewatripont *et al.*, note 4 *supra*, p. 95.

⁷³ S. Bikchandani, D. Hirshleifer & I. Welch, “A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascade”, (1992) 100 *The Journal of Political Economy*, p. 992.

⁷⁴ Wray, note 72 *supra*, p. 820; see, for the weaknesses of mathematical models, also, Dewatripont *et al.*, note 4 *supra*, p. 85.

modelling that seemed to work provided that they were sufficiently sophisticated. There is an unavoidable performative element in the design of models, which, through their future orientation, not only have a descriptive function, but also draw upon the effect of a self-fulfilling prophecy.⁷⁵ The informational cascade has clearly been re-inforced by the bonus system – although it would be too superficial to reduce this effect simply to “greed”. The bonuses appeared to be deserved upon the basis of the sophistication of the mathematical modelling and the competition among investment banks for the most brilliant designers of the new financial products.⁷⁶

Similar phenomena of the problematical self-closure of sophisticated epistemic communities have also been observed in the rating agencies, whose role will be discussed in more detail later: the rating agency *Arthur Andersen* was one of the most prestigious before the *Enron* scandal. It used to attract the most brilliant professional analysts. This situation is ambivalent under conditions of being forced to work in a highly-complex world of modelling and analysing; it may also have prepared the ground for a risky homogeneity that closes off every shadow of doubt or irritation by heterodox ideas.⁷⁷ It is not just the economic dependence on the customers that may have blinded the analytical insight of the rating practice, but the over-estimation of the value of the customers upon which the rating agency’s value was, itself, dependent. *Arthur Andersen* was itself a global player with a high standing and a high market value.

V.4. MODELLING RISK AND THE REDUCTION OF THE OPENNESS OF THE EXPERIMENTAL ORDER OF THE ECONOMIC SYSTEM

The new type of risk knowledge and the closure of epistemic communities that produce and operate with complex “high knowledge” tend to exclude the creative unrest of experimentalism⁷⁸ upon which the advanced capitalist society is dependent – the more this

⁷⁵ D. Mackenzie & Y. Millo, “Negotiating a Market, Performing Theory: The Historical Sociology of a Financial Derivatives Exchange”, (2003) 109 *American Journal of Sociology*, p. 107.

⁷⁶ If one takes into account the network based character of the new “epistemic communities”, it comes as no surprise that, apparently, the “stars” of investment banking seem to be quite often less performing after changing to a new bank; see B. Groysberg, *Chasing Stars: The Myth of Talent and the Portability of Performance*, (Princeton NJ: Princeton University Press, 2010).

⁷⁷ C. Grey, “The Real World of Enron’s Auditors”, (2003) 10 *Organisation*, p. 572 & 573; M. Alvesson & M. Robertson, “The Best and the Brightest: The Construction, Significance and Effects of Elite Identities in a Consulting Firm”, (2006) 13 *Organisation*, p. 195.

⁷⁸ M.C. Dorf & C.F. Sabel, “A Constitution of Democratic Experimentalism”, (1998) 98 *Columbia Law Review*, p. 267.

cognitive dimension is “organised by date”⁷⁹ and the design of a “world of virtual investment”,⁸⁰ the more it seems to generate a new type of purified homogeneity that leads to “lock ins” (see, also, Stäheli,⁸¹ for the blind spot of systems theory with reference to the impure effects of the breakdown of meaning) which may revive this creatively-distributed search process which the critics of capitalism under-estimate⁸² and which incentivise the generation of heterodox experimental knowledge.⁸³

The cognitive structure of the new type of “network co-ordination” and its epistemic closure could not be assessed properly with regard to its inherent risk of not being able to anticipate unknown risks (“black swans”⁸⁴) or even to model the long-term performance of the housing market⁸⁵ that the mere diversification of risks and the new instruments for the insurance of risks could not be brought to bear on the design of the new financial instruments. Only some outsiders to the economic profession had the realistic idea of the weaknesses of the risk management system inherent to the new financial markets. Apparently, the replacing of experimentation with complex calculations and the under-estimation of the “impure” proliferating systemic risk,⁸⁶ which could not be integrated into the modelling, contributed to exacerbate the crisis and to give it catastrophic dimensions – not only with regard to the economic losses, but also to the maintenance of trust in the institutions of the liberal order. One might even go so far as to draw a parallel to the simulation of virtual realities in cyberspace, which tends to create an imaginary synthesis between the transactions upon the basis of the closed set of rules of the modelisation of new realities and the virtual actor himself, herself or itself.⁸⁷

⁷⁹ P.D. Bougen & J.J. Young, “Organizing and regulating as Rhizomatic Lines: Bank Fraud and Auditing”, (2000) 7 *Organisation*, p. 403 & 405.

⁸⁰ Appleby, note 3 *supra*, p. 406.

⁸¹ U. Stäheli, *Sinnzusammenbrüche. Eine dekonstruktive Lektüre von Niklas Luhmanns Systemtheorie*, (Weilerswist: Velbrück, 2000).

⁸² Appleby, note 3 *supra*, p. 363.

⁸³ R. Rajan & R. Zingales, *Saving Capitalism from the Capitalists: Unleashing the Power of Financial Markets to Spread Wealth and Create Opportunity*, (New York: Crown Business, 2003), p. 263 & 265.

⁸⁴ N.N. Taleb, *The Black Swan: The Impact of the Highly Improbable*, (New York: Random House, 2007).

⁸⁵ Shiller, note 72 *supra* (2008), p. 31; Wray, note 72 *supra*, p. 588.

⁸⁶ S.L. Schwarcz, “Regulating Complexity in Financial Markets”, (2009) 87 *Washington University Law Review*, p. 211; Dewatripont *et al.*, note 4 *supra*, p. 91.

⁸⁷ R. Potier, “Au risque du virtuel”, (2009) *Topique. Revue Freudienne* No 107, p. 151.

Against this background, it does not lead us very far to reduce the economic system to a dynamic that can only be defined by its reference to an “in-dividual” in the literal sense, which, through his or her search for wealth and private power, is pushed by circular processes towards the self-aggrandising of the economy.⁸⁸ This analysis cannot shed light on the internal self-transformation of the economic system or, in particular, the shift towards more abstract cognitive self-modelling. This is why it may also be dubious to describe this process as being driven by an anonymous “matrix” of a re-inforcement of the *eigenvalue* of the economic system at the expense of other social systems.⁸⁹ Although the much diffused assumption that short-termism has contributed to the exacerbation of the financial market crisis is probably not wrong, it is quite likely that the institutionalised support of the long-term orientation of actors, as such, will not be able to contribute much to the stabilisation of the economic system.⁹⁰ The thesis that institutionalising a priority of long-term interest by strengthening control by means of differentiated attribution of voting rights *etc.*, may have a reverse side in re-inforcing the distance between the owners (the shareholders) and the management. The more fundamental problems seem to be attributed to a lack of a “control project” on the part of postmodern corporations: institutional investors, in particular, do not make much use of their property rights in the firm, a tendency which has obvious detrimental effects on the financial security of their clients.

V.5 THE EXAMPLE OF THE RATING AGENCIES

This development finds its repercussion in the malfunctioning of rating agencies. As has been mentioned above, their role has been permeated by sophisticated modelisation. The ensuing transformation is not so much a phenomenon of corruption, as an inherent consequence of the homogeneity of the cognitive approach to the self-observation of the economic system.⁹¹ Once a certain logic of modelisation has been established, rating agencies can only control the inherent consistency of the concrete version of the modelisation that has been used by the firm that has to be rated. The problems lie in the risks of the homogeneous modelling as such, and not in its concrete application. This is also an argument against placing too much hope in a strengthened liability of rating agencies *vis-à-vis* third parties (buyers of securities, *etc.*).

⁸⁸ S. Weber, *Geld und Zeit: Gedanken zu Kredit und Krise*, (Zürich-Berlin: Diaphanes, 2009), p. 49.

⁸⁹ G. Teubner, “The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors”, (2006) 69 *The Modern Law Review*, p. 327.

⁹⁰ *The Economist* 20-2-2010, p. 62.

⁹¹ G.M. Hodgson, “The Great Clash of 2008 and the Reform of Economics”, (2009) 33 *Cambridge Journal of Economics*, p. 1205 & 1213.

Though it is a tempting idea to make use of a traditional form of private law⁹² in order to block the tendency towards a perverse homogenisation of economic paradigms, it is dubious whether this will strengthen the incentives to produce better knowledge about financial risk. One might even think about paying a subsidy to independent rating agencies,⁹³ because there is a collective interest in raising the level of information and understanding in the field of decision-making on investment under conditions of uncertainty. However, except in cases of obvious errors (the *Enron* case, for example), it would be extremely difficult to establish any standard of due diligence which could be referred to in court decisions. On the reverse side, one has to take into consideration that a mistake in the information given to customers may easily provoke the loss of billions of dollars to banks. Thus, the fundamental problem, which, seemingly, has been solved at the front door, returns at the back door when it comes to the definition of negligence.

This problem has also an internal side, in as much as the financial losses may raise the question of who is to be held responsible within the organisation of a bank: Had the CEOs been correctly informed by the investment bankers? What is “correct information” about the pros and cons of a complex financial strategy? This very issue has come to the fore in the investigation of the troubles of the German (public) *HSH Nordbank*.⁹⁴

VI. THE NEW TREND TOWARD THE CONTROL OF INTERNAL ORGANISATIONAL STRUCTURES IN COMPANY LAW

VI.1. A VIEW FROM WITHIN

The emergence of the concept of “governance” in company law signals a still unclear movement from the epistemological focus on a homogeneous bureaucratic model of organisation towards a more “inward-looking” conception.⁹⁵ While the German model of the co-determination of firms has been an explicit institutionalisation of a corporatist model based upon stable groups of stakeholders, the Anglo-American model has been not only focused upon transparency and a risk analysis of firms with a perspective on “shareholder

⁹² See, generally, P. Korth, “Quasivertragliche Haftung von Ratingagenturen gegenüber Investoren aufgrund fehlerhafter Bewertung von Unternehmensanleihen”, (unpublished Dissertation, Frankfurt, 2009); M. Osterloh & B.S. Frey, “Fixlöhne als Alternative zu Boni und ausgeklügelten Anreizsystemen”, *Neue Zürcher Zeitung*, 13-03-2009, p. 25.

⁹³ Shiller, note 72 *supra* (2008), p. 124; see, also, Dewatripont *et al.*, note 4 *supra*, p. 21.

⁹⁴ *Frankfurter Allgemeine Zeitung*, 16-3-10, p. 14.

⁹⁵ M. Power, *Organized Uncertainty: Designing a World of Risk Management*, (Oxford: Oxford University Press, 2007), p. 19.

value”, but has also increasingly epitomised the intra-organisational processes which should be established by the legal system for the “embedding” of a consistent self-organisation and self-description of the firm. This legal and organisational evolution leads back to the sobering recognition of the fact that “financial auditing has been in a constant process of reform and critique” since the first scandals which exposed its limits.⁹⁶ The evolution towards a “securitisation” of companies, which has, as one of its aims, the transparency of a company, “involves a process of externalization ...in which data traces of relevant phenomena are created, placed within an administrative infrastructure, and formalized in strings of procedure”.⁹⁷ As a consequence, a specific logic of auditing is established, which is worked out in the epistemic community of the accountants, and which operates on the assumption that a company can be “read” as a set of different “scripts” that make the internal processes accountable to external observers.⁹⁸ At the same time, this idea reflects the difficulties for the top management of firms, of banks in particular, both to understand and to control the postmodern company in a consistent way. This does not rule out the possibility of a tightening of control in postmodern organisation – on the contrary. However, both intra- and extra-organisational approaches to control have to be aware of the fundamental change of the organisation in the “society of networks”: the new “control project” has to be formulated on a much more abstract (meta-) level of a paradoxical form of “proceduralisation” that reflects the entanglement of rules and their “application” in decision-making processes.

VI.2. A VIEW FROM OUTSIDE: THE FUTURE OF PUBLIC REGULATION

Against the background of the aforementioned general ideas of the basic rationality of the legal system and of private law in particular, the rationale of a re-introduction of public interest into the interpretation of private law and the public regulation of the financial market can find new contours;⁹⁹ the goal of private law, with public economic law as its second layer, does not primarily lie in the priority of private individual interest *vis-à-vis* the common interest, as it should be interpreted by the state. Private law is, instead, based upon the

⁹⁶ *Ibid.*, p. 43.

⁹⁷ *Ibid.*, p. 163.

⁹⁸ *Ibid.*, p. 208; see, also, M. Strathern, “The Tyranny of Transparency”, (2000) 26 *British Educational Research Journal*, p. 310.

⁹⁹ For a pre-crisis overview of financial market regulation, see C. Bumke, “Kapitalmarktregulierung. Eine Untersuchung über Konzeption und Dogmatik des Regulierungsverwaltungsrechts”, (2008) 41 *Die Verwaltung*, p. 227; for a theoretical critique of conventional approaches to financial market regulation, see Esposito, note 33 *supra*, pp. 272-276.

institutionalisation of the distributed search and experimenting processes of a society which defines itself by the unknown future, and not by the “givens” of tradition. This is why the “social epistemology” of liberal society is so important: the legal system is, to a much broader extent than is normally assumed in systems theory, based upon a whole infrastructure of knowledge, proof rules, probability and presumption rules, all of which are fine-tuned to the experimental logic of the liberal legal system. This infrastructure includes, for example, a limitation of the reference to bureaucratic leeway and discretion when it comes to the estimation and the forecast of the consequences of complex technology or welfare state intervention which – as is often the case – comes into conflict with the knowledge and rule basis of a liberal order: *i.e.*, such a *collective* order is also open to public experiments in legal or social reform; however, what is unacceptable, from the liberal perspective, is the trust that the German Federal Constitutional Court, in particular, places upon public decision-making under conditions of uncertainty,¹⁰⁰ because it neglects the trans-subjective elements of the complex epistemology of a liberal order, and ignores the rationale of its “control projects”.

Having said this, the possibility of a social trajectory in the experimental processes of society leading to a “lock-in” cannot be discarded at all. This allows for state intervention and also for a sort of “social” understanding of private law by judges, once the experimental logic of private law, as such, is threatened by the private actors themselves. This is precisely what can be assumed with regard to the processes that have led to the catastrophic developments on the financial markets: the counter-measure for processes that risk consuming too much diversity is a re-introduction of more variety in order to fuel the search processes with more possibilities. This, however, does not refer to the number of “financial products”; on the contrary, the *construction rules* of these “products” are at stake once a whole domain of options is modelled in a way that is difficult both to access and to observe for outsiders.

This assumption could also be helpful as a general frame for the reform of the regulatory processes, including the relationship between public and private in the preceding co-ordination procedures. First of all, one should bear in mind that a promising approach to tighter regulation and more public control may well be appropriate for the handling of a catastrophe of the type that has occurred in 2008. However, the possibility of the emergence of a new bubble cannot be completely ruled out, nor will a new bubble necessarily have the

¹⁰⁰ I. Augsberg & S. Augsberg, “Prognostische Elemente in der Rechtsprechung des Bundesverfassungsgerichts”, (2007) 98 *Verwaltungsarchiv*, p. 290.

same character as the last one. The complexity of modelling approaches can neither be reduced in a significant way, nor does it allow for a reliable anticipation of future risks. A systemic approach to the systemic risks of the financial markets could somehow draw upon the strengthening of the openness of search processes and the diversity of modelling approaches. This could mean, for example, that non-capital requirements, as such, may be given preference. In contrast, standardisation and public control should be more focused on the formulation of second order models which do not compete with the complexities of financial modelisations, but, instead, focus on the risks of the homogeneity of financial strategies which could be answered with more heterogeneity, or, if this proves too difficult, with the imposition of additional insurance or more information with a perspective on strengthening the control functions of both the financial markets and the owners of a bank in particular. The increasing internal differentiation of complex corporations and the complexity of control processes, should also correspond to a differentiation of the financial products and their different inherent risks: the riskier products should be coupled to less protection of investors, on the one hand, and owners, on the other. This could also be adequate for inter-bank trading, a process that is even more complex, as it does not allow for the reasonable calculation of prices, yet.¹⁰¹ In the same vein, the differentiation and limitation of bankruptcy regimes¹⁰² should be supported from the perspective developed here: without going into detail which cannot be judged from a theoretical point of view, the limitation of bankruptcy to the riskier parts of a bank (investment banking) could turn out to be an idea that is compatible with both more availability of information to the public, enabling owners to control managers,¹⁰³ and the strengthening of the liability system. It has been said - quite convincingly - that, once a crisis is imminent, the moral hazard of speculation that “systemic banks” cannot go bankrupt is a threat to both the political system *and* the taxpayer. This constellation has an additional side-effect in the field of liability towards customers upon the basis of traditional tort law:¹⁰⁴ even if it were possible to formulate legitimate expectations for information on the risk of unconventional investment as a frame of reference for the definition of “negligence”, the liability system - in the traditional way - may be overburdened

¹⁰¹ *The Economist* 13/02/2010, “Special report on financial risk”, p. 5.

¹⁰² G. Franke & J.P. Krahenen, “Ein staatliches Hospital für kranke Banken”, *Frankfurter Allgemeine Zeitung* No 48, 26/02/2010, 12; *The Economist* 23/01/2010, 62; Dewatripont *et al.*, note 4 *supra*, p. 111 *et seq.*

¹⁰³ Shiller, *The Subprime Solution: How Today's Global Financial Crisis Happened, and What to Do about it*, note 72 *supra*, p. 135 *et seq.*; see, also, Dewatripont *et al.*, note 4 *supra*, p. 5.

¹⁰⁴ US SC 15.8.2008 *Stoneridge v. Scientific Atlanta* – only limited “scheme liability”.

by individual claims of buyers of securities, a constellation that can easily contribute to the deepening of the crisis of a systemic bank, and can further be detrimental for other private parties if the capital stock is distributed among the claimants of the customers of investment banks.¹⁰⁵

This risk shows that the seemingly paradoxical collective component of private law is at stake, and demands a strengthening of regulatory strategies that epitomise both the information and the control exercised by the owners of the banks and its management.¹⁰⁶ This is also a reason why the bonus-system needs to be evaluated from a perspective that shows its contours in the light of the trans-subjective role of private law: a bonus paid to investment bankers on the assumption of a future profit made under conditions of extreme uncertainty is not just a matter of private autonomy between contracting parties. A risk that can be attributed to the modelling of complex financial products simply does not deserve the same protection as other rights of customers, owners, or the state, as the unwilling insurer of those risks in a crisis. Whether this issue can be managed by a doctrinal adaptation of the existing rules of private law alone (“frustration of purpose” - “*Wegfall der Geschäftsgrundlage*”), or whether it should be integrated into a broad conception of a differentiation of rights in the case of a crisis, need not be discussed here.

However, the value of the diversity regulation of financial markets should not be completely centralised: the dynamic of the financial markets can only be tackled by a distributed network of regulators, which is based upon the exchange of information and some basic rules, but which, at the same time, allows for the competition of different secondary risk models that allow for different experimental approaches.

Finally, one should also include a more general aspect into the analysis of the tendency towards a fragmentation and hybridisation of knowledge in heterarchical networks with flat hierarchies that witness difficulty in aggregating a sense of unity in an overarching sense of responsibility for both the organisation and society at large; this is a necessary

¹⁰⁵ The criminal investigation procedure against the CEO of the *Deutsche Industriebank AG* (IKB) which could only escape bankruptcy by massive state aid did not end in a formal accusation the risky strategy based on sub-prime mortgage financing could not plausibly as being negligent; in this case many experts also doubt that the CEO had enough technical knowledge to understand the complex transactions, *Frankfurter Allgemeine Zeitung* 17/3/2010, p. 14.

¹⁰⁶ R. Rajan, *Fault Lines*, (Princeton NJ: Princeton University Press, 2010) takes the view that the state (“let them eat credit”) opted for easy credit to poorer people as an alternative to a redistribution policy.

counter-vailing component for the re-integration of network society¹⁰⁷ that is apparently hard to establish. The dynamic of the permanent self-transcendence of the postmodern society makes the subjectivisation of the individual based upon a process of accessing the symbolic function of the “*other*” which is enshrined in the language (as opposed to “*others*” as individuals) increasingly difficult, and seems to allow for a retreat into fictitious virtual universes beyond the constraints of acknowledging and de-ciphering reality as an alternative open to “choice”.¹⁰⁸ From this perspective, there may be some correspondence between the addiction to video games, on the one hand, and the increase in the trend to the modelisation of society in a virtual reign of figures and equations beyond the uncertainties of the symbolic “*other*” of language and its non-calculable risks of sense-making, on the other.¹⁰⁹ At the same time, one can observe an intriguing general tendency in society at large to refer to the abstract modelisation of goals that claim to transcend both the limits and the risks of complexity. How about the “Futures”¹¹⁰ of the educational system?¹¹¹ How about a political system within which the left-wing parties, in particular, do not present alternatives, but promise – again and again – a holistic “change”?

VII. THE OUTLOOK

Financial modelisation seems to have a very specific character that is related to the constellation of complex markets. And yet, the problems that come to the fore in this type of market demonstrate a more general problem of postmodern society: its dependence on the design of domains of options under conditions of uncertainty which require thinking in networks (“*pensée réseau*”), which draws upon a multiplicity of forms and combinatorics¹¹² and can no longer pre-suppose the stability of the central perspective reproduced by classical liberal society and the structuring effects of its “laws”. The role of the person observing the

¹⁰⁷ Shiller, *The New Financial Order: Risk in the 21st Century*, note 72 *supra*, p. 271.

¹⁰⁸ A. Ehrenberg, *La Fatigue d'être soi*, (Paris: Odile Jacob, 1998), p. 18.

¹⁰⁹ P.L. Assoun, “Au risque du toxique”, (2009) *Topique. Revue Freudienne*, No 107, p. 31 & 32.

¹¹⁰ Educational reforms are completely immunised against any form of critique by the pretension that, in the future, everything will be different: a failed “reform” belongs to the past and has to be forgotten; see, also, N. Luhmann, *Schriften zur Pädagogik*, (Frankfurt aM: Suhrkamp Verlag, 2004), p. 241; see, for the inflation of symbols as a crisis phenomenon, also, R. Stichweh, in this volume.

¹¹¹ See, generally, for the ideology of a “reform” as a never-ending “project”, S. Jung, *Die Form der Reform. Eine systemtheoretische Rekonstruktion der Verwaltungsreform als Beitrag zur Theorie der Reform*, (Marburg: Metropolis, 2008).

¹¹² S. Lavaud-Forest, “Perspectives numériques”, (2009) 85 *Communications*, p. 55 & 62; C. Lipsyc, *Construction de la perspective, construction du sens*, *ibid.*, p. 37 & 49.

distributed order based upon common experience and its secondary modelling (by the version of the “society of organisations”) has been shattered. This evolution leads to a new paradigm of multi-faceted cognitive constructions that operate beyond clear criteria and well-defined targets, and the accumulation of solutions generated upon this basis.¹¹³ This new constellation demands a reflexive secondary observation focused on the explicit preservation of the multiple character of the new modelisation processes in order to avoid “lock-in” effects. Evaluation *ex post*, and not a refined approach of steering *ex ante*, will be necessary for the new “control-project” of postmodern society. Postmodern administrative and constitutional law are still not prepared for the challenge of decision-making in complex conditions of uncertainty which differ from those of the experience-based society of individuals: law is based upon the assumption that this constellation can only be tackled by a broader range of discretion of state actors,¹¹⁴ and does not reflect the deep transformation of discretion once it comprises not only a residual capacity of “free” decision-making within a limited range of options, but also the possibility of modelling a complex domain of actions with far-reaching constraints imposed on a high number of actors. The alternative cannot lie in a more powerful court control; however, in accordance with the fundamental laws of the “society of the individuals”, the cognitive self-organisation of society has to be given priority in a new form. The postmodern legal system should opt for a “*renvoi*”¹¹⁵ of the cognitive problems to societal actors, and, at the same time, it should be more attentive to the meta-rules of societal knowledge generation and their limits, and, albeit to a lesser extent, to knowledge itself.

¹¹³ P. Schumacher, “Les mécanismes de l’innovation radicale”, (2009) 85 *Communications*, p. 171 & 177.

¹¹⁴ See *Bundesverfassungsgericht* Reports 49, 89 (138) – nuclear law; 50, 290 (p. 338 & 354 *et seq*); Augsberg & Augsberg, note 100 *supra*.

¹¹⁵ See the example of the legal construction of the limits of the freedom of opinion in a changing media society; K.-H. Ladeur, “Helmut Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie”, (1999) 32 *Kritische Justiz*, p. 281.

CHAPTER 4

DEATH BY COMPLEXITY – THE CRISIS OF LAW IN WORLD SOCIETY

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It is common sense that the law has played a major role in the events leading up to the current financial and economic crisis. Yet, the financial crisis was not simply caused by the failure of specific legal institutions and instruments, but it was preceded by a much deeper crisis of the legal system as a whole. I will try to explain this crisis of law by relying on a central distinction in Luhmannian systems theory: the distinction between cognitive and normative expectations. Upon this basis, I will - following Luhmann - argue that the interaction of the legal, the economic and the political system in the post-globalisation era is marked by a shift from normative to cognitive expectation structures. Beyond Luhmann, I will argue that this shift has entailed a simultaneous over-complexity *and* under-complexity of the legal system: an over-complexity of the cognitive expectations that the legal system has to process, and an under-complexity of its internal normative structures. And, maybe most importantly, I will argue that both the turn away from normative expectation structures and the simultaneous proliferation of cognitive expectations have rendered the distinction between normative and cognitive expectations itself impossible to uphold. The consequence is a breakdown of societal expectation structures, which have, for the most part, been replaced by a vague hope for the continuance of the politico-economic *status quo*.

I. FUNCTIONAL DIFFERENTIATION, COMPLEXITY AND KNOWLEDGE

Luhmann famously called functional differentiation the “original sin” of modern societies, an evolutionary achievement which cannot be undone. He shares this idea with social theorists as diverse as Hegel, Marx, Durkheim and Weber, who all describe – albeit in different terms – a “dis-embedding” of the economic “system of needs” from its societal pre-conditions, and an ensuing fragmentation of conflicting social rationalities.¹ Luhmann, however, was the first

¹ See M. Weber, “Wissenschaft als Beruf”, in: J. Winckelmann (ed), *Gesammelte Aufsätze zur*

to integrate these sociological insights into an overarching epistemological framework. His main achievement was not to have elaborated a general analysis of systemic differentiation, but to have identified and meticulously described the concrete mechanisms that organise and structure communicative processes by providing for the autopoietic linkage of communicative acts to other communicative acts in the form of “codes”, “programmes”, “media”, “expectations”, *etc.* Systems theory, therefore, is basically a theory of both complexity² and knowledge; it is concerned with the problem of how to create “order from noise”³ in social interaction.

However, the concept of complexity is itself complex, and in need of definition.⁴ The traditional starting-point for defining complexity in abstract terms is the distinction between the elements involved and their relationship: the higher the number of elements in a given structure and the more relationships between different elements, the greater the complexity of the overall structure becomes. In social structures based upon communication, however, the relationships between elements must be limited in order to stabilise certain forms of communication over time.⁵ It is this selectivity which accounts for the emergence of social systems in the first place: they establish a difference between the inside and the outside, between the system and its environment, in order to enable a selective linkage of communicative elements against the background of a potentially unlimited inter-dependence of social communication.

The difference between a system and its environment, therefore, is always based upon a “complexity gap”.⁶ At first sight, a system is necessarily *less* complex than its environment. But, in a theory of autopoietic systems, this reduction of complexity is only part of the story. As soon as the difference between the system and its environment is established, the system develops internal differentiations in a recursive manner. The process of systemic

² *Wissenschaftslehre*, (Tübingen: Mohr, 1973): “polytheism of modernity”.

³ H. Wilke, *Systemtheorie entwickelter Gesellschaften*, (Weinheim: Juventa-Verlag, 1989), p. 10.

⁴ This formula expresses the idea that the accumulation of internal complexity in social systems is only possible through an operative closure of the system towards its environment, see H. von Foerster, “On Self-Organizing Systems and their Environments”, in: M.C. Yovits and S. Cameron (eds), *Self-Organizing Systems: Proceedings of an Interdisciplinary Conference 5 and 6 May 1959*, (Oxford: Pergamon Press, 1960), p. 31-50.

⁵ N. Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1998), p. 136.

⁶ N. Luhmann, *Soziale Systeme. Grundriß einer allgemeinen Theorie*, (Frankfurt aM: Suhrkamp Verlag, 1987), p. 383.

⁶ *Ibid.*, p. 249: “Komplexitätsgefälle”.

differentiation is applied to the system itself, and thus leads to reflexive mechanisms of communicative reproduction: legal communication creates ever more sophisticated legal communication, just as economic transactions create ever more complex economic transactions, *etc.* Through these reflexive processes, social systems replace the entropic “unstructured complexity” of their environment with the “structured complexity” created through their own reproductive mechanisms.⁷ This “complexity gap”, accordingly, is not a gap between *more* and *less* complexity, but is, instead, a gap between *different forms* of complexity.⁸

This insight implies that every social system develops its own mechanisms for both reducing complexity by limiting informational input (“noise”), and for recursively enhancing the complexity of its internal structures (“order”). The system-specific strategies to transform un-structured complexity into structured complexity can be understood as different ways of organising social knowledge: knowledge, according to Luhmann, is nothing but the generalisation of the conditions under which communication is processed in a particular social system.⁹

At this point, however, Luhmann departs from the common understanding of the concept of knowledge by introducing a differentiation between cognitive and normative expectations. He defines as *cognitive* all expectations that are modified in cases of disappointment and thus lead to learning processes, while he defines as *normative* those expectations which are counter-factually upheld even in cases of disappointment. Only the former does he characterise as knowledge, while the latter are termed as law.

This basic distinction between the two different modes of expectations is itself closely related to the idea of functional differentiation. While Luhmann acknowledges that rudimentary forms of knowledge and law are produced in every social system, he argues that the societal division of labour leads to the emergence of specialised structures for the processing of cognitive and normative expectations in both the scientific system and the legal system, respectively. It seems quite plausible that this epistemic differentiation of law and science around the year 1800 was a necessary pre-condition for the “great transformation”¹⁰

⁷ *Ibid.*, p. 383 *et seq.*

⁸ *Ibid.*, p. 446.

⁹ *Ibid.*, p. 447.

¹⁰ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, (1944), (Boston

which almost simultaneously de-coupled economic and political rationality. In all events, the differentiation of law and science has enabled both the economic and the political system to pre-suppose certain cognitive and normative structures that are crucial to their functioning, but which cannot be produced within the systems themselves.

II. LAW, ECONOMY, POLITICS (AND SCIENCE) IN THE WORLD SOCIETY

Thus, the price to be paid for functional differentiation is an ever increasing inter-dependence of functional systems: the broader the “complexity gap” between a system and its environment, the greater the system’s need to process and to select environmental information. It is this paradox which accounts for the need for structural couplings between systems. As the system-specific modes of communication become more and more sophisticated, they develop their own internal differentiations and media, and are, at the same time, less and less able to react to the events that occur within their environment. Structural couplings, which “at the same time link and separate functional systems”,¹¹ enable a functional system to “take certain structures in its environment for granted and structurally rely on them”,¹² and thus to re-construct the knowledge and norms generated in other systems.

With regard to the generation and processing of normative expectations, which is the focus of this chapter, late modern societies are, therefore, characterised by a close interaction of three functional systems: the economic, the legal, and the political system. In order to understand this interaction, one must first realise that, specifically, the economic system not only builds only upon cognitive expectations, but is also, to a large degree, *dependent* upon normative expectation structures.¹³ The effectiveness of property rights, the bindingness of contracts, and the basic rules of market competition are all pre-supposed to be counterfactually valid even in the simplest economic transactions. However, the economy itself can neither produce nor guarantee these expectations; they can neither be formulated within the binary code of “payment/non-payment”, nor can they be communicated in the medium of the economic system, *i.e.*, in the terms of monetary exchange.

MA: Beacon Press, 1957).

¹¹ N. Luhmann, *Das Recht der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1993), p. 441.

¹² *Ibid.*

¹³ D.C. North, “Institutions”, (1991) 5 *Journal of Economic Perspectives*, pp. 97-112; M. Granovetter, “Economic Action and Social Structure: The Problem of Embeddedness”, (1985) 91 *American Journal of Sociology*.

At this point, however, the economic system is structurally-coupled to the legal system. With regard to the economy, the legal system fulfils the function of “stabilising normative expectations”.¹⁴ Its recursive self-reproduction in the medium of validity is nothing but a very sophisticated mechanism for determining which social expectations are to be counter-factually upheld, *i.e.*, to be regarded as normative – and which are not. Ultimately, this is decided in court, for which reason the legal system is marked by an internal differentiation between the centre (the courts), and the periphery (the legislation, doctrine, *etc.*). Against this background, the economic system can “delegate” the processing of normative expectations to the legal system, and, at the same time, specialise its own internal structures for the processing of cognitive expectations.

The picture becomes more complex, however, when the role of the political system is taken into account. As the legal system recursively processes normative expectations, it necessarily raises issues of justification and legitimacy. The fundamental tautology of the legal system that the “law is the law because it is the law”¹⁵ can only partially be obscured by the ever more sophisticated structures of juridical argumentation. Thus, the legal system, for its part, relies upon its structural couplings to the political system: through the concepts of constitution and legislation, it can externalise the question of legitimacy to the political process by pre-supposing (and, if necessary, simulating) the validity of the collective decisions made under certain procedural pre-conditions.¹⁶

Thus, we can see that late modern society organises the generation of normative expectations in a specific constellation involving three different functional systems, each implying different organisational structures (the market, authority, and democracy).

How this triadic constellation works can be illustrated by looking at the example of competition law. The economic “rules of the game” must necessarily be construed from a vantage point outside the economic system, as the logics of the market process inevitably tend to destroy their own pre-conditions through the formation of monopolies, the abuse of economic power, *etc.*¹⁷

¹⁴ N. Luhmann, *Das Recht der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1993), p. 131.

¹⁵ *Ibid.*, p. 168.

¹⁶ N. Luhmann, “Verfassung als evolutionäre Errungenschaft”, (1990) 9 *Rechtshistorisches Journal*, p. 176.

¹⁷ F. Böhm, *Wettbewerb und Monopolkampf. Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden Wirtschaftsordnung*, (Berlin: Carl Heymanns Verlag,

These rules are therefore given the form of legal norms, and they are developed and carved out within legal discourse. However, even as legal rules, their content is, to a considerable degree, contingent upon the different models of competition and competition law that can be imagined¹⁸ – which becomes clear from even the briefest look at the divergences between EU and US competition policies.¹⁹ Thus, the rules of the economic game are ultimately agreed upon (or not, as the case may be) in political discourse, both to the extent *and* in the forms permitted by the interplay of constitutional law and legislation.

In legal doctrine, this interaction of economy, law and politics has been discussed under the umbrella term of “economic constitutionalism”.²⁰ The concept refers to the general idea that “conflicts between the economy and politics are solved according to the principle of functional differentiation and formulated as questions of law”.²¹ Clearly, this broad definition leaves the concrete form of the economic constitution open. Accordingly, different and, sometimes, contradictory models of economic constitutionalism are discussed, ranging from ordo-liberal conceptions to more interventionist ideas. Provided that both the legal and the political system are, to a considerable degree, territorially segmented, this leads to the co-existence of numerous “varieties of capitalism”,²² specifically marked by notable divergences between the Anglo-Saxon “liberal market economies” and the Rhenish “co-ordinated market economies”. Notwithstanding their differences, all these models converge with regard to their fundamental *gestalt*, which assigns the role of a mediating instance between the economy and politics to the legal system, and assumes that normative expectations are generated through the sophisticated interaction of all three functional systems.

III. NORMATIVE EXPECTATIONS IN WORLD SOCIETY

When we analyse the financial crisis and the role that law has played in this crisis, it is clear that the model of systemic interaction referred to by the notion of economic constitutionalism

1933).

¹⁸ G. Wiedemann (ed), *Handbuch des Kartellrechts*, (Munich: C.H. Beck, 1999).

¹⁹ See J. Basedow, *Weltkartellrecht*, (Tübingen: Mohr Siebeck, 1998).

²⁰ H.F. Zacher, “Aufgaben einer Theorie der Wirtschaftsverfassung”, in: H. Coing, H. Kronstein & E.-J. Mestmäcker (eds), *Wirtschaftsordnung und Rechtsordnung. Festschrift zum 70. Geburtstag von Franz Böhm*, (Karlsruhe: C.F. Müller, 1965); E.-J. Mestmäcker, “Macht – Recht – Wirtschaftsverfassung”, (1973) 173 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* pp. 97-111; P. Behrens, “Weltwirtschaftsverfassung”, (2000) 19 *Jahrbuch für Neue Politische Ökonomie*, pp. 5-27.

²¹ Behrens, *ibid.*, p. 8.

²² P.A. Hall & D. Soskice, “An Introduction to Varieties of Capitalism”, in: *idem*, *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage*, (Oxford: Oxford University Press, 2001).

has failed completely. The reasons for this failure are not clear at first sight, but they can be re-constructed starting from an indication that Luhmann gave in his famous article about “world society”.²³ In this article, Luhmann speculates that the emergence of world society, *i.e.*, “globalisation”, will gradually lead to a general replacement of normative expectations by cognitive expectations, that the reliance on law and politics, which once enjoyed a certain “evolutionary and functional primacy”, will be replaced by a new leadership of science and technology.²⁴

This prognosis is rather counter-intuitive as, even in globalised exchange processes, economic transactions seem to rely no less on normative pre-conditions, such as the guarantee of property rights and contract enforcement, than they did in the “golden age” of the nation state.²⁵ Nevertheless, two remarkable developments can be observed with regard to the formation of such expectations in a globalised economy. For one, normative expectations are less and less guaranteed by a functionally-differentiated legal system, but are, instead, generated in seemingly pre-modern social constellations such as ethnic networks,²⁶ professional ethics²⁷ and reputation mechanisms.²⁸ Second, where this return to pre-modern normative structures is not an option, as in large parts of the financial market, or where it fails,²⁹ normative expectations are not replaced by cognitive expectation structures, but, instead, the distinction between normative and cognitive expectations is *itself* called into question.

²³ N. Luhmann, “Die Weltgesellschaft”, (1971) 57 *Archiv für Rechts- und Sozialphilosophie*, p. 1.

²⁴ *Ibid.*, p. 10 *et seq.*

²⁵ G.-P. Calliess *et al.*, “Transformations of Commercial Law: New Forms of Legal Certainty for Globalized Exchange Processes?”, in: A. Hurrelmann, S. Leibfried, K. Martens & P. Mayer (eds), *Transforming the Golden Age Nation State*, (Basingstoke: Palgrave Macmillan, 2007); T. Dietz & H. Nieswandt, “Cross-Border Cooperation. The meaning of Cognitive and Normative Expectations for the Emergence of Global Research and Development Cooperation”, TransState Working Paper No: 56/2007, available at: <http://www.sfb597.uni-bremen.de/pages/pubApBeschreibung.php?SPRACHE=de&ID=59>, (last accessed 15/01/2008).

²⁶ L. Bernstein, “Opting Out of the Legal System: Extralegal Contractual Relation in the Diamond Industry”, (1992) 21 *Journal of Legal Studies*, pp. 115-157.

²⁷ D. Sciulli, *Theory of Societal Constitutionalism. Foundations of a Non-Marxist Critical Theory*, (Cambridge: Cambridge University Press, 1992); M. Herberg, *Globalisierung und private Selbstregulierung*, (Frankfurt aM: Campus, 2007).

²⁸ Y. Ben-Porath, “The F-Connection: Families, Friends, and Firms and the Organization of Exchange”, (1980) 6 *Population and Development Review*, pp. 1-30.

²⁹ B.D. Richman, “Ethnic Networks, Extralegal Certainty, and Globalization: Peering into the Diamond Industry”, in: V. Gessner (ed), *Contractual Certainty in International Trade*, (Oxford-Portland OR: Hart Publishing, 2008).

In *Soziale Systeme*,³⁰ Luhmann reflected that the very distinction between cognitive and normative expectations already implied the possibility of its abolition, that there was a “peculiar grey area” in which risks are treated as accidental and happenstance – and neither led to normative sanctions, nor to cognitive learning processes. At best, they are rationalised through insurance mechanisms. Most phenomena of the current crisis seem to fall under this intermediate category, which might be termed as “complex expectations”.³¹ Even the term “crisis” seems rather inadequate given that the total breakdown of expectation structures within the economic system has not (yet) led to a cognitive turning-point where these structures would have been modified – and it has not led to the affirmation of normative expectations by way of sanctions, either.

This can be illustrated with a view to one of the central normative pillars of modern market economies: the concept of liability. Within the economic system, the concept of liability refers to the normative expectation that contractual promises, and, more generally, the assumption of risks, will, under certain pre-conditions, be followed by a payment of the promisor or the risk-bearer, respectively. This expectation is clearly of a normative nature, as it is upheld even in cases where the promisor changes his or her mind or has no money. If necessary, it is met with sanctions, which potentially include bankruptcy. Thus, the economic system is coupled to the legal system and relies on the latter’s decision-making structures as well as on the conditioned use of force, which, in turn, is made possible by the coupling of the legal to the political system.³²

The collapse of major banks from 2007 onwards has shown that the growing and increasingly unchecked complexity of the economic system had, in the preceding decades, gradually, but severely, undermined this basic conception of liability. Even before the collapse, it was clear to market actors that certain players in the banking sector had become “too big to fail”. It was also clear that liability would not be enforced on these players, and that the state would eventually have to step in – which, albeit selectively (see the case of *Lehman Brothers*), it did. Thus, the status of the concept of liability as a normative expectation was fundamentally challenged, as it was not affirmed by sanctions but, to the

³⁰ N. Luhmann, *Soziale Systeme. Grundriß einer allgemeinen Theorie*, (Frankfurt aM: Suhrkamp Verlag, 1987), p. 442.

³¹ A further elaboration of this third category of social expectations might be an interesting enhancement to general systems theory. I am grateful to Dirk Baecker for this suggestion.

³² N. Luhmann, *Das Recht der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1988), p. 466.

contrary, taken as political motive for “rescue packages”. At the same time, state intervention prevented cognitive learning processes within the economic system – which would - admittedly - have implied disastrous side-effects.

But, for the legal system, and, more generally, the social formation of normative expectations, it was precisely the “rescuing” of the economic *status quo* through political intervention that had disastrous effects. The complexity gap between the legal system and its societal environment was almost completely levelled, as legislative action was restricted to mere reaction and “crisis management”. At the same time, the economic and the political systems, in their interaction which now, for the most part, by-passed the legal system, entered into an unholy alliance which synchronised the cyclical nature of the economic process with short-term political interventions. Clearly, this development has a long history that has been masterfully described in Foucault’s lucid analysis of neo-liberalism.³³ It is not my intention, however, to give an account of this history, but, instead, to identify some specific instances which paradigmatically represent the blending of cognitive and normative expectations and the ensuing dissolution of the *eigen*-complexity of the legal system, which I have just sketched in abstract terms.

IV. STRUCTURAL AND OPERATIVE COUPLINGS

The concept of liability provides an excellent starting-point for this analysis, as it not only exemplifies the breakdown of the distinction between cognitive and normative expectations, but also makes visible the regulatory arrangements at the inter-linkages of the economic, legal and political systems, which made this breakdown possible. To this end, we can distinguish between the structural couplings and the operational couplings of the legal system to its envioning systems. At both levels, the legal system failed to uphold a sufficient degree of internal complexity to make the formation of stable normative expectations possible, and has, instead, surrendered to the exigencies of the ever more complex cognitive expectation structures of the economic system. But, as both the economic and the legal system have failed – probably, necessarily so – to build up the appropriate reflexive mechanisms for processing these cognitive expectations,³⁴ the distinction between cognitive and normative expectations has, itself, collapsed.

³³ M. Foucault, *Naissance de la biopolitique: cours au Collège de France (1978-1979)*, (Paris: Gallimard & Seuil, 2004).

³⁴ This points to the difficult question of whether functional systems beyond the law might auto-

IV.1. STRUCTURAL COUPLINGS I: REGULATORY LEGISLATION

The central regulatory complex which has re-shaped both the economic and legal conception of liability in recent decades has, arguably, been the Basel process. In order to be clear, it must be noted that this is not to deny that such recent developments, specifically on the financial market, are but the continuation of a broader historical trend which has gradually eroded the normative foundations of the economic system. This is because, at its core, the concept of liability is a concept of representation. It ideally represents an obligation entered into by a certain person, be it voluntarily or not: an obligation to perform a specific action, to pay a certain amount of money, *etc.* However, the history of economic relations has been a history of de-presentation.³⁵ This is evidenced most notably by the rise of the corporation as an entity specifically vested with “limited liability” alone – and, even more visibly - by the changing nature of the monetary medium. Once thought of as a representation of tangible property, coupled to the gold standard, money has long become “fiat money”, *i.e.*, money that is created *ex nihilo* and represents nothing but itself. With the breakdown of the Bretton Woods system in 1973 and the de-coupling of the international monetary system from the gold standard, there is, in the end, no money other than “fiat money” – world-wide. As a consequence, money emitted by banks – in whatever form – does not need to be backed by a tangible equivalent. The concept of liability has, to a certain extent, become virtual, which is precisely why it must be upheld as a normative expectation.

In this post-representative constellation, the concept of liability has also become fundamentally paradoxical. Its content is not determined through external standards, but through self-reference: as liability is created *ex nihilo*, it can also be created *ad infinitum*, its market value is ultimately controlled by the liable entity itself. This is why states can de-value their currencies, on the one hand, and why corporations, on the other, can buy their own shares. The liability paradox, however, is resolved by introducing a distinction relating to the creation of capital: the distinction between equity and debt (“*Eigenkapital und Fremdkapital*”). Equity denotes the value of an entity’s assets after all its obligations have been paid, while debt refers to the obligations themselves. The stability of the concept of

constitutionalise in the sense that they develop internal higher-level structures which provide for a system-specific reflection of their function towards society as a whole. On this idea, see Gunther Teubner’s contribution to this volume, on the one hand, and Moritz Renner, *Zwingendes transnationales Recht*, (Baden-Baden: Nomos, forthcoming 2010), Chapter III, on the other.

³⁵ M. Foucault, *Les mots et les choses*, (Paris: Gallimard, 1966).

liability is, in modern market economies, made dependent upon the relation between these two elements, the “debt/equity ratio”.

The genius of the debt/equity concept lies in the fact that it allows a far-reaching transformation of normative expectations into cognitive expectations. Thus, the concept of liability is largely replaced with the concept of risk. The scope of normative expectations, in contrast, is confined to stabilising the debt/equity ratio itself. This stabilisation is the central issue in the contemporary regulation of the financial sector. Rules such as the Basel Accord lay down minimum requirements with regard to the debt/equity ratio (“regulatory capital provisions”). In 1996, however, with an amendment to the Basel I Accord,³⁶ this system was fundamentally changed. The 1996 Amendment allowed internationally active banks to determine regulatory capital requirements upon the basis of their own risk models.³⁷ Thus, even the last residue of normative expectation structures on the financial markets was “cognitivised”, and liability, for the most part, left to economic calculus in the end.

That the risk assessment models of the banks were deficient is clear to everyone by now: the cognitive expectation structures that have gradually taken the place of the normative foundations of the economic system have proven to be, for the most part, dysfunctional. They were replaced with the vague hope that the state as the lender of last resort would have to take responsibility for the continued functionality of an economic system which has shown itself incapable of learning. As a consequence, the cognitive expectation structures within the economic system have themselves collapsed.

It becomes clear at this point that the very cognitive capacities of the economic system are dependent upon a normative complement. This is because it is only by a clearly-marked distinction between cognitive and normative expectations that learning processes become possible in the first place. As soon as all expectations become cognitive, on the other hand, the distinction itself necessarily collapses and learning processes are ultimately made impossible: without normative criteria (in the Luhmanian sense) for their selection, the

³⁶ Contrary to conventional wisdom it is not the advent of Basel II that marks the decisive turning point, *see* M. Hellwig, “Systemic Risk in the Financial Sector: An Analysis of the Subprime-Mortgage Financial Crisis”, (2009) 157 *De Economist*, pp. 129-207.

³⁷ Even more problematical, however, was the fact that market and systemic risks were hardly reflected in the regulatory capital requirements of the Basel Accord. This is a central issue of the post-Basel II reform debate.

accumulation of information becomes pointless. Or, formulated as a paradox, it is only the inability to learn that enables learning processes.

With regard to the legal system, this means that even the law of the knowledge society³⁸ must, at its core, build upon normative expectations. Clearly, law always has to cope with, and to adapt to, the cognitive expectation structures in society; it has never been a kingdom of pure normativity. A prime example of such adaptation processes can be seen in the development of the “strict liability” concepts caused by technological innovations between the late Nineteenth and the mid-Twentieth centuries. The establishment of the legal concept of strict liability was based upon the consideration that liability for the causation of damages should, in an age of automated production, not be made contingent upon (human) fault or failure. But, in order to impose strict liability for certain types of activities, the courts necessarily had, more or less scientifically, to evaluate social risks rather than indulge in the normative questions of intent and negligence. In doing so, they specifically had to pay due regard to the technical feasibility and to the costs of preventative measures. Thus, cognitive expectations with regard to the technological-scientific state of the art, industry-specific standards and economic calculus soon found their way into legal reasoning.³⁹

With the advent of global mass-communication as well as high-risk technologies, the importance of making the law responsive to social and technological change grew even further. But, at the same time, the failure of contemporary regulatory institutions, such as in the Basel process, has shown that the law’s responsiveness to cognitive complexity has its limits. It is not by chance that earlier legal innovations, such as the concept of strict liability, had served to complement the “cognitivisation” of legal expectation structures with a simultaneous re-inforcement of normative expectations: while liability standards were adapted to technological feasibility, liability itself became “stricter”, *i.e.*, it could no longer be avoided through a mere showing of due diligence. The Basel process, in contrast, has led to a situation in which the normative concept of liability has been wholly replaced by the notion of calculable risks – risks, however, which were soon to become totally incalculable. Thus, the legal process, by its recourse to the mechanisms of “regulated self-regulation” and the

³⁸ See Karl-Heinz Ladeur’s contribution to this volume

³⁹ See, generally, M. Vec, *Recht und Normierung in der Industriellen Revolution Neue Strukturen der Normsetzung in Völkerrecht, staatlicher Gesetzgebung und gesellschaftlicher Selbstnormierung*, (Frankfurt aM: Klostermann, 2006).

unquestioned adoption of economic criteria for risk-evaluation, has ultimately undermined its own basic capability: that of creating and stabilising normative expectations.

IV.2. STRUCTURAL COUPLINGS II: CONTRACT

A very similar transformation of the concept of liability, and, more generally speaking, the structure of social expectations, can be observed in the changing nature of contractual exchange. This will be exemplified with a view to the now infamous mechanism of credit derivatives.

The concept of contract stands for the central structural coupling of the economic and the legal system, and even more:

“[I]t is one of the most important evolutionary achievements in social history.”⁴⁰

Its central function is to provide for an abstraction: to abstract the bindingness of contractual promises from all other circumstances and thus combine “a specific difference with an indifference towards anything else”.⁴¹ Thus, contract, as a legal form, enables an unhindered autopoiesis of the legal system, which, by way of adjudication, arguing both with the precedents *and* with the building-up of an appropriate doctrine, takes the contractual promise as the starting-point for the formulation of both abstract *and* general rules of law. The economic system, on the other hand, can take the bindingness of contracts for granted, and adapt its mechanisms to the cognitive handling of this situation, for example, by specifying the conditions of an “efficient breach”.⁴² This differentiation on both sides of the coupling, in the legal system as well as in the economic system, however, is only possible because the form of contract, as such, is stable. Its bindingness is expected counter-factually, *i.e.*, normatively.

The basic mode of operation of the contractual mechanism has hardly changed during the last two centuries. Freedom of contract and the principle of *pacta sunt servanda* still form the foundations of capitalist economies.⁴³ However, in order to identify the changes that the concept has undergone in recent decades and years, we must take a closer look. Then, we can

⁴⁰ N. Luhmann, note 10 *supra*, p. 459.

⁴¹ *Ibid.*

⁴² See C. Goetz & S. Robert, “Liquidated Damages, Penalties, and the Just Compensation Principle: A Theory of Efficient Breach”, (1977) 77 *Columbia Law Review*, pp. 554-594.

⁴³ L. Raiser, “Vertragsfunktion und Vertragsfreiheit”, in: von Caemmerer (ed), *Festschrift Deutscher Juristentag*, (Karlsruhe: Müller, 1960), pp. 101-131.

see that the status of the contractual promise as a normative expectation within economic discourse has been gradually, but steadily, diminished through mechanisms which allow for a transformation of the contractual bond into a matter of risk management. Derivatives such as “credit default swaps” (CDS) played a considerable role in the *Lehman Brothers* bankruptcy and are a prime example for this mechanism.

CDS basically work as insurance for contractual claims. CDS, possibly bundled into the so-called CDO (collateralised debt obligations), are themselves contracts which foresee that the CDS seller will step in for the default risk of an underlying second contract. The buyer of the CDS can thus hand on the risks associated, for example, with a loan agreement: in the event that the debtor of the loan agreement defaults, the CDS buyer will be compensated by the CDS seller. For this “risk insurance”, the CDS buyer pays a certain periodic “premium” to the CDS seller. Thus, the effect of the CDS is that it transforms the contractual obligation into a calculable risk which can be cognitively handled by the apposite computerised algorithms. The legal system is, for the most part, excluded from this loop. Instead, the CDS, as the abstracted risk of contractual default, is itself tradeable and thus re-integrated into the cycle of economic transactions. In the meantime, the structural coupling between the economic and the legal system is elegantly by-passed. The legal system still shows itself, for the most part, unable to specify the normative implications of the CDS as a legal instrument: even the basic legal status of the instrument is still unclear.⁴⁴

But, as a consequence, the economic system’s own specialisation for cognitive expectations is increasingly difficult to uphold. The spread of the CDS inevitably leads to a spread of risks, which, at a certain point, inevitably becomes too complex to process. At the same time, the default of a CDS seller such as *Lehman Brothers*, which might itself have passed on its risks (“netting”), can have catastrophic domino effects. In the end, there remains only hope: the vague expectation, neither normative nor cognitive, that the major CDS sellers are themselves stable enough – or eventually stabilised by state aid – to handle the risks that they have taken. Again, we can observe that the proliferation of cognitive expectations in the economic system has not been sufficiently balanced by stable normative expectation structures – and that, as a consequence, the distinction between cognitive and normative expectations has itself collapsed.

⁴⁴ See, for example, S. Brandt, “Kreditderivate: Zentrale Aspekte innovativer Kapitalmarktprodukte”, [2002] *Bank- und Kapitalmarktrecht*, t p. 243.

IV.3. OPERATIONAL COUPLINGS: CORPORATIONS

Similar developments can be observed on the field of corporate law. This field is of particular interest to an inter-disciplinary study of both the financial crisis and its causes, because the corporation both as a semantic construction and as a formal organisation allows for an interaction of different functional systems at a level below (or beyond) the level of structural couplings.⁴⁵ As a formal organisation, the corporation structures processes of decision-making that can combine different types of rationality and react to economic as well as to political or legal considerations. As a semantic construction, it constitutes an actor with specific qualities and capabilities in different functional systems: a buyer or producer on the market, a legal person with standing in court, or an important player in politics.

The concept of the corporation is, to a large extent, shaped by normative expectations. Corporate bodies have rights and responsibilities in their external relations to other bodies or persons, and their internal structures and procedures are also based upon norms. Although Luhmann mainly deals with the corporation as an actor on the market, *i.e.*, in the “internal environment” of the economic system,⁴⁶ its form is essentially determined by the *legal* system. Not only is the very idea of legal personality a creation of the legal system, but the relations of the corporation to its employees, its suppliers, its creditors, *etc.*, are also all legally preformed by legislation, by contracts and in corporate charters.

But preceding the financial crisis, there were far-reaching changes in the institutional foundations of the corporation. Recent decades have been ringing with discussions about “corporate governance” and “corporate social responsibility” (CRS). Although both debates are mainly unconnected, they do reveal a number of important parallels. While the debate on corporate governance mainly deals with the internal structures of the corporation, specifically with regard to making control mechanisms more efficient, and is now mainly concerned with the banking sector,⁴⁷ the discussion on corporate social responsibility deals with the external responsibilities of the corporation, with regard to human rights, social and environmental standards (in the colloquial meaning of the terms), *etc.* But both discussions relate to the formation of normative expectations concerning the corporation.

⁴⁵ V. Tacke, “Systemrationalisierung an ihren Grenzen – Organisationsgrenzen und Funktionen von Grenzstellen in Wirtschaftsorganisationen”, (1997) 7 *Managementforschung*, pp. 1-44.

⁴⁶ N. Luhmann, *Die Wirtschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1988), Chapter 3.

⁴⁷ P. Mülbart, “Corporate Governance of Banks”, (2009) 10 *European Business Organization Law Review*, pp. 357-408.

And both discussions have moved in a very similar direction. Against the background of the accelerating economic globalisation, domestic law has been perceived as less and less able to regulate corporate behaviour. Especially in the liberalised internal market of the European Union, but similarly within the federal system of the United States, corporations can move freely and thus choose the law applicable to their internal and external relations. Thereby, states become entangled in a regulatory competition for the best corporate law – whereas the quality standards in this competition remain, to a large extent, unclear. States have, once again, reacted to this situation by resorting to new means of regulation, mainly building upon self-regulatory arrangements with limited state supervision. This has been the case in the elaboration of the non-binding German Corporate Governance Code, and similar developments can be observed with regard to the question of corporate social responsibility.

These include voluntary corporate codes of conduct, industry-specific alliances or guidelines, as well as auditing agencies; in short, “soft law” mechanisms increasingly take the place of state regulation through “hard law”. Frequently, however, the term “soft law” is no more than a euphemism. The standards set in both corporate governance and corporate social responsibility codes are formulated in a rather vague manner and without defining concrete and actionable obligations.

The often-advocated idea that such obligations might be enforced by the market⁴⁸ seems rather delusory, as functionally-differentiated market processes *may* generate knowledge⁴⁹ - but they do *not* generate norms. The idea of internalising the generation of normative expectations into the cognitive expectation structures of the economic system is bound to fail as the market process ultimately aims at enhancing normative uncertainty, not at reducing it. An efficient allocation of resources as the answer to the problem of scarcity, which is the unifying “contingency formula” of the economic system,⁵⁰ is only possible as a never-ending process of re-allocation. Stopping this allocative cycle would mean that the economic system would dissolve.

This is why the division of labour between the economic system and the legal/political system with regard to the generation of cognitive and normative expectations

⁴⁸ E. Posner, “Symbols, Signals, and Social Norms in Politics and the Law”, (1998) 27 *Journal of Legal Studies*, pp. 765-798.

⁴⁹ F.A. von Hayek, *Knowledge, Evolution and Society*, (London: Adam Smith Inst., 1983).

⁵⁰ N. Luhmann, note 46 *supra*.

makes sense: the functional pre-conditions of economic exchange in the form of normative expectations must be generated outside the system of economic exchange in order to allow for the eternal process of “creative destruction”⁵¹ to continue. However, the self-destruction of normative structures in the face of globalisation leads to a peculiar confusion of economy, law and politics, which might prove disastrous for all these systems. On the one hand, corporations, as market participants, are increasingly expected to act as “moral entrepreneurs”.⁵² On the other, the legal and the political systems are increasingly transforming themselves into a mere cognitive super-structure of the economic system, enhancing their “conceptual readiness”⁵³ in order to adapt to economic exchange processes and, at the same time, truncating their *eigen*-structures for generating complex normative expectations. The result is an emergence of politico-economic institutional conglomerates, such as the state-subsidised big banks, which are neither adaptive, *i.e.*, able to learn, nor stable, *i.e.*, able to produce norms and sanction them.

V. ECONOMIC CONSTITUTIONALISM AND DEMOCRACY

But not all hope is lost. In particular, the growing debate about an emerging transnational law shows that legal discourse is not necessarily doomed to meaninglessness in the post-globalisation era.⁵⁴ Instead, normative expectations might still be formed and reproduced within a specifically legal rationality which provides for both a continued differentiation and a controlled inter-dependence of the economic and the political system. This pre-supposes, however, that legal discourse beyond nation-state institutions builds up a sufficient degree of *eigen*-complexity and, at the same time, develops structural couplings to both the economic system and the political system.⁵⁵ Only in this way can the formation of normative expectations be immunised against the growing complexity of cognitive structures in economic discourse.

In this context, the vast literature on private governance regimes demonstrates that law increasingly evolves outside state institutions wherever the pre-conditions for an

⁵¹ J.A. Schumpeter, *Capitalism, Socialism, and Democracy*, (New York: Harper, 1942).

⁵² Y. Dezalay & B.G. Garth, “Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes”, (1995) 29 *Law & Society Review*, pp. 27-64.

⁵³ G. Teubner, “Reflexives Recht: Entwicklungsmodelle des Rechts in vergleichender Perspektive”, (1982) 68 *Archiv für Rechts- und Sozialphilosophie*, p. 13.

⁵⁴ G. Teubner (ed), *Global Law without a State*, (Aldershot: Ashgate-Dartmouth Publishing, 1997).

⁵⁵ N. Luhmann, note 11 *supra*, p. 451.

autopoietic linkage of communication are fulfilled, specifically where conflicts are decided by third parties and where there is an “institutionalised memory” which provides for the stabilisation of normative expectations.⁵⁶ However, the difficulty that such governance arrangements have to deal with is a certain one-sidedness of their basic structures. Private governance arrangements rely, to large degree, upon contractual mechanisms of norm-generation,⁵⁷ and thus on a close structural coupling to the economic system. As a consequence, the internal structures of transnational governance regimes mainly aim at a reconstruction of economic exchange relations and the pertinent interests of the exchange parties.

This can be observed, for example, in the practice of international commercial arbitration, where the law applicable to a contract can be freely chosen, and where the legal concept of the “legitimate expectations of the parties” is of paramount importance for the interpretation of the contract.⁵⁸ The one-sided structural coupling of law and the economy, however, always runs the risk of turning into “structural corruption”: as soon as legal norms are left to the free disposal of economic actors, they lose their value as normative, *i.e.*, counter-factual, expectations. The consequence would be the above-described terminal spiral of a dissolution of normative expectations, followed by an over-complexity of cognitive expectations, and finally the total breakdown of societal expectation structures.

Structural corruptions of the legal system can only be avoided by strengthening the autonomy of legal discourse and its norm-generating mechanisms, and thereby allowing the legal system to produce a high degree of *eigen*-complexity. Within legal discourse, cognitive responsiveness must be complemented by a higher-level structure of normative expectations, which fulfils a stabilising role in upholding an adequate complexity of the legal system towards its environment. This, in turn, implies, on the one hand, a certain formalisation of legal discourse,⁵⁹ and, on the other, the structural couplings of the legal system to social discourses beyond the economy in order to counter-balance the one-sided informational

⁵⁶ G.-P. Calliess & M. Renner, “Between Law and Social Norms: The Evolution of Global Governance”, (2009) 22 *Ratio Juris*, pp. 260-280.

⁵⁷ G. Teubner, “‘Global Bukowina’: Legal Pluralism in the World Society”, in: *idem*, note 54 *supra*.

⁵⁸ A.T. von Mehren, To what Extent Is International Commercial Arbitration Autonomous?, *Le droit des relations économiques internationales. Études offertes à Berthold Goldman*, (Paris: Litec, 1982).

⁵⁹ See K.-P. Berger, *The Creeping Codification of the Lex Mercatoria*, (The Hague: Kluwer Law International, 1999).

openness of the legal system towards economic rationality – and thus deliberately keep the “complexity gap” between both systems open.

It is here that the interaction of law and politics, which has been disregarded by much of the contemporary literature on transnational law, is of central importance. The structural couplings of law and politics through legislation and constitution, which have been decisive for the evolution of modern legal orders, will have to be replaced by transnational functional equivalents, such as the legal concept of “transnational public policy”,⁶⁰ *i.e.*, the application of a body of non-derogable legal norms in transnational dispute resolution, if the very idea of a functional differentiation of society is to be upheld. Otherwise, the above-outlined processes which lead to an amalgamation of cognitive and normative expectation structures are unavoidable. The rather “old-European” claim that I am making here is that the triadic structure of economic constitutionalism that provides for a mediation of economic and political rationality through an autonomous legal system will have to be re-constructed and adapted to the conditions of a globalised society.

In this triadic structure that allows for the formation of normative expectations, it is – although, strictly speaking, not part of my topic – the political system that deserves special attention. This is because the legal system with its centralised decision-making structure is perfectly able to stabilise normative expectations, although it is always plagued with the paradox of having to decide, on the one hand, and having to mark every decision as necessary, *i.e.*, as mandated by law, on the other.⁶¹ This ineluctable paradox of normativity can only be processed in the intricate interplay of law and politics that is provided for by constitutional law.

Here, the particularity of the political system, in as far as it is democratically organised, lies in the fact that it combines the capability to produce normative expectations with a high degree of informational, *i.e.*, cognitive, openness towards its environment.⁶² This leads to a paradoxical situation in which “everything could be different – but I can change

⁶⁰ P. Lalive, “Ordre public transnational (ou réellement international)”, [1986] *Revue de l'Arbitrage*, pp. 329-373; M. Renner, “Towards a Hierarchy of Norms in Transnational Law?”, (2009) 26 *Journal of International Arbitration*, pp. 533-555.

⁶¹ B. Lahusen & M. Renner, “Gespenster zweiter Ordnung”, in: G.-P. Calliess, A. Fischer-Lescano, D. Wielsch & P. Zumbansen (eds), *Soziologische Jurisprudenz. Festschrift für Gunther Teubner*, (Berlin: Walter de Gruyter, 2009).

⁶² N. Luhmann, “Komplexität und Demokratie”, in: N. Luhmann (ed), *Politische Planung. Aufsätze zur Soziologie von Politik und Verwaltung*, (Opladen: Westdeutscher Verlag, 1994), p. 38.

hardly anything”.⁶³ The making of collectively-binding decisions is channelled through specified institutions and thus consciously made difficult. At the same time, however, the results of these institutionalised decision-making processes are accepted as collectively-binding irrespective of their factual correctness. The democratic process, through its representative structure, thus provides for a loose coupling of cognitive and normative expectations. At this point, the characteristics of democratic decision-making, in contrast to the de-centralised production of knowledge through market transactions, become apparent. The economic system organised as a market simply does not provide for mechanisms which could transform cognitive expectations into normative expectation structures.

The legal system, therefore, must maintain its structural couplings to the political system even where it transcends the confines of the nation-state – simply in order to be able to fulfil its function of stabilising normative expectations. It is precisely this function that the economic system with its highly-specified cognitive structures relies upon. And it is against this background that the evolving debate about the constitutionalisation of transnational law must be understood. When transnational governance arrangements, such as the institutions of international commercial arbitration, increasingly rely on notions of a “transnational public policy”, this is not a mere disguise for judicial law-making. It indicates a reconciliation of law and politics in the transnational arena, which might counter-balance the excessive cognitive demands that the law is confronted with by a globalised and ever more complex economic system.

Clearly, the current state of international political institutions is rather deplorable, especially when it comes to regulating the global economy. This makes it necessary to find ways for transnational legal structures to reflect domestic, supranational and international discourses alike – as well as to effect the emerging forms of a genuinely transnational public in non-state organisations and institutions. The structural couplings of law and politics, therefore, are characterised by a multi-level structure, which necessarily entails the possibility of conflicts between different levels of regulation. As a consequence, the normative structures of the legal system must become self-reflexive not only with regard to their role in processing social complexity, but also with regard to their inherent contradictions and conflictuality.⁶⁴

⁶³ *Ibid.*, p. 44.

⁶⁴ A. Maurer & M. Renner, “Kollisionsrechtliches Denken in der Rechtstheorie”, (2010) forthcoming in *Archiv für Rechts- und Sozialphilosophie*, Beiheft 2010.

CHAPTER 5

POLITICAL EPIDEMIOLOGY AND THE FINANCIAL CRISIS¹

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During the height of the financial crisis, “*The Times*”² asked anxiously: “How to survive the global panic?” The difficulty of describing the financial crisis is dealt with by referring to a well-established vocabulary of psychopathology:

“The fastest-spreading contagion known to humankind swept through Britain this week causing raised blood pressure, spiralling stress hormone levels and rash economic actions galore. The contagion is an outbreak of mass panicked anxiety.”

Although descriptions of the current crisis emphasise its unique status (there even seems to be a sort of competition regarding how “bad” the crisis really is: Is it worse than 1929?), the semantics of contagion has been well-established for describing financial crises for some time. In 1875, for example, a British academic described a financial crisis with strikingly similar words:

“A panic strikes the Western world: the Asiatic cholera of the commercial world, epidemic, most contagious and fatal.”³

I. CONTAGION

The semantics of contagion was already well established in the Nineteenth century. Etymologically, it comes from the Latin word “*contagio*” (contact, touch), thus implying a corporal and tactile dimension. It is noteworthy that contagion derives from a different metaphorical register than most of the systems-theoretical key metaphors: while systems

¹ I would like to thank Poul Kjaer and Gunter Teubner for many valuable comments.

² *The Times*, 11 October 2008.

³ T. Alborn, “‘A plague upon your house’: commercial crisis and epidemic disease in Victorian England”, in: S. Maasen & E. Mendelsohn (eds) *Biology as Society, Society as Biology: Metaphors*, (Dordrecht-Boston MA-London: Kluwer, 1995), p. 282.

theory draws its conceptual apparatus from the visual (for example, observation) and the audible (for example, noise and communication), the lower senses are normally not present within systems theory. This already points to a possible theoretical challenge of contagion, referring to a different mode of communication.

Although contagion can be traced back to *Thucydides* as a term for the spreading of diseases (medical and moral),⁴ it received its modern biological meaning in the Sixteenth century: the medieval concept of *miasma* explained diseases by an astrally polluted air: infection was assumed to be caused by the atmosphere. In contrast, the concept of *contagio* traced diseases to microbes being transmitted by physical contact. This semantic introduced the crucial aspect of a proto-communication theory, notably by John Snow's "*On the mode of communication of cholera*",⁵ which focused upon the media which enabled contagious contact. Snow assumed that water was the primary medium of cholera. The notion of contagion was further elaborated with the emergence of bacteriology, and, eventually in the Nineteenth century, with Koch and Pasteur, who are often seen as founders of modern germ theory. Bacteriology linked the threat of contagion to migratory movements, thus externalising the cause of contagion in terms of an invader.⁶

Modern concepts of contagion combine two crucial theoretical insights: on the one hand, the quick and unconscious communication of a disease by physical contact which is often transmitted by a medium such as water; on the other hand, the uncontrolled self-replication of a transmitting agent.⁷ The epidemiological notion of contagion was, and, indeed, still is, not only the description of a disease and of its paths of dissemination, but is also a political concept (especially with regard to public health) - "Epidemics dramatize the need for regulation"⁸ – and this is also why epidemics are crucial to Foucault's history of governmentality: epidemic discourse is a problematisation of the social, preparing and necessitating measures of control: for example, techniques of containment such as quarantine,

⁴ S. Jarcho, *The Concept of Contagion in Medicine, Literature, and Religion*, (Malabar FL: Krieger Publishing, 2000).

⁵ J. Snow, *On the Mode of Communication of Cholera*, (London: John Churchill, 1885).

⁶ P. Sarasin, S. Berger, M. Hänseler & M. Spörri (eds), *Bakteriologie und Moderne. Studien zur Biopolitik des Unsichtbaren*, (Frankfurt aM: Suhrkamp Verlag, 2007).

⁷ A. Bashford, & C. Hooker (eds), *Contagion: Historical and Cultural Studies*, (London-New York: Routledge, 2001), p. 4.

⁸ P. Wald, *Contagious. Cultures, Carriers, and the Outbreak Narrative*, (Durham NC: Duke University Press, 2008).

precautionary techniques such as vaccination programmes and hygiene techniques, as well as knowledge techniques such as the collection of data by epidemiologists and state authorities. Thus, an intricate *nexus* between contagious communication and socio-political control was established.

The semantics of contagion was extremely successful, and it quickly spread to social areas outside the medical and biological realm, turning into a general analytical all-encompassing concept. In the Nineteenth century, crowd psychology was heavily informed by concepts of contagion:⁹ the “crowd spirit” was now conceived of as the social equivalent to a self-referential disease; this spirit was either transmitted corporally by hearing, seeing and physical contact with other members of the crowd, or it was communicated in a mediatised, non-corporal way. The latter was the most challenging modification of the semantics of contagion: the agent was now de-materialised; it was no longer a particular micro-agent with its own materiality. Instead, one of the main carriers of the crowd spirit was now a de-materialised mode of communication: it is rumours which are the invisible agents that transmit crowd madness! Contagious communication does not rely on the consciousness of actors: paradoxically, the crowd spirit, which is often seen as the underside – or even as the dissolution – of the social, was conceived of as pure communication and affect, independent of individual intentions.¹⁰ Contagion, then, became possible because the individuality of individuals was lost. Key concepts to theorise this weakening of individuality were suggestion and suggestibility: contagion only works upon the basis of such “weak” individuals who do not construct any impediments against flows of communication and affects. For this general version of contagion, it was not only classical crowd phenomena such as mobs, demonstrations and barricades, which were seen as crowds. Instead, everything and everyone could turn into a crowd: even the parliament, a legal jury or the readers of a newspaper could suddenly turn into a crowd. For early American sociology, social contagion even became a synonym for communication,¹¹ unknowingly linking up with early conceptions of epidemics as problems of communication¹² and control. This short sketch of

⁹ See, for example, Gustave Le Bon and Gabriel Tarde.

¹⁰ U. Stäheli, “Protokybernetische Figuren in der Massenpsychologie”, in: M. Hagner & E. Hörl (eds), *Transformationen des Humanen. Beiträge zur Kulturgeschichte der Kybernetik*, (Frankfurt aM: Suhrkamp Verlag, 2008), pp. 299-325.

¹¹ P. Wald, pp. 117-119.

¹² J. Snow, note 5 *supra*.

the semantics of contagion points at three dimensions which will become important for financial contagion as well: contagion implies a media theory of transmitting diseases, it problematises the weakening of subjective rationality, and it prepares political strategies of control.

II. CONTAGION IN ECONOMICS

Embedded within such a semantic of contagion, financial markets were described as “crowd markets”¹³ and the “animal spirit”¹⁴ of speculation was debated and criticised. Although contagion has proved to be a successful popular metaphor for describing financial markets since the Nineteenth century, it was only with the Asian crisis in the 1998 – the “Asian flu” and later with the “Russian virus” – that contagion entered academic economic discourse.¹⁵ Finance theory conceives of contagion as a “spread of market disturbances ... from one country to another”,¹⁶ or as a “spill-over” effect. Contagion is based upon (too) close interdependencies of different markets or market sectors. The measure of contagion is defined by a change in correlations:

“Contagion is best defined as a significant increase in cross-market linkages after a shock.”¹⁷

The Asian crisis is often seen as the first global crisis of finance economy. It is no accident that contagion arises at a moment when the globality of crisis is at stake. Contagion, in this sense, is no longer based upon bodily contact and infection, as in medical epidemiology and crowd psychology; instead, it has become a virtual process. However, implicitly, it still adheres to the idea of possibly dangerous contacts. It introduces implicitly – and explicitly in recent epidemiological finance semantics – a new spatial understanding of what is seen as close or distant. This semantic problematises the classical physical link between causality and spatiality: processes of contagion no longer occur within a continuous

¹³ U. Stäheli, note 10 *supra*, pp. 299-325.

¹⁴ J.M. Keynes, *The General Theory of Employment, Interest and Money. Collected Writings, Bd. 7*, (London: Macmillan Press, 1973[1936]).

¹⁵ Ben-Ami, D, *Cowardly Capitalism*, (New York: John Wiley & Sons, 2001), p. 15; P. Kelly, “Metaphors of Meltdown: Political Representations of Economic Space in the Asian Financial Crisis”, (2001) 19 *Environment and Planning D: Society and Space*, pp. 719-742; J.R. Talbott, *Contagion*, (New York: Wiley, 2009), p. 8.

¹⁶ S. Claessens & K. Forbes, *International Financial Contagion*, (Dordrecht: Kluwer Academic Publisher, 2001), p. 22.

¹⁷ *Ibid.*, p. 46.

space, but they constitute a topological space. This is why classical causal mechanisms that pre-suppose a Euclidean space have ceased to work: the impact of an event on another event is no longer based upon closeness in a Newtonian space (such as two balls touching each other). Contagion tries to account for unexpected causalities of far away entities and events. This becomes evident in the Organisation for Economic Co-operation and Development (OECD) definition of contagion:

“i) events in one financial market trigger events in other markets; and ii) the magnitude of the response in the other markets appears unfounded in economic fundamentals.”¹⁸

A striking literary example for this spatial re-ordering is Dietmar Dath’s most recent novel “*Deutschland macht dicht*”.¹⁹ Dath paints the scenario of financial apocalypses in which places which have been far away from one another are suddenly turned into close neighbours: Bars of *Düsseldorf* are suddenly in *Frankfurt Westend*, the “*Oktoberfest*” is re-located on the peak of the *Zugspitze*. Financial contagion creates a new topological space, and Dath shows what happens if this topological re-structuring not only affects the world of finance, but also when it spills over into whole lifeworlds and geographies. Contagion, thus, defies causal logics: the link between events is completely disproportional and unexpected, making it difficult to explain how this misfit came into being. Since the Asian crisis,

“shocks originating in a particular economy affect, in a very severe and unexpected way, nations that are very distant and that appear to be largely unrelated to the shock originator.”²⁰

Traditional geography has lost its explanatory power: for the topology of contagion, Brazil and China may suddenly become close neighbours, although, geographically, they still literally exist on different continents. Moreover, what the metaphor of contagion tries to grasp are not only these new relations of proximity, but also the ever changing nature of this topological space: spatial closeness becomes highly temporalised – my neighbour of today might disappear tomorrow and re-emerge in the future somewhere else. This topological understanding also has effects on the politics of epidemiology: in contrast to bacteriological

¹⁸ OECD, Financial Market Trends, June 2000 quoted in D. Ben-Ami, note 15 *supra*, p. 161.

¹⁹ D. Dath, *Deutschland macht dicht*, (Frankfurt aM: Suhrkamp Verlag, 2010).

²⁰ S. Edwards, *Contagion*, (2001), available at:
http://www.anderson.ucla.edu/faculty/sebastian.edwards/world_economy5.pdf.

discourse, the invader is always *already within* the financial system; to be more precise, because of the dynamics of a topological financial space, the relation between the inside and the outside becomes more intricate: “financial contagion” is not introduced by a foreign element, but it comes from within – and one never knows where it will come from.

The background condition for contagion is an increasingly inter-connected finance economy. With the beginning of the 1980s, the finance economy became more and more dominated by the logic of securitisation. The imaginary of securitisation was driven by the hope of controlling risk by diluting and spreading it:

“Risk would flow to those best able to bear it ... For a risk shared was a risk halved.”²¹

However, these attempts of risk reduction introduced a new rationality of global connections:

“Financial reason is a logic of agglomeration, of association, of far-flung connections.”²²

Financial economy has turned into a complex, heterarchically organised global network without a clear centre – a network which is even “specialised” in creating improbable connections. Contagion is based upon this new network structure – in a sense, it exaggerates the logic of being able to connect everything with everything, including the ever-present possibility of unexpected and, to date, unheard of connections. The semantics of contagion is, at the same time, a new imaginary for thinking global. Globalisation is neither the homogenisation of the world, nor the diffusion of global norms and procedures – and it is also - at least not primarily - the construction of a world horizon. Instead, what contagion highlights is the *operative logic* of the global – a particular mode of connecting and disconnecting globally; the creation of a pervasive example of global connectivity. It is in this sense that epidemiological discourses point to a much needed non-representational notion of the global.

Contagion proves itself to be a highly-contested concept. Although it was embraced by finance scholars in the 1990s, it was simultaneously used by the critics of the financial economy. Interestingly, contagion describes - for both academics and critics alike - similar

²¹ R. Martin, *An Empire of Indifference: American War and the Financial Logic of Risk Management*, (Durham NC-London: Duke University Press, 2007), p. 7.

²² *Ibid.*, p.22.

economic processes, which are, however, evaluated contrarily. Critics, such as Martin Jacques, understand this “wild” connectivity as a threat to the economic system:

“The crisis has enveloped the whole world like an uncontrollable virus, spreading from the US and within a handful of months assuming global proportions, at the same time mutating with frightening speed from a financial crisis into a fully fledged economic crisis.”^{23 24}

Critical contagion semantics become highly ambivalent: on the one hand, they describe uncontrollable economic processes which endanger the global economic system. Contagion is thus a semantic to describe the unhealthy state of the economy – of an economy devoid of morality. On the other hand, contagion is a call for steering: contagion has become possible because of the *laissez-faire* politics of neo-liberal governments. To put it briefly, for critiques of the financial economy, the political sphere’s failure to steer has created a nightmare of spontaneous processes which have become truly ungovernable.

For left-wing discourses about the financial crisis, contagion is still closely-linked to crisis semantics, although “contagion” and “crisis” are strange bedfellows. Classically, a crisis has a particular cause (for example, unemployment, monetary policies, protectionism or even class struggle). The semantics of crisis are foremost a causal model that explains effects by a central, often hidden, cause. In contrast, “contagion” is a result of non-linear processes. Although one might - as Jacques does - identify a primary culprit, such as the USA, which is seen as the “origin” of the virus. However, contagion becomes so frightening because the initial cause loses its organising power and enables processes of wild connectivity. Often, critiques of the financial economy try to reconcile the semantics of crisis and contagion: crisis is still the primary process, whereas contagion tries to describe a crisis out of control. (However, is not precisely “being-out-of-control” one of the specific characteristics of a crisis?) This reduces contagion to a surface phenomenon of a deep and “real” crisis. Such an articulation of two contradictory semantics is not without problems for critical strategies, since it weakens the importance of responsibility:²⁵ If one is swept away by contagion, how is it then possible to identify those responsible for the crisis? The solution in critical

²³ J. Martin, “The New Depression”, *New Statesman*, 16 February 2009, pp. 22-24.

²⁴ Michel Camdessus (IMF) mentions the Mexico crisis as the “first financial crisis of the 21st century, meaning the first major financial crisis to hit an emerging market economy in the new world of globalized financial markets”. (quoted in Ben-Ami, note 15 *supra*).

²⁵ See, for example, K. Andersen, “The End of Excess: Is this Crisis Good for America?”, *Time*, 26 March 2009, available at: <http://www.time.com/time/nation/article/0,8599,1887728,00.html>.

discourses is easy, albeit not very satisfactory: one has to identify those who started the strange dynamics of the contagion, *i.e.*, those who are responsible for a generalised irresponsibility. Thus, the critical use of “contagion” has to pre-suppose the possibility that an economy could exist without contagion. Contagion, then, is only an exception to “normal” economic life – an exception that could have been avoided.

This use contrasts heavily with that of finance theorists, not so much in the description of what is happening, but in terms of *how* contagion relates to a “crisis”. For them, contagion is always possible; it is not the signature of an unhealthy economic system, but the necessary, although undesirable, result of a complex economic system. Classical concepts of crisis in social theory are normally evolutionary concepts: they may be inserted within a philosophy of history, such as in Marxian crisis theory. Then, crisis is seen as a culmination of a historical process which is based upon necessary contradictions. In this sense, crisis is, itself, absolutely normal and necessary – it is created by historical laws. The only thing which is surprising about such a crisis is its precise moment (or its non-arrival!). The outbreak of the crisis is a turning-point – and also the moment of the *political* (at least in non-dogmatic versions of Marxism): now, in a situation of undecidability, political decisions become possible. A second branch of social crisis theory does away with the assumption of historical laws. Instead, it explains crisis as a cumulative effect of a large number of conflicts and dysfunctions, which finally add up to a crisis (for example, the cumulation of organisational failures).²⁶ Both notions of a crisis are processual notions, which emphasise the evolutionary nature of a crisis. Although the crisis itself is understood as a turning-point, it is a turning-point which has a history leading towards it – be it a history driven by contradictions, be it a history of accumulating smaller and/or bigger dysfunctions.

Contagion, however, defies any link to a philosophy of history – it does without the assumption of causality, a point to which I will return later. This is why it also alters the question of responsibilities: it is nearly impossible to trace the central cause of contagion processes, and even more so to identify their individual origins. For finance theory, contagion is no longer linked to crisis, since crisis pre-supposes a continuous and teleological process. Thus, contagion does not represent deeper causes, but it becomes a process which is worth analysing for its own sake. Contagion semantics in finance does not simply do away with

²⁶ H. Brunkhorst, “Crisis”, in: W. Outhwaite & T. Bottomore (eds), *Twentieth-Century Social Thought*, (Oxford: Blackwell Publishing, 1993), pp. 126-129.

crisis, but speaks about the *contagion of a crisis* itself – i.e., about the possibility “that financial crises could be contagious”.^{27,28} From this perspective, a classical crisis looks even somewhat idyllic: such a crisis might be severe, but it could be explained by fundamentals. A crisis which is spreading like a virus loses its anchoring in a first-order reality. “True” contagion does not have any “common shock”, there is no overall explanation, and this makes contagion even more threatening than a crisis for which one can, at least in principle, account. Contagion, then, is a strange mixture of first-order and second-order semantics: it tries to account for the fact that other observers observe a crisis – and that they become infected by their own observation. The observation is taken as both observation *and* operation at the same time. Contagion is produced by a particular way of observing other market participants, which, in turn, produces contagious observations. While crisis semantics belonged to a first-order discourse of an objective crisis (and later to its relativisation by distinguishing objective from subjective crisis), contagion becomes so powerful because it articulates first-order and second-order thinking. This is also why the dynamics of contagion cannot be explained by referring back to the reality of the crisis. To put it formally, we may distinguish the critical semantics of crisis and finance semantics according to the re-entries which are performed: critical semantics starts with “crisis” as a marked term – and re-enters crisis/contagion on that side. This is why contagion remains subordinated to the “real” logic of crisis. Finance semantics, in contrast, starts with contagion, and re-enters the distinction on the contagion side. From this perspective, it is not so much the crisis which has to be explained, but, instead, the *process* of contagion. Contagion, then, is not restricted to a crisis, as *everything* might become contagious, even a crisis.²⁹

Despite its recent success in financial theory, the concept of contagion in finance is only minimally defined.³⁰ Certainly, there is a crucial change of perspective involved with the focus on contagion. But what is neglected is the very process of constructing a crisis (for

²⁷ Kaminsky & Reinhart, “On Crisis, Contagion, and Confusion”, (2000) 51 *Journal of International Economics*, pp. 145-168.

²⁸ Actually, critiques also speak, as we have seen with Martin Jacques, about a contagious crisis – but contagion is still subordinated to the crisis itself.

²⁹ This also alters how the economy is being observed: While crisis semantics implies a documentary model which asks what lies behind contagious surface phenomena, contagion semantics takes contagion seriously as a monument of its own – a phenomenon whose “*Eigengesetzlichkeit*” one has to account for.

³⁰ It remains quite unclear whether contagion refers to the disease itself, to the process of being infected, to the carrier (“virus”) of infection, or to the channels of infection (see J.R. Talbott, *Contagion*, (New York: Wiley, 2009).

example, by rumours): in most economic accounts of contagion, a crisis is simply taken as existing – just as a given fact which is spread by the dynamics of contagion. However, crises are far from being a given, or a natural, fact; instead, they rely on cultural and social processes which construct particular economic phenomena as in the form of crisis. But there is a second, perhaps even more unsettling, vagueness in the concept of contagion. Implicitly, contagion introduces into economic theory what has often been neglected by mainstream economists: a media theory of economic communication. This shows itself, for example, in the interest in “channels of contamination” and in how an infection is transmitted. It is here that the semantics of financial contagion, implicitly, link up with medical epidemiological discourse, which started to become interested in the “mode of communication” – and, particularly, in the media of diseases. From a sociological and culturalist perspective, this emerging interest in the mediality of the economy is a crucial hint for how to re-think crisis theory: instead of grasping a crisis by causal or additive models, economic media and their structuring – for example, the rhythm of a crisis – become important.

III. NEW FINANCIAL EPIDEMIOLOGY

Starting with 2000, contagion has been integrated into a more elaborate theoretical apparatus. Ironically, this is partially done by re-invoking the medical epidemiological context from which contagion first started off as a concept. “New Financial Epidemiology”, however, is not simply a repetition of earlier concepts; instead, it places them within a context informed by complexity theory, population theories, modern epidemiology and new ecological approaches. This new approach calls itself an “Ecology for Bankers”,³¹ or “Ecology of Finance”.³² If it is true that the semantics of contagion implied a media theory of the economy, it might be worthwhile following this path in order to answer this question: How does financial epidemiology account for the mediality of the financial economy?

Let me turn to one of the most interesting representatives of such a perspective in order to pursue this question. Andrew Haldane³³ is one of the directors of the Bank of

³¹ R.M. May, S.A. Levin & G. Sugihara, “Complex systems: *Ecology for bankers*” (2008) 451 *Nature*, pp. 893-895.

³² B. Phelan, “Ecology of Finance”, (2009) Seedmagazine.com; available at: http://seedmagazine.com/content/article/ecology_of_finance/P2; last accessed 6/23/10.

³³ See A.G. Haldane, *Rethinking the Financial Network*, (2009); available at: <http://www.bankofengland.co.uk/publications/speeches/2009/speech386.pdf>; last accessed 6/23/10 and *idem*, *THE \$100 BILLION QUESTION* (2010); available at: <http://www.bankofengland.co.uk/publications/speeches/2009/speech386.pdf>; last accessed 6/23/10.

England and one of the most well-known representatives of “financial epidemiology”. He shifts the academic debates to a political context by considering the political consequences of finance ecology. Haldane explicitly raises and exploits the analogy between an infectious disease and finance economy. Contagion could occur anywhere and at anytime. This virtuality of contagion has been made possible by the dense network structure which characterises financial economy. What is uncanny about contagion is that it simply happens! There is no big external cause which is responsible for the self-referential dynamics of contagion. Thus, the possibility of contagion is always lurking somewhere within the economy; it starts off with a small trigger event (such as the sub-prime crisis!) whose importance is disproportional to the chain reactions that it produces. This also means that merely identifying the catalyst does not explain contagious processes. There is no single event, person or country that can be accredited as simply being responsible for these processes. Instead, what is at stake is the whole network structure of financial economy, *not* an isolated event.

This is very much in contrast with the way in which politics observes the economy: if one could identify the culprit, one could at least prevent the next crisis! However, what epidemiological thinking argues is that such an isolation of a single event has no predictive power at all: the same event that might be a trigger event in one situation might have no effect in another situation. What becomes apparent is that this argument is crucial in order to analyse the mediality of the economy: the network structure becomes important because it makes the dissemination of economic communication possible: be it flows of payments, flows of goods and people, and even flows of rumours.

For Haldane,³⁴ an explanation of the last crisis has to proceed from the network structure of the financial economy. However, this is not the place to explore his interesting argumentation in depth. But let me indicate the dimensions which are crucial for my interest in the media theory of contagion. First, the process of *homogenisation* becomes important. Haldane problematises that the contemporary financial network is marked by increasing complexity and, at the same time, homogeneity. The invention of new financial products has

³⁴ A.G. Haldane, *Rethinking the Financial Network*, note 33 *supra*.

increased complexity by adding new dimensions to the network. At the same time, risk management has created a more homogenised environment:³⁵

“So what emerged during this century was a financial system exhibiting both greater complexity and less diversity ... Complexity plus homogeneity did not spell stability; it spelt fragility.”³⁶³⁷

It was not a particular version of risk management which was responsible for this homogenisation, but the successful imitation of a particular model. An ever increasing diversity of products was dealt with by the *same* standard procedures of risk management. This standardisation, in turn, was regulated and further institutionalised by agreements such as Basel II. So, what is problematical is a particular way of transmission and repetition – one might even say that a particular mode of risk management became contagious. To put it differently, what is crucial to the understanding of finance networks is not only the flows of payments (as important as they are), but also the replication of auditing and risk management procedures.

Secondly, Haldane points to the importance of *connectivity*. Traditionally, an increasing number of interconnection (for example, the internet) was seen as safer, since connections could act as “shock-absorbers”. However, the virtues of interconnections may suddenly turn and endanger the whole system:

“Interconnections served as shock-amplifiers, not dampeners as losses cascade.”³⁸

In addition, financial networks do not have a symmetrically-distributed connectivity, and there is a significant number of super-hubs with increased connectivity. Such a structure is an advantage against random attacks since many less important nodes might become victims, but not the whole network structure. However, if there is a targeted attack, this asymmetry proves to be a disadvantage: if some of the central hubs are hit, the whole network might become unstable. This is when an “Ecology for Bankers” comes into play:

³⁵ *Ibid.*, p. 4.

³⁶ *Ibid.*, p. 8.

³⁷ Further characteristics of financial networks are the inter-linking of robustness and fragility, feedback processes that increase fragility, and uncertainty generated by untransparent products (*ibid.*, p. 4).

³⁸ *Ibid.*, p. 10.

“It seems that the ephemeral networks that define financial reality and global markets are a key to understanding the ecology of market robustness and its potential vulnerability to collapse.”³⁹

The robustness of the system depends upon “the interplay between network topology and random or targeted ‘attack’”. The organisation of the network pre-figures the effects of possible “attacks” – notably about how “contagious” an attack may become.⁴⁰ This entails a change of perspective: focusing on connectivity brackets the contents that are distributed by a network, and also does away with the highlighting of the isolated agents that are responsible for their risk management. Connectivity, then, is about the symbolically-generalised medium money, and attempts at structuring the connectivity of this medium.

Network theorists try to trace money flows by using data from Fedwire. Such a perspective matches sociological accounts of the economic system, which assume payments to be the primary economic operation.⁴¹ However, the current discussion in the wake of financial crisis has pointed to a crucial aspect that is often neglected in contemporary models of network topology. Instead of exclusively focusing on payment flows, May *et al.* suggest that “soft” factors, such as rumours, also be considered. Reducing financial networks to payment flows “may miss an essential aspect of systemic risk, namely the ‘contagious’ dynamics’ of public perceptions and asset valuation”.⁴² George Sugihara, one of the co-authors of “Ecology for Bankers”, who moved from marine biology to finance and back to biology, warns against focusing only on payments:

“It could be that it’s not just the flow of money ... It could be that there are networks of personal relationships that may be a bigger factor, or the network that causes rumours.”⁴³

This expansion of the network model to rumours, mass media and social capital multiplies the “channels” that spread financial contagion – and also the heterogeneity of financial networks. As I will argue, this is also a challenge to systems theory, since it points to the “intermediality” of functional systems: symbolically generalised media, such as

³⁹ R.M. May, S.A. Levin & G. Sugihara, “Complex systems: Ecology for bankers”, (2008) 451 *Nature*, p. 895.

⁴⁰ *Ibid.*, p. 894.

⁴¹ N. Luhmann, *Die Wirtschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1988).

⁴² May *et al.*, note 39 *supra*, p. 894.

⁴³ G. Sugihara in: B. Phelan, “Ecology of Finance” (2009) *Seedmagazine.com*, p. 4, available at: http://seedmagazine.com/content/article/ecology_of_finance/P2: last accessed 6/23/10.

money, have to be related to “soft” media, such as rumours and the cultural construction of finance.

What are the consequences for politics if one assumes such an epidemiological understanding? Many of the cornerstones of classical politics have been abandoned: there is no single cause which can be made responsible – and whose therapeutic treatment would leave space for improvement. Moreover, if contagion does not follow the continuous logic of a crisis, it is nearly impossible to predict a crisis.⁴⁴ This is why May *et al.*⁴⁵ are quite disillusioned with the possibilities of policing and regulating financial crises:

“it is still difficult to control the spread of panic behavior ... Within the financial system, robustness is something that emerges; it cannot be engineered.”

There are only indirect control options for financial systems. Thus, financial politics becomes a politics about creating network conditions which prevent the quick spreading of contagious dynamics. In this sense, Haldane sketches the contours of a political epidemiology of finance.

Such a politics is primarily a politics on the operative level of finance – *i.e.*, it is a politics of controlling and distributing money flows, of organising their rhythm. What is needed is a politics of connection and disconnection. Regulation is not so much about identifying the cause of financial panic, but of a cutting and a weakening of the connections – of “netting off” and “targeting super-spreaders”. In terms of “targeted vaccination programmes”, as Haldane⁴⁶ has suggested, super-spreaders should be identified and put into quarantine. However, there is no safe vaccine available, as the Swiss Bank Sarasin emphasises:

“Similar to the flu, there is no ideal vaccination for the portfolio.”⁴⁷

The belief in an ideal vaccine or regulation may even prove to be harmful. Regulation has to bear in mind the topology of financial networks – and try to avoid generating over-homogenisation by homogeneous modes of regulation. Otherwise, regulation might achieve

⁴⁴ See Greenspan’s recent speech (March, 2010) about the inevitable failure of economists in predicting the crisis.

⁴⁵ May *et al.*, note 39 *supra*, p. 894.

⁴⁶ Haldane, *Rethinking the Financial Network*, note 33 *supra*.

⁴⁷ Bank Sarasin about the SARS-pandemia and its meaning for the investor, in Bank Sarasin, “Bei Pandemie kein idealer Impfschutz fürs Portfolio”, *Frankfurter Allgemeine Zeitung*, 9 March 2006.

what is contrary to its aims: it might prepare the ground for contagion by creating too much similarity. The aim of regulation is the generation of “robust networks”, *i.e.*, networks which are able to stand contagion, for example, by modularisation.

Secondly, Haldane calls for new modes of making network topologies visible. Such a politics is about the discursivisation and visualisation of finance. Again, it is not about a direct and causal intervention into finance, but about a “new type of data” which are able to construct network topologies. Haldane argues against classical atomistic models that created a “node-by-node mapping” – and also against a bias on institutional boundaries. Instead of this, the money flows have to be made visible. Thus, finance politics becomes media politics: “Network information is a classic public good.”⁴⁸

A third dimension is only mentioned implicitly by Haldane and by other finance epidemiologists. As I mentioned above, data about payment-flows and their regulation is not the whole story. Epidemics are also based upon affective and cultural factors: the way finance is observed by actors and institutions becomes crucial to the whole logic of contagion. This is why Haldane⁴⁹ mentions the importance of public communication, notably – following the work of Shiller and Akerlof⁵⁰ – the role of narratives. Stories are not simply superficial phenomena, but they are constitutive to the economy since they pre-figure how economic events are observed. Other authors have also mentioned the role of rumours in finance markets,⁵¹ which, in turn, are also informed by popular stories and pictures about the financial economy.⁵² In this field, it is even more difficult to formulate a policy recommendation – a central steering of financial narratives is no option. However, the lack of classical policy answers does not mean that the politics of financial contagion has to ignore this crucial aspect. Recent discussions about “cultural economy” emphasise that the cultural constitution of economic processes is crucial for accounting for this “soft” dimension of

⁴⁸ Haldane, *Rethinking the Financial Network*, note 33 *supra*, p.23

⁴⁹ *Ibid.*

⁵⁰ G.A. Akerlof & R.J. Shiller, *Animal Spirits. How Human Psychology Drives the Economy and Why it Matters for Global Capitalism*, (Princeton NJ: Princeton University Press, 2009).

⁵¹ See J.N. Kapferer, *Rumors: Uses, Interpretations, Images*, (New Brunswick NJ: Transaction Publishers, 1990); U. Stäheli, *Spektakuläre Spekulation*, (Frankfurt aM: Suhrkamp Verlag, 2007), on rumours as media.

⁵² Akerlof & Shiller, note 50 *supra*, emphasise the importance of New Era plots such as in stories about the New Economy. Such stories are constitutive for the speculative dynamics since they support the belief in the opening of new economic opportunities. It might be equally interesting to look at stories about the failure of an economic era which usually emerge during a financial crisis. At the height of the financial crisis 2008/9, even conservative newspapers spoke about the apocalypse of capitalism (*Frankfurter Allgemeine Zeitung*); the *Financial Times* started a series on the “Future of Capitalism”.

epidemiological politics. It is in popular culture and the mass media, where economic meanings are both constructed and contested, and where pictures about an ideal economy and its failures are being constructed. These struggles also pave the way for how politics answers to financial economy.

IV. OPERATIVE POLITICS

The politics of the “new financial epidemiology” is a politics of control, mainly working at the operative level of the financial system. Drawing from Gilles Deleuze’s distinction between a disciplinary society and a society of control,⁵³ we can grasp the contours of this politics more clearly. It is not so much about disciplining the speculator or even institutions, not so much a discussion about the necessary individual competencies for becoming a good speculator. These were the hegemonic topics in early Twentieth-century speculation discourses,⁵⁴ linking up to the question of who should be included and who should be excluded from the financial economy. The epidemiological framework is not primarily interested in processes of subjectification, but in the control of network structures and topologies. What is in the foreground, here, are the flows of communication and their media infrastructure, network links and the organisation of connectivity. While normalisation was the keyword for the disciplinary model of financial markets, financial epidemiology struggles against too much homogeneity, since this may create ideal conditions for contagion. Instead, one of its political aims is to foster heterogeneity, most clearly put in its sceptical accounts of the standardised versions of risk management. The underlying idea of the financial system is equally distant to both Marxist crises models and to neo-classical equilibrium concepts. Since financial economy is always on the edge of developing an uncontrollable dynamics of contagion, financial politics is about dealing with this permanent border situation.

Such politics works mainly on the operative level – and, in this way, it also contrasts with a politics of representation, although it does not fully replace the latter model. It is primarily a politics of connection and disconnection. This also creates the theoretical challenge of better accounting for how disconnection (“netting-off”) works, of how strategies of vaccination and immunisation operate. The very problem of non-connection and

⁵³ G. Deleuze, “Postscript on the Societies of Control”, from *OCTOBER 59*, (Cambridge MA: The MIT Press, 1992), pp. 3-7.

⁵⁴ U. Stäheli, “Protokybernetische Figuren in der Massenpsychologie”, in: M. Hagner & E. Hörl (eds), *Transformationen des Humanen. Beiträge zur Kulturgeschichte der Kybernetik*, (Frankfurt aM: Suhrkamp Verlag, 2008), pp. 299-325.

disconnection has been neglected by systems theory and network theories, since they are primarily interested about how connectivity works, leaving blank the problem of creating non-connections, cutting links and creating islands of indifference. Focusing on flows of communication also means looking at the rhythm of operations, at the temporal dynamics of communication. Thus, netting-off is not simply a spatial model of creating non-connective islands such as bad banks, but also about inserting breaks within the rhythm of communication. A good example for the crucial role of the rhythm of payment-flows can be found in the descriptions of the attempts to save *AIG*: the trading stop during the weekend provided 48 hours which were fervently used to find a solution. Similar techniques which affect the rhythm of communication include the possibility of a temporary suspension of trading during a panic. Here, again, it is about creating an interruption in order to gain time – and to find a solution.

Such “operative” politics seems to be at odds with a more classical politics of representation. However, this emphasis on linking and cutting operations does not mean that representational practices lose their importance. Against a pure constructivist account, contagion is not simply a semantic construction of an observer, but it primarily refers to the operative dynamics. One of the analytical challenges is the question of how to relate these two levels. In systems theoretical terms, this is about the difficult question of the relation between operation and observation. As we have seen, the connectivity of operations is also dependent on how operations are being observed. That is why the importance of stories, pictures and semantics has been emphasised, not only by sociologists, but also by behavioural economists, such as Richard Thaler. Moreover, as Haldane has argued, a politics of disconnection requires a new type of data for making potentially contagious network structures visible. Thus, political epidemiology is always also media politics. This interconnection between operation and observation also holds true for the working of affect. Affects, such as fear, *do* generate dynamics of their own, but their success is also dependent on semantics. For example, “fear cultures”⁵⁵ are not only a thematisation of social affects, they also contribute to the creation of fearful communication. In addition, the semantics of contagion may become contagious. Crisis and panic semantics spread quickly; Thaler even speaks of an epidemic of ideas. Thus, taking operative dynamics seriously must not be restricted to the flows of symbolically-generalised media, as there is also an operativity of

⁵⁵ F. Furedi, *Culture of Fear*, (London: Continuum, 2004).

semantic forms – which may also develop patterns of dissemination and which share the characteristics of contagious communication.⁵⁶

There are also theoretical lines of flight that are opened up with political epidemiology. The semantics of contagion points to an implicit crisis theory – albeit a crisis theory which takes the critiques of classical models of crisis which assume internal contradictory dynamics or the accumulation of dysfunctions. Instead, the equivalent to a crisis is a change in the mode of communication which is metaphorically grasped with the semantics of contagion. But what are the characteristics of such a model of “crisis communication”?

There are four important dimensions to which I want to allude: *First*, contagion transforms the way in which communication works: it partially erases the dependence of communication on *alter ego*-calculations.⁵⁷ To put it differently, it is a way of communication, which becomes hyper-connective by temporarily dispensing with the time-consuming creation of “expectations of expectations” (“*Erwartungserwartungen*”). Communication becomes an uncontrollable cascade of events. Although the notion of contagion is closely-linked to network theory, this does not necessarily imply that functional differentiation is replaced by the idea of a network society. Instead, by focusing on contagion, the communicative dynamics of the financial economy is foregrounded. Thus, networks of payments help to describe *how* the medium of money is being structured, and *how* the connectivity of payments is being organised. *Second*, this mode of communication also re-arranges the relationship between communication and affect. This becomes clear in the crucial role of fear in panic communication. One might even say that affectivity replaces the dominance of cognitively-controlled communication of the *alter ego*-model. Although affectivity is crucial to any mode of communication, in contagion, it tends to become predominant. *Third*, in such situations, the mediality of finance communication is foregrounded. It is not so much about the *content* of communication, about foundational data – not even, as we have seen, about second-order observation (which has to rely on a well-working *alter ego*-model) – but about the *connectivity* of communication. To be more precise, it is in these situations that communication media become important as the condition for connectivity. This is also why many descriptions of panic behaviour are also accounts of

⁵⁶ Sociology thematised this aspect long ago with the concept of “moral panic”.

⁵⁷ U. Stäheli, “Writing Action”, (2000) 1 *Distinktion*, p. 1 for a critique of the *alter ego* model.

“media accidents” – for example, the capacity overload of digital networks. *Fourth*, contagious communication does not restrict itself to one medium. Instead, one might speak about a strange form of intermediality, in which there is a “spill-over” of contagious communication within one medium to other media. For example, contagious chains of payments might suddenly swap over to contagious rumour communication, or they might produce affective dynamics. Thus, contagion also points at the heterogeneity of financial communication, which is, however, still organised by an autopoietic logic of self-production.

Although contagion is a threat to an autopoietic system because it undermines the “normal” mode of communication which is based upon well-organised *alter ego* perspectives, it is not external to the logic of functional systems. Instead, financial contagion is made possible by the functional differentiation of the financial economy. It is only upon the basis of financial derivatives, which may be seen as the hallmark of self-reference, that new forms of connectivity have become possible. Thus, contagion is in line with the self-reference of financial communication, with the tendency to increase complexity and connectivity. In this sense, contagion has become possible by the permanent need to accelerate communication (contagion is an enormously quick process, a time-efficient way of communicating) and increases social connectivity.⁵⁸

For systems theory, one of the challenges of contagion is to think of the impurity of systemic operations which is created by the immanent logic of an autopoietic system which, at the same time, makes this logic impossible. This does not necessarily entail a shift from functional differentiation to a network society, somehow indicating a new epoch. Instead, boundary problems remain pertinent – even more so if the very guarantees of “purified” systemic operations are no longer valid. Looking from a systems-theoretical perspective at the processes of contagion would also mean accounting for the normalising structures which try to transform potentially uncontrollable contagious dynamics into systemic self-reference, for example by introducing internal means of interrupting inter-dependencies (“*Interdependenzunterbrechungen*”) into the financial economy by temporal (for example, the rhythm of payments) and spatial means (for example, zones of quarantine).

⁵⁸ I would like to thank Gunter Teubner for pointing to a permanent pressure of increase (“*Steigerungszwang*”) in functional differentiation.

Section II.2

Fundamental crises of society

CHAPTER 6

THE RETURN OF CRISIS¹

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INTRODUCTION

Modernity and crisis are co-original.² The great illusion of Nineteenth-century *bourgeois* ideology and Twentieth-century neo-conservative thinking was, and still is, that there is no crisis. Even in the middle of the greatest economic crisis since 1929, the answer is still the same:

“Whoever that woman in my dreams is, it is not my mother.”³

Even in sociological theory (which, from the very beginning, was designed as a theory of the crisis of modern society),⁴ the category of crisis has been repressed. Since the neo-conservative turn to global economic politics in the 1980s, the so-called Reagan-Revolution and the successive Washington Consensus,⁵ since the post-socialist politics of the Third Way, the withering away of the workers’ movement, and after the final collapse of the

¹ Thanks to Poul Kjaer for a critical debate of some major points (and poetic suggestions) of this chapter, in particular those concerning the relation of functional and social differentiation. Thanks also to Regina Kreide for her strong criticism of an earlier version of Section V.3. on belief-oriented conflicts, and, last, but not least, thanks to Chris Engert for his important comments and the translation of German-English into English.

² See, only, J. Habermas, *Der philosophische Diskurs der Moderne*, (Frankfurt aM: Suhrkamp Verlag, 1982).

³ S. Žižek, *In Defense of Lost Causes*, (London: Verso, 2009), p. 338.

⁴ For the origins, see H. Marcuse, *Reason and Revolution. Hegel and the Origin of the Theory of Society*, (New York: Humanities, 1941). However, it is not only the origins, but also academic sociology, which was closely linked to concepts of crisis; Durkheim’s concepts of “antinomy” and “pathology” are crucial for his theory of modernity (See A.R. Mawson, “Durkheim and Contemporary Social Pathology”, (1979) 30 *British Journal of Sociology*, pp. 298-313). Weber’s main concept of rationalisation in substance is closely connected with the older Hegelian and Marxist notions of “bifurcation” and “reification” (see G. Lukács, *Geschichte und Klassenbewusstsein*, (Amsterdam: Thomas de Munter 1967). Even Parsons developed his theory as a reaction to the global economic crisis of 1929), and the 1960s and 1970s experienced a strong rebirth of the concept of crisis; see, only, J. Habermas *Legitimation Crisis*, (London: Heinemann Educational Books, 1976).

⁵ For a critical account, see D. Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus*, (Cambridge: Polity Press, 2004).

Soviet Empire and the tragic (but, maybe, not final) failure of “democratic socialism”⁶ – *crisis* has been replaced by *risk*.⁷

Risk and *crisis* are different paradigms, in social science as well as in political *praxis*. The lifeworld is in crisis, evolution is at risk. Crisis is a problem internal to society with social differences. Risk is a problem at the border of the system and the environment. From the perspective of the paradigm of crisis, there are only a few (for example, cosmic) risks which are not mediated by social differences. Yet, compared with environmental risk, Luhmann counters, problems of social crisis are “just trivial”.⁸ For him, there is no crisis that is not strongly relativised by risk. Theories of social difference and crisis “were already outdated at that time” when critical theorists, such as Marx, invented them in the middle of the Nineteenth century.⁹

Social crises (at least, in principle) can be solved *normatively* by *changing institutions*, by enacting egalitarian constitutional reforms or revolutions, by legal programmes. Yet, from the perspective of the paradigm of risk, they are “missing the point”, because they are relying on the old “humanistic framework” of “freedom and equality, self-realization and solidarity” and “its affectionately ‘social’ concern” for “outdated mythologies” such as “exploitation”, “injustice” and “suppression”.¹⁰ The now (presumably) much bigger problems are the “neglect” of individual human beings, the “exclusion” of *surplus-populations* (Arendt), and the “destruction” of systems and their environments.¹¹ The very point is that *individual neglect*, *ecological pollution* and *societal exclusion* need *technical (or therapeutic) solutions* (if there are any), and that technical solutions need *smart experts*, instead of political protest, moral outrage, civic self-organisation, and democratic

⁶ Democratic socialism was what the people in the countries of the Soviet Empire wanted but the great coalition of communist bureaucrats and Western neo-conservatives, including the vast majority of liberals, inhibited from the very beginning in 1968 as well as in 1989. Rightly observed by Zizek in the *New York Times* 11/09/2010.

⁷ U. Beck, *Risikogesellschaft: Auf dem Weg in eine andere Moderne*, (Frankfurt aM: Suhrkamp Verlag, 1986); A. Giddens, “Affluence, Poverty and the Idea of a Post-Scarcity Society”, *UNRISD Discussion Papers DP 63*; *idem*, “Risk and Responsibility”, (1999) 1 *The Modern Law Review*, p. 1; A. Giddens, *Runaway World*, (New York: Routledge, 2003); N. Luhmann, *Soziologie des Risikos*, (Berlin: Walter de Gruyter, 1991). Luhmann might have been the first to turn from crisis to risk; see *idem*, *Oekologische Kommunikation*, (Opladen: Westdeutscher Verlag, 1986).

⁸ N. Luhmann, “Globalization or World Society: How to Conceive of Modern Society?”, (1997) 1 *International Review of Sociology*, pp. 67-80, at 67 & 70.

⁹ Luhmann, note 8 *supra*, p. 76.

¹⁰ Luhmann, note 8 *supra*, p. 69 & 71.

¹¹ Luhmann, note 8 *supra*, p. 75.

mass movements. Risk management needs neither unions, nor socialists, nor social democrats.¹² Hence, post-socialists marching on Tony Blair's Third Way, and the German Greens after they successfully discarded their excess baggage of leftist ideology, are precisely the *right* parties. But they might be on the wrong track.

The global economic crisis of 2009 reveals that it was a catastrophe for the Left to bury Marxism, because Marxism was the only theory that reminded us incessantly that modern capitalism is an inherently catastrophic system, and that crisis, not catastrophe, presents the great chance for change. Now, we have, in Europe, a British form of social democracy which has structurally coupled itself to the City of London, and the same is true with the American Democrats and Wall Street. Obama has still kept the rhetoric of change (which rightly, even if unconsciously, refers to the eleventh Thesis of Feuerbach), but the democratic basis for this kind of talk has been lost. And continental European social democracy (including the major conservative parties, such as the CDU or the French Gaullist Party) are no better off, in fact, they may even be worse off, because they have even lost any authentic rhetoric for change, and the only thing that they have, instead of this, is the poor and unwarranted belief that "capitalism will do", and that, if it fails, the only therapy will be more capitalism.

In this chapter, I will try to correct the theoretical retreat from the paradigm of crisis, and to re-invent a revised version of a concept of *crisis that is structural*. At the end of the chapter, I will use the revised concept for a brief diagnosis of the new constellation of a normatively integrated world society, which, indeed, suffers from all the environmental problems that Luhmann rightly mentioned.¹³ For this purpose, I will crudely combine some ideas of Marx, Polanyi, and Luhmann. I will start with Polanyi and Marx, as there are some advantages in Polanyi's theory of the great transformation which extend far beyond Marx' analysis of modern capitalism, which is too concrete and one-sided. Yet, neither Polanyi nor Luhmann are able to link the *objective* problems of modern society with the *inter-subjective* learning processes that lead to the building of new institutions (Section I). For this reason, the theory of Marx is still *paradigmatic* for a *radical critique* of modern society, which can *avoid*

¹² N. Luhmann, "Systemtheorie und Systemkritik", Interview (1986) *TAZ (Tageszeitung)* 21.10.86, pp. 11-12.

¹³ On the "normative integration" of world society, see P.S. Atiyah, "Personal Injuries in the Twenty-First Century: Thinking the Unthinkable", in: P. Birks (ed), *Wrongs and Remedies in the Twenty-First Century*, (Oxford: Clarendon Press, 1996). R. Stichweh, "Der Zusammenhalt der Weltgesellschaft: Nicht-normative Integrationstheorien in der Soziologie", in: J. Beckert, J. Eckert, M. Kohli & W. Streek (eds), *Transnationale Solidarität – Chancen und Grenzen*, (Frankfurt aM: Campus, 2004), pp. 236-245.

any conservative consequence (Section II). Then, I will give a critical account of Luhmann's sound challenge of "crisis" and "critical theory" (Section III). I argue briefly that an appropriate understanding of environmental problems needs a new consideration of social differences (Section IV). However, we now need a broader concept of social differences and their societal causes. Social differences, in a broader sense, are not to be reduced to mere economic differences (Section V). Then, I will combine the thesis of the different basic social conflicts of modernity (belief-oriented, state-oriented, capital-oriented and inclusion-oriented conflicts) with the Habermas typology of crisis from his 1973 book entitled *Legitimation Crisis* (Section VI), before I return to the present constellation of global crises (Section VII).

I. DIS-EMBEDDEDNESS AND EXPROPRIATION

Both Marx (mid-Nineteenth century) and Polanyi (mid-Twentieth century) have explained the social crisis of modern society (or the crisis of our social lifeworld) as a structural and lasting effect of the functional differentiation of the market economy, and the commodification of labour, money, and real estate.¹⁴ While Polanyi calls this process the "dis-embeddedness" of the three markets of real estate, labour and money, Marx focuses on the labour market and calls it the expropriation "of the labourers" from "their own means of production, and of all the guarantees of existence afforded by the old feudal arrangements".¹⁵ Marx' primary interest in the labour market is closely-connected to his basic idea of an internal relation between functional differentiation and a completely new form of class rule.¹⁶ Polanyi's advantage, compared with Marx, lies in the differentiation between three equally autonomous markets. He can, therefore, avoid any reduction of the financial sector or the real estate market to the labour market, and equally avoid the reduction of the spheres of circulation and consumption to the sphere of production. This enables him to construct a

¹⁴ K. Polanyi, *The Great Transformation: The Political and Economic Origins of our Time*, (1944), cited here according to the second Beacon paperback edition, (Boston MA: Beacon Press, 1957).

¹⁵ K. Marx, *Capital*, vol I, Ch. 26, quoted from: <http://www.marxists.org/archive/marx/works/1867-c1/ch26.htm>. For a historical representation, see B. Moore, *Injustice. The Social Bases of Obedience and Revolt*, (New York: Sharpe, 1978).

¹⁶ The rule of the economic or political classes such as that the modern *bourgeoisie* or the socialist *nomenklatura* no longer has anything to do with pre-modern stratification. The analysis of the working class of the second half of the Nineteenth and the first half of the Twentieth century as a kind of pre-individualised *Stand* (Estate, rank in a hierarchical society) was the crucial mistake in Ulrich Beck's *Risikogesellschaft* [note 7 *supra*] that was constitutive for his whole argument that the individualised risk society is the first sign of a new formation of society, called with the stopgap of Anthony Giddens' *second modernity*. Surprisingly enough, and evidently against his own better knowledge (see N. Luhmann, "Zum Begriff der sozialen Klasse", in: *idem, Soziale Differenzierung*, (Opladen: Westdeutscher Verlag, 1985) Luhmann makes the same mistake in his polemics against "critical theory"; see Luhmann, note 8 *supra*.

more complex theory of the economic crisis of capitalism, which is not centred in the sphere of production, and is therefore able to disclose a greater variety of the (technical) solutions to economic crises (including Keynesianism in particular) than Marx, who focused on the sphere of production and the central economic conflict between capital and labour. Marx' conceptual narrowing onto one basic conflict between two classes leads *a priori* to an unstable system of classes, and, hence, revolutionary consequences and effects become more probable (if not, in a more restrictive, orthodox - albeit mistaken - reading of Marx, they become both unavoidable and necessary).¹⁷ But the conceptual restrictions did not work in both *praxis* and in reality, and subsequently had to be either revised or dogmatised.

However, the very advantage of the Marxist theory of society lies elsewhere. First, it was Marxism, and *only* Marxism, which developed a totally reflexive theory of modern society, which conceptualises, describes, explains, comprehends and criticises society *totally from within the society* as a societal process, leaving no transcendence, no normative fundament and no subject beyond the societal process. The early Habermas labelled this under the heading of “*Erkenntniskritik*” which (after Marx, Dilthey, Peirce and Freud) should only be possible as “*Gesellschaftskritik*”, a critical endeavour which the late Habermas has described as “*Transzendenz von innen und ins Diesseits*”, which never ever reaches a point of view beyond the society.¹⁸ Even Luhmann has clearly acknowledged that the invention of a completely reflexive theory of society was the very advance of Marxism, and hence, from Marxism, we still have to keep the self-reflexive and holistic structure of social theory (described by Marxists in Hegelian terms as *societal totality*): from Marx “*zu bewahren wäre dabei* (in the re-construction of a theory of society as systems theory – HB) *die Auffassung der Gesellschaft als eines sich selbst abstrahierenden, kategorisierenden, thematisierenden Sozialsystems, also die Negation einer gesellschaftsexternen Geistigkeit, eines transzendentalen Bewußtseins, das sich selbst die Gesellschaft erklärt.*”¹⁹

But Luhmann, reducing sociology to the observers perspective (Section III *infra*), misses (and deliberately wants or categorically must miss) the very point of Marx'

¹⁷ Rightly criticised by Luhmann, “Zum Begriff der sozialen Klasse”, in: *Soziale Differenzierung*, note 16 *supra*.

¹⁸ See, also, J. Habermas, *Theorie des kommunikativen Handelns*, (Frankfurt aM: Suhrkamp Verlag, 1981), Bd. 2, p. 590 *et seq.*

¹⁹ N. Luhmann, “Selbst-Thematisierung des Gesellschaftssystems. Über die Kategorie der Reflexion aus der Sicht der Systemtheorie”, (1973) 2 *Zeitschrift fuer Soziologie (ZFS)*, pp. 21-46, at 31.

scientifically revolutionary idea, which *secondly* consists of the *combination of the concept of modern society as a reflexive totality* (Luhmann's junction) with the *concept of collective social learning processes* which the actors themselves are making in their *praxis of transcending* society from both within and inside this world (Habermas' junction). Only after this conceptual move can a *critical theory* that inquires into the *internal links* between the *objective process of dis-embedding of labour* (that is caused by the functional differentiation of the economy) and the *emergence of inter-subjective class struggles* be constructed. The conflict between economically-determined classes *overburdens the legitimisation potential of bourgeois society and bourgeois democracy*, so that the *objective systemic crisis* (economic crisis, financial crisis, fiscal crisis) turns into a *social* and finally into a *legitimisation crisis* that paves the way to new normative solutions.

It is the *inter-subjective* concept of *class-struggle* that, *thirdly*, leads Marx to the insight that the self-organised and reflexively-closed capitalist economy not only causes the social catastrophes of dis-embeddedness and expropriation (Polanyi's point), but also engenders the *conditions* for the possibility of the *active learning processes* of the expropriated classes themselves (which Marxism introduced under the label of *class consciousness*). These learning processes then can (but must not) lead to *fundamental changes* of the *institutional (legal and constitutional) core* of modern society (in Marxism discussed as the *theory of revolution*).²⁰

But these learning processes are, as we will see in Section V, not only caused by *capital-centred conflicts* between *social* classes, but also by *state-centred conflicts* between *political* classes (such as the haves and have-nots of coercive power) and between states, and *belief-centred conflicts* and conflicts between the *included and excluded* classes of society (such as religious sects and churches, or such as black and white Americans, between the centre and the periphery of Paris, the *banlieue*, etc). In so far as Luhmann was right that, today, we should avoid Marx' "*zeitbedingte Konkretisierungen (...), die dem historischen Moment und der polemischen Konfrontation verpflichtet waren, so zum Beispiel die Selbstetikettierung als Materialismus, die von der Negation des transzendentalen Idealismus*

²⁰ See, for a still convincing model, K. Eder, "Collective Learning Processes and Social Evolution: Towards a Theory of Class Conflict in Modern Society", (1983) 1 *Tidskrift för Rättssociologi*, pp. 23-36; *idem*, "Learning and the Evolution of Social Systems – An Epigenetic Perspective", in: M. Schmid & F.M. Wuketits, *Evolutionary Theory in Social Science*, (Berlin: Springer, 1987), pp. 101-125; K. Eder, "Kulturelle Evolution und Epochenschwellen: Richtungsbestimmungen und Periodisierungen kultureller Entwicklungen", in: F. Jaeger & B. Liebsch, *Handbuch der Kulturwissenschaften Bd. 1*, (Stuttgart: Metzler, 2004), pp. 417-430.

lebt und mit diesem ihre eigene Bestimmbarkeit verloren hat; oder (and this is the point that is most relevant for my thesis here – HB) *auf die Beschränkung der sozialen Kritik als bloße Kritik des Privateigentums, nachdem Eigentum nichts weiter mehr ist als die in jedem Geld-Code erforderliche Garantie eines binären Schematismus (Haben/Nichthaben)*”.²¹ Hence, social class struggles are no longer exclusively about property, but about the equal/unequal distribution of wealth, and it is not only *social* (or *economic*) differences which are challenging radical criticism, but also *political* differences and differences between *believers and non-believers*, between the *included and excluded* classes of populations as well. Therefore, the concept of *class antagonisms* also has to be broadened and re-defined, but, at the same time, it does not vanish from the centre of social theory. The process of abstraction and re-specification of Marxism is necessary to keep its critical potential alive and to sharpen its criticism of modern society.²²

II. THE HIDING

Yet, in contrast with Polanyi and all the more conservative critics of modern society, Marx developed a theory that allows a criticism of liberalism, which is free from all conservative ambiguities. At the same time as he describes the critical consequences of the functional differentiation of “modern capitalism” (Max Weber) – “written in the annals of mankind in letters of blood and fire”²³ – Marx celebrates the, up to then, unbelievable progress of capitalism, and its “civilizing tendency”.²⁴ This celebration is for categorical reasons. For Marx, the “disciple of Hegel” (Dieter Henrich), the functional differentiation of markets pre-supposes, and, in a way, supports and re-inforces *universal emancipation, egalitarian freedom, individualisation, personal autonomy*, and finally accomplishes the process of *enlightenment and disenchantment*.²⁵

²¹ Luhmann, note 19 *supra*, p. 31 (my emphasis).

²² Conversely, orthodox Marxist criticism such as that of the German “*Links-Partei*” has become completely toothless.

²³ K. Marx, Ch. 26 note 15 *supra*.

²⁴ *Idem*, *Grundrisse zur Kritik der politischen Ökonomie*, (Berlin: Dietz, 1953). This celebration often comes very close to a complete affirmation of industrial capitalism which finally becomes undistinguishable from communism; see R.N. Berki, *Insight and Vision. The Problem of Communism in Marx's Thought*, (London: Dent & Sons, 1983).

²⁵ Marx celebrates the process that Polanyi describes as the dis-embedding of labour, money and real estate as the great achievements of the “*bourgeoisie*” which already cause the “constantly revolutionizing (of) the instruments of production, and thereby the relations of production, and with them the whole relations of society” (K. Marx & F. Engels, *The Communist Manifesto*, quoted from:

The progressive grand narrative of “*bourgeois* historians” is true, but one-sided. The process of *dis-embeddedness* is a process of *real emancipation* of the “immediate producer, the labourer (...) from the regime of the Guilds”.²⁶ Yet, even though Marx celebrates the emancipatory advances of modern capitalism, he, like Polanyi, simultaneously recognises that *dis-embedment by commodification* triggers not only *a*, but *the*, crisis of modern society, which even leads to a “backlash of enlightenment into myth”,²⁷ or, in the words of Marx, “the fetishism of commodity”.²⁸

The myth of modern capitalism, namely, the fetishism of commodity, consists of the *real abstraction* of the economic system from the lifeworld of the worker.²⁹ This real abstraction enables, as Marx shows in *Capital*, the *self-referential closure of the economic system*. This dis-embedded functionally-differentiated economic system reproduces itself (*autopoiesis*) through the monetary codification of communicative operations of commodity exchange. Marx describes the dis-embedding process with a simple *schema*. The first *schema* refers to the embedded economy of the ancient world of Aristotle. It describes an *open, finite* and *stable* economic system of circulation that keeps itself within the horizon of the lifeworld and the needs of *living labour*: “C-C” (commodity [C]; immediate commodity exchange of use-values), or as in the more developed economy of ancient Athens: “C-M-C” (money [M]; money mediated exchange of use-values). The second *schema* describes the modern capitalist economy after its successful dis-embedment from the social lifeworld of living labour. Modern capitalism is a *closed, infinite* and *dynamic* system of circulation that is oriented no longer to the concrete and the particular equivalents of use-values, but to the accumulation of the universal equivalent, the generalised exchange value: M-C-M’-C’-M’’... (Profit [M’-M]; capital and labour market); M-M’-M’’... (interest [= M’-M = Δ M]; financial market).³⁰

The incredible productivity of the self-referential closed-system of M-C-M’ or M-M’ circulations emanates from the processing (*Verzeitlichung*) and dis-entanglement (*Entfaltung*) of the paradox of self-reference (money buys money). The paradox of economic self-

<http://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch01.htm#007>).

²⁶ K. Marx, Ch. 26, note 15 *supra*.

²⁷ M. Horkheimer & T.W. Adorno, *Dialektik der Aufklärung*, (Frankfurt aM: Fischer, 1997).

²⁸ K. Marx, *Capital*, vol 1, Ch. 1, quoted from: <http://www.marxists.org/archive/marx/works/1867-c1/ch01.htm>.

²⁹ J. Habermas, note 18 *supra*.

³⁰ K. Marx, *Capital*, Ch. 4, note 15 *supra*.

reference is as unavoidable as all the paradoxes of the Hegelian subject of self-reflection. But it can be resolved productively (and sometimes destructively) by using first action “A”, and then “non-A”, or by using (re-iteratively) action “A” on a higher level of “meta-language”, and “non-A” on a lower level of “object-language”.³¹ If we proceed with the both sides of the paradox in time, disentangle it at different levels, and let evolution do the rest, then there is a chance that time will heal all wounds (a chance which, for the sceptic Luhmann, seemed to be very small, although the neo-conservative believers in de-regulated markets, and the sellers of predatory lending tell us that the chance is extremely high, at least for them).³²

But then *crisis* comes. What the crisis reveals is the *social* difference that lurks behind the *functional* difference of *the system and the environment*. For Marx, this was the difference between antagonistic social classes, the difference of *capital and labour*. For the labourers, the crisis was always already there. For them, capitalism *is* crisis.³³ Once the closed reflexive system of exchange reaches the labour market, the *living labour force* (“*lebendige Arbeit*”) is transformed into *dead labour* (“*tote Arbeit*”), or constant and variable capital.³⁴ It is the dis-embedment process of the labour market that transforms the *substantiality* or *objectivity* (in Luhmann’s German, “*Sachlichkeit*”)³⁵ of the *bourgeois* society (*bürgerliche Gesellschaft*) of

³¹ For example, creating series of new investment vehicles, hedge funds, bets, first with and then against, the housing markets, limited and unlimited bets on Alt-A and sub-prime mortgages, bets first on countries financial solvency and then on countries insolvency, synthetic collateralised debt obligations (CDOs), etc.

³² See N. Luhmann, “Gesellschaft als Differenz” (2006) e-manuscript (Luhmann-Archive Bielefeld): “Mit Hilfe von Zeit läßt sich das Paradox des Zugleich von Bestimmtheit und Unbestimmtheit auflösen, indem es auf verschiedene Zeithorizonte verteilt wird. Ein selbstreferentielles System operiert also nicht nur *in* der chronologisch vorgegebenen Zeit, sondern auch *mit Hilfe von* Zeit, indem es von jeder erreichten Gegenwart aus Vergangenheit und Zukunft unterscheidet.”

³³ This is why Lukács and other Marxists argue that the position of the proletariat to recognise the totality of the modern society is “privileged”. “Privileged” here does not mean that this is recognition that cannot fail. It means simply something to the effect that people in the position of the working classes in Nineteenth century England had no illusions about equal freedom of markets because they knew the whole story about the “hiding” (see note 36 *infra*), from their own everyday experience: G. Lukács, *Geschichte und Klassenbewusstsein*, note 4 *supra*, p. 164 *et seq*; see, further, H. Marcuse, note 4 *supra*, p. 249, 256 *et seq.*, & 274 *et seq*; J. Habermas, note 18 *supra*, p. 590 *et seq*; on the symptomatic truth of crisis, see, also, S. Žizek, *Die Tücke des Subjekts*, (Frankfurt aM: Suhrkamp Verlag, 2001), p. 177 *et seq.*

³⁴ On the difference between living and dead labour, see K. Marx, *Capital*, Chapter VI, Section 1, note 15 *supra*. The transformation of living into dead labour is the great topic of the Marxist theory of alienation and reification; paradigmatically, see Lukács, note 4 *supra*.

³⁵ For Luhmann’s systems theory, the distinction between the three dimensions of societal integration is crucial: substantial/objective (*sachlich*), timely (*zeitlich*) and social (*sozial*) integration. This distinction is not as innocent or harmless as it appears because, with the substantial dimension, Luhmann re-introduces Weber’s *purposive rationality* and Schelsky’s *technische Sachlichkeit*, and transfers it together with *social normativity* to the *timely level of social evolution*, and this finally leads him to a total affirmation of the evolutionary *Sachlichkeit* of the functionally-differentiated society, and the relegation of the social sphere to an earlier, less *sachlich* (less functionally-differentiated) level of evolution (see Section III *infra*).

functional differentiation into a *social relation* of classes, exploitation, suppression and injustice:

“On leaving this sphere of simple circulation or of exchange of commodities, which furnishes the ‘Free-trader Vulgaris’ with his views and ideas, and with the standard by which he judges a society based on capital and wages, we think we can perceive a change in the physiognomy of our *dramatis personae*. He, who before was the money-owner, now strides in front as capitalist; the possessor of labour-power follows as his labourer. The one with an air of importance, smirking, intent on business; the other, timid and holding back, like one who is bringing his own hide to market and has nothing to expect but - a hiding.”³⁶

The labour market reveals the irony of history. All the great *normative* and *legal*³⁷ advances of modern society that are institutionally pre-supposed³⁸ by functional differentiation (universal emancipation, equal freedom, and personal autonomy) are realised, but not as Hegelian substantial *Sittlichkeit* (ethical life), but as *negative Sittlichkeit* (Theunissen), instead. The truth of modern ethical life is the *damaged life* (Adorno), is *injustice* (Barrington Moore), and *distorted communication* (Habermas).³⁹

For Marx, the labour market is the centre of the *great transformation* of the *substantial/objective* (in German: *sachliche*) difference of functional systems into the substantially irrelevant *social* difference of class, exploitation and suppression. The great transformation that Polanyi described as a historical or *diachronical* process has, as we now can see, a *synchronical* complement that is *internal* to modern capitalism. This change of perspectives is important because the synchronical, or internal, transformation does not simply *replace* the embedded social order of the past with the dis-embedded functional

³⁶ K. Marx, *Capital*, Chapter VI, note 15 *supra*. The distinction between *external* and an *internal* transformation marks the methodological difference of a Marxian approach of critical theory and Polanyi's more conservative cultural criticism. Even though Polanyi does not simply argue for a regressive re-embedding of the economy (I follow here an interpretation of Polanyi that Andrew Arato developed in the discussion of an earlier version of this chapter), he is not able to develop an immanent criticism of modern capitalism, and that is the great advance of the stubborn Hegelian method of Marx, who can draw a systematic distinction of external and internal transformation, and then can ground the critique of capitalism on structural conditions that are exclusively modern.

³⁷ Marx always analyses these pre-suppositions as *legal pre-suppositions*, belonging to the *objective spirit* of the *bourgeois* society; see K. Marx, “Zur Judenfrage”, in: I. Fetscher (ed), *I Studienausgabe: Philosophie*, (Frankfurt aM: Fischer, 1966); K. Marx, “Die Bourgeoisie und die Konterrevolution”, (1848) *Neue Rheinische Zeitung*, MEW 6, (Berlin: Dietz, 1982), p. 108 *et seq.*

³⁸ See N. Luhmann, *Grundrechte als Institution*, (Berlin: Duncker & Humblot, 1965).

³⁹ Proletarian class consciousness (see Lukács, note 33 *supra*) can therefore be defined as the insight of the *negative Sittlichkeit* of bourgeois society as a whole.

system of the present. In contrast, it shows that this replacement does not work, because it now produces a *social antagonism* between the two ends of the economic process: dead and living labour.

The advanced reproduction of capital (dead labour) *cannot get rid* of its “living negation” (Marx). Living labour cannot be externalised and pushed aside in the systems *environment* because it is the “material basis” (Marx) of economic autopoiesis. This material basis of labour consists of nothing else than the *normatively-structured lifeworld* of the labourer. The “hiding” does not kill him, and his original timidity does not silence his “sense of injustice” (Barrington Moore).⁴⁰ Now, under completely *new* conditions of life, with *newly invented* associations, and *new* public forms of political articulation, intervention and competition, the labourers must cope with their lives, fight for their rights, and constitute themselves *as a social class* that stands in a conflicting relationship with the ruling social class of modern capitalism.⁴¹

However, the constitution and the organisation of a suppressed social class *as a class that fights injustice* can only occur in the *unspecialised totality* of a *socially inclusive public sphere* which is *omnicompetent* at least with regard to political talk. In contrast to functional systems, the public sphere is constituted not by capital-oriented conflicts (such as industrial capitalists *versus* factory workers) and the central economic organisations (such as business companies) *but by state-oriented conflicts* and the *organisation of the state* that is *public from the outset* (see Section V.2 *infra*). Furthermore, the new associations of workers (and other collective actors) have historical conditions which offer them the possibility of going far beyond the industrial system of the economy, as we will see (Section V.3. *infra*). Marx neglected a couple of *non-economic pre-conditions* for the making of the working class

⁴⁰ The negative *sense of injustice* is prior to the affirmative “sense of justice” (Rawls). Rights stem from wrongs, and justice from injustice, and not the other (right wing Hegelian) way around. The “experience of injustice” is prior the “conscious of the laws of equality”, everything else is already ideology (J. Piaget, *Das moralische Urteil beim Kinde*, (Frankfurt aM: Suhrkamp Verlag, 1973), p. 311, my translation).

⁴¹ See E.P. Thompson, *The Making of the English Working Class*, (New York: Vintage, 1966); see B. Moore, note 15 *supra*. Marx and Engels had already observed the specific modern conditions for new forms of association and public discourse in *The Communist Manifesto*, which itself addressed “the whole world” (which still meant mainly Europe): The “steam navigation, railways, electric telegraphs”, the emergence of a “world literature”. The new media of communication (railway, telegraph), and the new forms of the public sphere (world literature) were the conditions for the completely new “organisation of the proletarians into a class, and, consequently, into a political party”, and for the attainment of a “union” of the “modern proletarian” within a “few years” (<http://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch01.htm#007>).

(Section V *infra*).⁴² But before I come back to this problem, two more remarks on both the similarities and the differences between critical theory and systems theory are necessary.

III. THE PRICE OF ELEGANCE

Because systems theory *categorically* relies on the *abstraction from the sense of injustice* (that is constitutive for the language of social actors) – systems theory must completely replace the *normative language* of suffering and injustice with the *technical language* of problem, risk, and catastrophe, which no longer need any translation into the normative language of social actors. From the methodological point of view of the functionalist *observer*, we can no longer take the social perspectives of winners or losers, of ruling or ruled classes, seriously. This perspective is useless for an observing system. Theory has neither a sense of justice, nor a sense of injustice. Theory relies on observation of objects, and not on the experience of the actors:

“*Das Subjekt ist kein Objekt. Was soll es also in der Theorie?*” (The subject is not an object, so, what the hell has it to do with theory?).⁴³ [Author’s translation]

There is – as in the methodology of Durkheim or Bourdieu – a complete break between the language of the observer and that of the participant.⁴⁴

Furthermore, for systems theory, modern society is a *functionally-differentiated* society that is *constituted* by the difference between the *system* and the *environment*. The totality of the society can be constructed as autopoiesis (self-referentially closed self-production) of a social system *vis-à-vis* an environment of organic and physical systems of nature. This kind of “systemic stabilisation of socially integrated groups” already marks the emergence of a specifically social evolution.⁴⁵ But only functionally-specialised systems are self-referentially closed *within a societal* environment (and not only *vis-à-vis* nature). There is a legal *order*, but no legal *system* before the closure of the system by a professionalised legal discourse.⁴⁶ There is an economic *order*, but no economic *system* before the

⁴² Thompson, note 41 *supra*.

⁴³ N. Luhmann, “Selbstthematisierung des Gesellschaftssystems. Über die Kategorie der Reflexion aus der Sicht der Systemtheorie”, (1973) 2 *Zeitschrift fuer Sozialforschung*, pp. 21-46, at 21.

⁴⁴ R. Celikates, *Kritik als soziale Praxis. Gesellschaftliche Selbstverstaendigung und kritische Theorie*, (Frankfurt aM: Campus, 2010).

⁴⁵ J. Habermas, note 18 *supra*; .For the importance of this “definition”, see A. Nassehi, *Der soziologische Diskurs der Moderne*, (Frankfurt aM: Suhrkamp Verlag, 2006).

⁴⁶ N. Luhmann, *Das Recht der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1993); for the origins in

implementation of the reflexive mechanism of a money-steered self-organisation of the three markets of money, real estate and labour.⁴⁷ Whereas *societal orders* are dependent upon the hierarchical structure of a stratified society, *functional social systems* are no longer *embedded* in any hierarchical order of social classes, or stratification.⁴⁸

But if we combine, the (1) *methodological* point of view of the scientific observer-system with (2) systems theory's basic *structural* distinction (the system *versus* the environment) and its (3) basic *evolutionary* distinction (segmented, centralised, hierarchical societies *versus* functionally-differentiated world society) – then, the relegation of *social differences, stratification and class rule* to the societal environment of modern society is a conceptually-determined consequence, drawn from the categorical framework of systems theory. This categorical decision is an elegant constructivist move to get rid of the problems of undemocratic class-rule, exploitation and blatant injustice *without simply denying them* (as the spin-doctors of neo-conservative capitalists do).⁴⁹

From an observer's perspective of system's theory, the semantics of the social problems of suppression and injustice must be described *as* problems not of *modern* society, but of the *stratified* society of the old-European *past*: social romanticism. Social problems, therefore, are no longer the basic problems of the *presence and future* of modern society,⁵⁰ and social problems are no longer societal problems, but are, instead, *environmental problems*, which belong to the cultural environment of functional systems. Just as nuclear waste contaminates our natural environment, so the humanistic language of the past, the outdated language of egalitarianism and solidarity, contaminates our semantic environment.⁵¹ Hence, the problem that is left for a functionally-differentiated society can no longer be the problem of how to overcome social inequality, injustice and exploitation. On the contrary, "we have to come to terms, once and for all, with a society without human happiness and, of

Twelfth and Thirteenth century canon law, see J.A. Brundage, *Medieval Canon Law*, (London: Longman, 1995); H.J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, (Cambridge MA: Harvard University Press, 1983).

⁴⁷ N. Luhmann, *Die Wirtschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1988); Marx, note 24 *supra*; K. Polanyi, note 14 *supra*.

⁴⁸ But this does not mean that they cannot be related internally to the emergence of new class-structures upon the basis of functional differentiation (see Section I and *infra*).

⁴⁹ "We may well recognize the hardships and the injustice of stratification, but this is no longer the main problem of society." (Luhmann, note 8 *supra*, p. 70).

⁵⁰ Luhmann, note 8 *supra*, p. 72 *et seq.*

⁵¹ On semantic contamination of the environment, see N. Luhmann, *Gesellschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1997).

course, without taste, without solidarity, without similarity of living conditions”.⁵² What we can do, instead, is the same as what we can do with all environmental problems, we can try to *neutralise the negative externalities of inequality, injustice and exploitation* for functionally-differentiated systems, and, having done that, forget about them, and let evolution take its course. And if social crisis returns at night, and, with it, all the nightmares of the stubbornly moral language not only of injustice, oppression and exploitation, but also of neglect, pollution and exclusion, we should not worry, because: “whoever that woman in your dreams is, it is not your mother”.

This says nothing against the methodological and categorical preliminary decision of systems theory. You can take such a decision, and then see how your categories work, how they fit to the facts, or, at least, whether they enable progressive research programmes.⁵³ But one must see that the elegance of systems theory, its *holistic empiricism à la Quine*, thus, the construction of everything out of *one single categorical distinction* (system *versus* environment) alone, has to pay a price. System theory can no longer take the possibility of other potential constituencies of society than that of systems and environments into account. It can no longer pose the empirically important question of *whether* the woman in our dreams is our mother or not. To be able to take the possibility of *other* potential constituencies of society into account, the much less elegant conceptual attempt of Habermas, that of combining the distinction between *system* and *environment* with that between *system* and *lifeworld* in this respect (and despite its often criticised shortcomings), has considerable advantages.

IV. POLLUTION AND INJUSTICE

In contrast to the paradigm of risk, the basic idea of Marx’ theory of crisis was that *social class formation* is based upon the *individualisation* that is caused by *functional differentiation*.⁵⁴ But he never considered other sources of individualisation than the economic dis-embedment of the individual, and he only considered the functional

⁵² Luhmann, note 8 *supra*, p. 70.

⁵³ I. Lakatos, *The Methodology of Scientific Research Programmes*, (Cambridge: Cambridge University Press, 1977).

⁵⁴ Thus, individualisation is not - as Beck and Giddens - presume a new phenomenon of a “second” modernity, but is already pre-supposed for the making of the modern working class. In contrast to the members of stratified casts, feudal classes, or estates, the members of the modern working class do not belong night and day, with body and soul, with “teeth, tongues and so on” (Luhmann), and over series of generations, to one single social class. See N. Luhmann, “Interpenetration – Zum Verhältnis personaler und sozialer Systeme”, (1977) 1 *Zeitschrift für Soziologie*, pp. 62-76, at 68.

differentiation of the economy, and never thought of *generalising* this path-breaking insight and of comparing economic class formation with similar processes, related to other functional systems (see Section V *infra*). Nonetheless, the general thesis that we can draw from Marx' political economy is that a new kind of class rule (which goes far beyond pre-modern stratification) emerges *necessarily* from functional differentiation, at least, as long as it is not regulated and institutionalised appropriately in a way that is in accordance with individual and collective self-determination, and, hence, is democratic.⁵⁵

Undoubtedly, Luhmann has a strong point against Marx and critical theory. The problems, risks and catastrophes which emerge at the difference of system and the environment: pollution, global warming, systemic collisions,⁵⁶ and societal exclusion are as old as modern society, and they *are not solved once the social problems of social injustice and economic exploitation, undemocratic class rule and political oppression are solved*. The latter thesis is due to Marx' philosophy of history, and is simply wrong, and, indeed, outdated. As the grand experiments with bureaucratic socialism as well as with democratic social welfare regimes have proved, the problems of functional differentiation, of the bifurcation of the system and the environment, of alienation, commodification and bureaucratisation, of pollution and exclusion cannot be solved at a stroke with the, presumably, one and only central social conflict, the conflict of capital and labour. On the contrary, both communist dictatorships *and* democratic welfare states have increased these problems, risks and catastrophes considerably.

On the other hand, Luhmanns radical argumentation that the social conflicts of modern society are irrelevant for the solution of (nearly unsolvable) environmental problems is untenable. Even if it can happen, and sometimes does happen, that normatively-justified solutions produce objectively counter-productive or even disastrous effects, this does not mean that coming to terms, once and for all, with a society without solidarity is already the solution. At best, it is as one-sided as the Marxian one. Some Communist Parties have tried it

⁵⁵ The radical democratic roots and implications of Marx theory of society were for long time obscured and repressed by the orthodox Party-Marxists as well as by utopian Western Marxists, with rare exceptions as in the works of Austro-Marxists and the independent leftist young lawyers of the Weimar Republic, such as Franz Neumann, Otto Kirchheimer and Ernst Fraenkel. Only now are the first signs of a new and revisionist reception and interpretation emerging; see S. Marks, *The Riddle of All Constitutions*, (Oxford: Oxford University Press, 2003); H. Brunkhorst, *Karl Marx - Der achtzehnte Brumaire des Louis Bonaparte - Kommentar von Hauke Brunkhorst*, (Frankfurt aM: Suhrkamp Verlag, 2007).

⁵⁶ A. Fischer-Lescano & G. Teubner, *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts*, (Frankfurt aM: Suhrkamp Verlag, 2006).

already. They have replaced normative solutions with technical ones, with disastrous effects for the moral infrastructure of society, which even seemed to be worse than the environmental catastrophes. It makes no crucial difference if we replace socialism without a human face with “capitalism without a human face” (Žižek). But one can keep a radical egalitarian perspective and take the (old Hegelian) argument that normatively-justified solutions can have disastrous effects, which are serious, without abandoning radical egalitarianism, and Rawls’ *difference principle* of justice is just one example of how to do this.⁵⁷

The exclusion of probably 30 million people in the United States alone (I take here the number of people without health care as a rough indicator) is not only and not primarily an *environmental problem of functional integration*, but it is also a *moral scandal* that jeopardises the *normative and social integration* of the American regional society, and brings American democracy to the edge. The same with neglect: neglect infringes upon our sense of injustice, and again endangers *normative and social integration*. Even pollution is not only a technical, but also a moral and ethical, problem, and is part of the process of capital accumulation that permanently transforms living labour and its natural substrate into dead labour.

Even if the environmental problems of societal exclusion, systemic collision, and ecological catastrophes cannot be reduced to class conflicts and capitalist relations of production, they are still *mediated by the hegemony of powerful class-interests*, by the *comprehensive* (and not just functional or system-specific) *social relations of the winners and losers* of neo-conservative globalisation and free-market competition. These social class-interests are neither simply irritations from the environment of modern society, nor can they be reduced to the *specific* problems of the respective functional system. They are still based upon *overall interests* and pose *overall conflicts* because they still have to be enforced and solved within the *public sphere*. In the public sphere, it comes to the fore that, in a lot of crucial cases, the *technical* and *objective* (*sachliche*) solutions of environmental problems are structurally-mediated by the outcome of *social* class conflicts.

It is *not accidentally* that those US-Americans who fight social and political class struggles top-down, who fight against health care for 30 million formerly excluded people

⁵⁷ J. Rawls, *Theory of Justice*, (Cambridge MA: Harvard University Press, 1971). Habermas’ discourse theory of justice is another one.

(because they want to maintain their hegemony and control of state-power, and keep the profits of the insurance companies high) are fighting not only for stable and lasting *social injustice*, for lower taxes for the rich and market de-regulation for Wall Street, but against any attempt to reduce global warming, environmental pollution and the rate of excluded surplus-populations. Backed by powerful propaganda machinery, and equipped with endless resources of money, they are fighting for the *interests of the ruling classes on both fronts*: (1) at the *social border* that separates the upper- and the under-classes, *and* (2) at the *environmental border* that separates system and environment. “I always remind people from outside our state that there’s plenty of room for all Alaska’s animals – right next to the mashed potatoes.” (Sarah Palin). Social class conflicts and the differentiation of system and environment are still deeply inter-twined. Thus, Marx and Adorno, Lukács and Habermas, Marcuse and Žižek were all right to insist that there is *no socially-neutral and socially-unmediated functional differentiation of system and environment*, and that problems of pollution, exclusion and commodification cannot be detached from social class-structures and class-struggles (as the conservatives of all kinds have tried to demonstrate again and again, but have, nonetheless, failed).

V. SOCIAL CLASS CONFLICTS

Marx not only failed with his one-dimensional progressivism, but also with his proposition that there is only *one* central and overarching class conflict in modern society, the conflict of capital and labour. In his historical writings, Marx had already admitted that there are more than two social classes emerging from the structure of the economic system, and that revolutions usually need coalitions of several classes, at least, if they are to succeed.⁵⁸

But there are not only *capital-oriented conflicts* (Section V.1.), but also *state-oriented conflicts* (Section V.2.), *belief-oriented conflicts* (Section V.3), and other structural conflicts between whole classes of people (as the new conflict between included and excluded populations). They are internally related to the societal structures of *functional differentiation*, *state-formation* and *individualisation*. *State-formation* is due to the functional differentiation of the political system, *and* to the formation of an unspecialised public sphere (Section V.2.). *Individualisation* has already been a corollary to the early *functional differentiation of the legal system* since the Twelfth century, which was the pre-supposition of the functional differentiation of the economy and political power: no modern capitalism

⁵⁸ Brunkhorst, note 55 *supra*.

without the legal institutionalisation of private property, no modern state without a professionalised system of positive law (Section V.3). However, the *exclusion* of surplus-populations from nearly all access to functionally-specialised institutions is a new phenomenon that seems to be due to the *crisis of the national state* and the constitutional differentiation and structural coupling of law, politics and the economy in the course of globalisation (Section V.4). The *unity* of these different kinds of basic social conflicts of modern society lies in their *performance in the public sphere*, and the fights of social groups or classes (collective actors) for or against the *public law* that constitutes the *modern public as a non-specialised and comprehensive institution*.

V.1. CAPITAL-ORIENTED CONFLICTS

Antagonistic class conflicts are – as we have already seen (Section I) – caused by the functional differentiation of the economy. Tilly calls them *capital-oriented conflicts*,⁵⁹ such as the conflicts between:

- a) *capital* and *labour*, factory workers and industrial capitalists;
- b) landed aristocracy (or rural *bourgeoisie*) and peasants;
- c) the classes of the *urban centre* (industrial capitalists, factory workers) and the classes of the *rural periphery* (landed aristocracy, rural *bourgeoisie*, peasants);⁶⁰ and, finally,
- d) among “competitors within the same markets – markets for goods, markets for labour, markets for capital itself”.⁶¹

In cases of conflict, all kinds of coalitions between (a) and (d) are feasible, and all of them can lead to different political and social outcomes.⁶² Yet, the complexity of modern class structures and collective cleavages increase enormously when we take into account the fact that there are also other kinds of social class- or group-constellations and other conflicts that are as internal to the societal structure of modern society as the capital-oriented conflicts.

⁵⁹ C. Tilly, *European Revolutions 1492-1992*, (Oxford, Blackwell Publishing, 1995), p. 38.

⁶⁰ *Ibid.*, p. 49 Classical analysis in K. Marx, *Der 18. Brumaire des Louis Bonaparte*, (1852).

⁶¹ Tilly, note 59 *supra*, p. 38.

⁶² To take the whole spectrum of social class conflicts which are constitutive for a functionally differentiated economy, into account, Polanyi's model of three dis-embedded markets fits better than Marx more idealised focus on the labour market. On diverse formations of coalitions, see Tilly, note 59 *supra*.

V.2. STATE-ORIENTED CONFLICTS

The central organisation of the political system, the state, is – in the same way as the economically central organisations of capitalist enterprises, of factories and banks, industrial concerns and trading firms – the focus of structural conflicts. Tilly describes them as *state-oriented conflicts*.⁶³ Whereas *capital-oriented conflicts* such as that of capital and labour are caused by the functional differentiation of the *market-economy*, *state-oriented conflicts* are caused by the functional differentiation of a reflexive, power-steered political system. In a similar way as the *dis-embedding of economy* led to the alienation and privatisation of societal labour, the *dis-embedding of politics* from the dense normative networks and the communal life of comprehensive church-corporations, rural estates and urban self-government led to a “great transformation” (Polanyi) that consisted of the *alienation of political power* from its *public roots* in the *political life of citizens*.⁶⁴ In the stratified society, people regularly comprised the totality of their lives with “teeth, tongues and so on”⁶⁵ to the respective corporations, guilds and estates into which they were born: one is born to a specific estate, grows up within its boundaries, marries or is married within it, works within it, lives in its special neighbourhoods, and is buried in its cemeteries, and, with bad luck, one is even a feudal serf or enslaved with “tongue and teeth” – whereas in a functionally-differentiated society, he or she can study in the rooms of the university but not move in with his or her whole family, open a shop, stay there after retirement, *etc.*

In the same way as the autopoietic closure of economic circulation is not possible without the transformation of living labour into dead labour, the autopoietic closure of political power circulation is *not possible without* the transformation of the *living power of the people* (“*der lebendigen Macht des Volkes*” – as Arendt says) into the *dead power of administrative coercion-wielding*.⁶⁶ In the same way as money can make more money only by subsuming the living labour force under the regime of formal organisations such as enterprises and firms – *coercive power can engender more coercive power* only by

⁶³ On the distinction capital- versus state-oriented conflicts: see Tilly, note 59 *supra*, p. 36 *et seq.*

⁶⁴ This at least was a permanent complaint of the intellectuals of Eighteenth century enlightenment; see, only as one famous example among thousands of others, the contra-position of *aesthetischer* versus *Maschinenstaat*, in: F. Schiller, *Briefe über die ästhetische Erziehung des Menschen*, (1795).

⁶⁵ N. Luhmann, note 54 *supra*, p. 68.

⁶⁶ H. Arendt, *Macht und Gewalt*, (Munich: Beck, 1970), p. 42.

subsuming the living power of the people under the regime of formal organisations such as states.⁶⁷

The systemic and highly-productive solution of the paradox of the self-referentially organised accumulation of coercive and administrative power *by* means of coercive and administrative power presents us with a new kind of cleavage between social groups or classes when we reach the *public sphere of the state*. Those who are *in control* of the coercive and administrative apparatus are opposed to the vast majority of the *others who are under their control*. The transformation of the *living power of the people* into the *dead power of administrative coercion* wielding was, and still is, in growing need of the many bodies of the people – not for an economically-profitable “hiding” (Marx), but for power-increasing mass slaughter: the performance of *ever more expensive wars* is closely-connected to the collection of *ever more taxes from ever more people*. It is for this very material reason that the state erects a never-before-experienced, comprehensive and intense regime of *disciplinary power* both over and between the people.⁶⁸ However, Foucault was not the first, here, as the Parliamentary Committee of 1819 had already seen, in Bentham’s famous proposal for a Ministry of Police, “a plan which would make every servant of every house a spy of the actions of his master, and all classes of society spies on each other”.⁶⁹

The statist transformation of living into dead power caused from the beginning:

- a) a structural conflict between the *controlling political class of wielders of power* (composed of officials, lawyers, professionals, physicians, notaries, merchants, and other *bourgeois* elements) and the *controlled people*, the vast majority of the nation; and
- b) the *competition of states with other governments* both inside and outside their territory (including wars of all kind).⁷⁰

⁶⁷ The transformation of living into dead power is the great topic of the enlightened critique of statist alienation and reification, paradigmatically: see Schiller, note 64 *supra*.

⁶⁸ See P.S. Gorski, *The Disciplinary Revolution. Calvinism and the Rise of the State in Early Modern Europe*, (Chicago IL: University of Chicago Press, 2003); C. Tilly, *Coercion, Capital, and European States, AD 990-1990*, (Cambridge MA: Basil Blackwell, 1990), p. 63 & 103 *et seq*; A. Lüdtkke, “Genesis und Durchsetzung des modernen Staates”, (1980) 20 *Archiv für Sozialgeschichte*, pp. 470-491; M. Foucault, *Überwachen und Strafen*, (Frankfurt aM: Suhrkamp Verlag, 1994); *idem*, *Gouvernementalität*, (Frankfurt aM: Suhrkamp Verlag, 2000).

⁶⁹ Thompson, note 41 *supra*, p. 82.

⁷⁰ See Tilly, note 59 *supra*, p. 37, 169 & 171; *idem*, note 69 *supra*, p. 111 & 113; *idem*, *Democracy*,

The *political class in control* is often, at least partly, identical to that of the *economic ruling class*, but is also equipped with a *different* and regularly competing, sometimes antagonistic, *political class-interest*, which articulates the “interest of the state in itself” (Claus Offe), which strives for its self-realisation with or against the urban capitalists (or the landed aristocracy), for or against the people, together with other nations, or against them. The same is true of the *have-nots* of political power, the people. In spite of the large extent to which the *working class* and the *nation* overlap, the specific interests of the nation are (at least partly) *different* from, and sometimes in contradiction with, the interests of the working class (and its different segments). Though they belong to a particular nation, at the same time, they have, more or less, the same interests as or similar interests to the working classes of other nations. As members of the nation, they share the national interest of self-preservation, and even of imperial expansion. As members of the working class, they share the interest in the abolition of social injustice and exploitation internationally. This was one of the tragedies of 1914.

V.3. CLASS STRUGGLE AND PUBLIC LEARNING

If we take all these very different social group-conflicts and class-conflicts together, one can say that The Communist Manifesto was basically right – even if nothing can be said about the direction that history takes. Class struggles can lead to self-destruction, imperialism, the emancipation of oppressed majorities, to democracy as well as to dictatorship, to successful learning-processes as well as to learning-processes with deadly outcomes, to learning and to unlearning, as we know from history.⁷¹ But, and here Marx and Engels were profoundly right, *history is the history of class-struggles*, and the path-breaking, world-disclosing insight of this (rightly so) most famous first sentence of *The Communist Manifesto*⁷² is that the dependent sub-, under- and lower classes always play an *active and decisive part in history*, and, in particular, in modern times. They are not simply the objects of the manipulative will of higher classes (the *many* or the *multitude* of classical political philosophy), but are, instead, themselves the very subjects of history, and always were.⁷³ This was anticipated first by Jewish and Christian prophetic ideology, then by the theories of popular sovereignty in the

(Cambridge-New York: Cambridge University Press, 2007), p. XII, p. 80 *et seq.*, & 204.

⁷¹ See J. Habermas, “Historisches zur Organisationsfrage”, in: *idem, Theorie und Praxis*, (Frankfurt aM: Suhrkamp Verlag, 1971).

⁷² “The history of all hitherto existing society is the history of class struggles”, K. Marx & Friedrich Engels, *The Communist Manifesto*, (Harmondsworth: Penguin Books, 1967), p. 79.

⁷³ See E.P. Thompson, note 41 *supra*, p. 12 & 63 *et seq.*

Eighteenth century, but was never related to social class-conflicts which are actually caused by the systemic structure of society. Only after the class-centred, *bourgeois* outcome of the French Revolution became clear to everybody, did “utopian egalitarianism and democratic values” emerge among the plebeian classes of the society.⁷⁴ *Class struggle* is the very *medium of normative learning processes* which lead to the invention of new institutional frameworks, new relations of understanding and production. When class-struggle is suppressed (as in archaic societies, despotic regimes or modern so-called “real socialism”), no learning is possible.⁷⁵ Where class-struggle is enabled by (still élitist) constitutional arrangements as occurred in the wake of the *bourgeois* revolutions of the late Eighteenth century, egalitarianism and democracy were finally added to the constitutional regimes already designed in the revolutions of the Eighteenth century, but they were invented only after the successful *bourgeois* revolutions, and against their *bourgeois* content, and only after further constitutional revolutions.⁷⁶ It is precisely this *real movement of history* (“*wirkliche Bewegung der Geschichte*”) that Marx and Engels articulate in the first sentence of *The Communist Manifesto*.⁷⁷

The still decisive role of class struggles in history indicates that social differences cannot be structurally determined by functional differentiation alone, as system theory presupposes. They are not simply a function of their respective specialised social systems, and therefore “just trivial” (Luhmann). Even if class-differences and class-struggles are engendered, shaped and tightened by *functional differentiation*, even if they fulfil a stabilising function within their respective systems,⁷⁸ they cannot be reduced to this function. This is so because social differentiation and class-conflicts are not only an *objective* (“*sachliches*”) product of functional differentiation, but also a *social* product of deeply unjust *alienation*, suppressing *reification*, and usurping and coercive *dis-embedding* processes which can be, and are, *articulated publicly by the affected actors themselves*.

With their public actions, “ordinary people” raise issues which they “regard as socially unfair”, articulate their sense of injustice, and make the repressed memory of the

⁷⁴ *Ibid.*, p. 13.

⁷⁵ K. Eder, “Collective Learning Processes”, note 20 *supra*; *idem*, “Learning and the Evolution of Social Systems”, note 20 *supra*.

⁷⁶ B. Ackerman, *We The People*, (Cambridge MA: Harvard University Press, 1993).

⁷⁷ K. Marx & F. Engels, *Deutsche Ideologie*, (1846).

⁷⁸ Stichweh, note 13 *supra*.

darker legacies of functional differentiation become aware and alive again.⁷⁹ These darker legacies are, due to the real abstractions of capitalism, substantially irrelevant, but normatively significant. If the expropriated workers, or the oppressed people, express their “rejection of suffering and oppression”, if they say something like “Workers of the world, unite!”, “A fair day’s pay for a fair day’s work!”, “Land to the tillers!”, “Liberty, Equality, Fraternity!”⁸⁰ – then they try to set *normative limits* to the “hiding” and “slaughtering”, to the transformation of their living labour and their living power into the dead labour of capital and the dead power of the state administration. Once suppressed classes or people *articulate their sense of injustice in the universalising medium of public will formation*, they *sublate their alienation and break up their reification* immediately.⁸¹ They act as collective actors beyond the particular constraints of functional systems, and *this* gives them (sometimes) the power to change their own society and to found new institutions.

Successful revolutions are still the most impressive proof of this, although they are not the only one.⁸² Stubborn reformism can have the same effect, as Marx had already observed when he described the struggles for the ten hours bill as the active transformation of the working class from a functionally-reduced *economic class* “in itself” (with a stabilising function) into a politically-organised class “in and for itself” (with a revolutionary option to change history).⁸³ Economically-functional stratification is transformed into *political class-struggle*, which matters for the structural change of the totality when the workers themselves switch from *economic* negotiations, insurgencies and revolts against the bread prices and the shop keepers, and Luddites against new machinery and technology, and from struggles for lower prices and better employment agreements to *political* campaigns for parliamentary legislation, for the ten hours bill.⁸⁴

⁷⁹ B. Moore, note 15 *supra*, p. 47.

⁸⁰ *Ibid.*, p. 81.

⁸¹ Already an insight of Lukács, note 4 *supra*, further developed in: J. Habermas, *Strukturwandel der Öffentlichkeit*, (Frankfurt aM: Suhrkamp Verlag, 1990); J. Habermas, *Erkenntnis und Interesse*, (Frankfurt aM: Suhrkamp Verlag, 1968); *idem*, note 18 *supra*.

⁸² Tilly, note 59 *supra*.

⁸³ K. Marx, note 15 *supra*, p. 294 *et seq.*, p. 315 *et seq.* The obvious association of the marxist distinction of economic and political class struggle with the Hegelian distinction of a consciousness “in itself” and “for itself” stems – if I see it correctly – from Lukács, note 4 *supra*.

⁸⁴ K. Marx, “Brief an Friedrich Bolte v. 23. Nov. 1871”, in: *Marx-Engels-Werkausgabe* MEW 33, (Berlin: Dietz, 1973), p. 332: “Z.B. der Versuch, in einer einzelnen Fabrik oder auch in einem einzelnen Gewerk, (...) von den Kapitalisten eine Beschränkung der Arbeitszeit zu erzwingen, ist eine rein ökonomische

State-oriented class conflicts between the *haves* and *have-nots* of coercive power are in the same way both *caused* and *shaped* by functional differentiation like the capital-oriented class-conflicts between the economic *haves* and *have-nots*. But *all* these conflicts, capital-oriented as well as state-oriented conflicts, must finally be *fought out in the public medium of understanding*, which is *the same for everybody*, and under, with and against *the public law* that binds *everybody equally*. It is this internal relation to the *public sphere* and *public law* that distinguishes *statist organisations* categorically from *economic organisations*. A state is not a business concern, even if neo-conservative social-democrats and Greens have forgotten this message in the meantime. A state is not a business concern *because* it is not only the central organisation of the political system (Luhmann), but also (in a way) *of the whole society*, and the same is true of the co-operatively entangled global systems of states and international organisations today (see Sections VI and VII). If they could not appeal to a *common public sphere* and a *common public law* – economic social classes as well as political social classes or religious social groups and their associations, unions and parties would not be able to organise, could not even articulate their ideal and material interests, and could not (as they *do* every day) form *any* kind of coalition between themselves.

Things become even more complex if we take not only the two *functional systems* of *politics* and *economy*, and the *public institution of the state*, but also the antagonistic tightening of belief-oriented conflicts and the individualising consequences of the functional differentiation of law into account.

V.4. BELIEF-ORIENTED CONFLICTS

Religion- or belief-oriented conflicts are a third category of the structural conflicts of modern society.⁸⁵ They are originally caused by the strong individualising and emancipatory effects of the *functional differentiation* of the *legal system*.

The functional-differentiation and self-referential closure of the legal system originates from the *academic professionalisation* of law and the invention of a *centralised*

Bewegung, ein Achtstunden- etc. *Gesetz zu erzwingen, ist eine politische Bewegung.*” See S. Hall, “The ‘Political’ and the ‘Economic’ in Marx’s Theory”, in: A. Hunt (ed), *Class and Class Structure*, (London: Lawrence & Wishart, 1977), pp. 15-60, at 36 *et seq.*

⁸⁵ Tilly focuses his works on the emergence of the modern state to the accumulation of capital and coercive power in cities and territorial states. This ties his studies to material interests, and neglects one of the main causes of revolutions and state formation: the formation of ideal interests from religious sources. Furthermore, Tilly completely neglects the evolution of the legal system (rightly criticised by H.J. Berman, “European Revolutions, 1492-1992 by Charles Tilly”, (1994) 3 *Contemporary Sociology*, pp. 337-338. What I try to do here, categorically speaking, is to combine Tilly’s incredibly useful actor-model of state-formation with the categories of rationalisation and system, which take both religion and law into account.

system of courts during the Twelfth and Thirteenth centuries.⁸⁶ Law was transformed from a legal order into a legal system.⁸⁷ For the first time in Europe, a “legal culture that interpenetrated and regulated the entire societal life” emerged.⁸⁸ This new and professionalised legal culture changed the law from a mere instrument of the co-ordination of the interests of the imperial ruling classes and the repression of the ruled classes and peoples (as in ancient Roman law) into a double-edged instrument of *repression and emancipation*: an instrument that served *not only* the interests of the ruling classes (and was more effective than any earlier legal order⁸⁹), *but also* that of the expropriated and oppressed classes of society, and was designed to *change and improve* the secular world.⁹⁰

The functional-differentiation of law had a strong *individualising* effect on a society that was still organised by the *primacy of stratification*.⁹¹ It invented strong elements of *organic solidarity* into a society, which, in its basic structure, was still *organised by mechanic solidarity*.⁹² The *legal system* functioned – and this is characteristic for the (Western?) evolution of modern societies, albeit only under certain conditions: especially of the effective expropriation of the peasants and the production of a steady agrarian surplus product⁹³ – as a *trigger and trajectory for all further evolutionary steps on the road to fully-fledged*

⁸⁶ On the *professionalisation* of the legal system between 1130 und 1239 AD, see J.A. Brundage, “The Rise of the Professional Jurist in the Thirteenth Century”, (1994) 20 *Syracuse Journal of International Law and Commerce*, pp. 185-190; J. Fried, *Die Entstehung des Juristenstands im 12. Jahrhundert*, (Cologne: Böhlau, 1974); see, generally on the emergence of the first *modern legal system* that was the system of canon law, H.J. Berman, note 46 *supra*.

⁸⁷ *Ibid.*, p. 129.

⁸⁸ N. Luhmann, *Das Recht der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1993), p. 25.

⁸⁹ R.I. Moore, *First European Revolution*, (Oxford: Blackwell Publishing, 2000). On the dialectical development of modern law, see H. Brunkhorst, “Dialectical snares: human rights and democracy in the world society”, (2009) 2 *Ethics & Global Politics*, pp. 219-239.

⁹⁰ See H. Brunkhorst, *Solidarity. From Civic Friendship to a Global Legal Community*, (Cambridge MA-London: The MIT Press, 2005), p. 23 *et seq.*

⁹¹ J. Fried, *Das Mittelalter. Geschichte und Kultur*, (Munich: Beck, 2009); P. Landau, “Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien”, in: Heinrich Scholler (ed), *Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien*, pp. 23-47; P. Landau, “Die Anfänge der Unterscheidung von *Ius Publicum* und *Ius Privatum* in der Geschichte des kanonischen Rechts”, in: Gert Melville & Peter von Moos (eds), *Das Öffentliche und Private in der Vormoderne*, (Cologne: Böhlau, 1998), p. 629-638; P. Landau, “Reflexionen über Grundrechte der Person in der Geschichte des kanonischen Rechts”, in: H.J.F. Reinhardt (ed), *Theologica et Ius Canonicum*, (Essen: Ludgerus-Verlag, 1995), pp. 517-532.

⁹² É. Durkheim (1893), *De la division du travail social*, available at: http://classiques.uqac.ca/classiques/Durkheim_emile/division_du_travail/division_travail_1.pdf, (with further links).

⁹³ R.I. Moore, note 89 *supra*, quoted from the German translation: *idem*, *Die Erste Europäische Revolution*, (Munich: Beck, 2001), p. 72 *et seq.*, & p. 89 *et seq.*

*functional-differentiation and post-traditional relations of understanding*⁹⁴ (for example, democratic constitutional regimes).

The “sturdy individualism” of medieval jurists of commercial law led to an early modern concept of “private property rights (...). In property matters medieval jurists were staunchly on the side of individual proprietors (...). Both canonists and civilians, in addition, zealously defended the rights of property owners against efforts by public authorities to expropriate their wealth through taxation or by any other means”.⁹⁵ The differentiation of a legal system was further based upon an considerable development of *equal individual rights*, and, in particular, of such rights for *all* children (legal equality for legitimate *and* illegitimate children concerning care, education, the responsibility of the father, *etc.*) and (Christian) women (the abolition of forced and arranged marriage, marriage by reciprocal consent).⁹⁶ Natural law which had, for a long time, defined men descriptively (and without any normative meaning) as naturally free was now *reloaded with a normative legal meaning*.⁹⁷ The general concept of *individual autonomy* became a fundamental legal principle.⁹⁸

Together with the corporative autonomy of the church (“Freedom for the Church!” was the most popular slogan during the Papal Revolution 1075-1122), a completely new and individualised legal freedom of corporation was introduced, which allowed for the foundation of more and more new corporations: universities, cities, monastic orders, professional associations, guilds and other forms of corporative self-organisation both outside and within the church (simply by contract between a minimum of 3 legal persons).⁹⁹ Furthermore, the *lex privata* (Gratian, C.19 q.2 c.2) was now used to grant membership in a monastery as an

⁹⁴ On the latter, see J. Habermas, note 18 *supra*.

⁹⁵ J.A. Brundage, note 46 *supra*, p. 80; see, already, M. Weber, *Religionssoziologie I*, (Tübingen: Mohr, 1978 (1920)), p. 56 *et seq.*

⁹⁶ C.J. Reid, “The Rights of Children in Medieval Canon Law”, in: *University of St. Thomas Legal Studies Research Paper Series 07-34*, Working Paper 2007, <http://papers.ssrn.com/abstract=1015403>, p. 26, & 29 *et seq.*; Brundage, note 46 *supra*, p. 165 *et seq.*; J. Fried, *Zu Gast im Mittelalter*, (Munich: Beck, 2007), p. 167; see, also, G. Le Bras, “Canon Law”, in: C.G. Crump & E.F. Jacob, *The Legacy of the Middle Ages*, (Oxford: Clarendon Press, 1926), pp. 321-363, at 346.

⁹⁷ L. Honnefelder, “Die ethische Rationalität des mittelalterlichen Naturrechts”, in: Wolfgang Schluchter (ed), *Max Webers Sicht des okzidentalens Christentums*, (Frankfurt aM: Suhrkamp Verlag, 1988), p. 267.

⁹⁸ *Ibid.*, p. 262, 267 *et seq.*, & 271; Fried, note 96 *supra*, p. 159 *et seq.*, 167 *et seq.*, & 170.

⁹⁹ M. Weber, *Wirtschaft und Gesellschaft*, (Cologne: Kiepenheuer 1964), p. 549 & 615 *et seq.*; Tilman Struve, *Staat und Gesellschaft im Mittelalter*, (Berlin: Dunker & Humblot, 2004), p. 14; Berman, note 46 *supra*, quoted from the German translation: *Recht und Revolution*, (Frankfurt: Suhrkamp Verlag, 1991), p. 351 *et seq.*, & 361 *et seq.*

individual right within the *ius publicum*. This even included a restricted right to resign from a clerical position (*renunciatio est voluntatis*).¹⁰⁰

From the beginning of the modern church state in the Twelfth century, a certain tension existed between the *compulsory membership* in feudal estates and the Catholic church on the one hand, and *individual and corporative rights of autonomy* on the other. During the crisis of the Fifteenth and Sixteenth centuries, corporative rights were used for the foundation of new Protestant sects and churches, and other kinds of *free associations*, private-public partnerships, *etc.*, (for example, the East Indian Companies). The *lex privata* was generalised to the “freedom of a Christian” (Luther), and, in particular, the *freedom of individual consciousness* was legally-constructed and professionally-differentiated (for judges, princes, scientists, citizens and legal subjects in general). The different notions of equal freedom and the freedom of the cities were re-interpreted for the first time as a *general human right* by rebellious peasants in 1525.¹⁰¹ In this way, the functional-differentiation of the legal system caused a lasting series of *belief-oriented conflicts* first between (a) believers and heretics (Twelfth century), then between (b) Catholics and Protestants (Sixteenth century), and later between (c) Christians and enlightened Deists (Eighteenth century), (d) religious people and atheists (Twentieth century), (e) fundamentalists and secular citizens (Twenty-first century), *etc.* The differentiation of the legal system de-fettered the potential for universal moral claims upon the basis of the individual consciousness alone, positioned the single individual human-being in an extremely *ex-centric position* (Plessner) *vis-à-vis* society as a whole,¹⁰² and enabled the foundation of all the new voluntary associations, corporations, Masonic Lodges, societies, political parties, federations, international organisations, clubs, NGOs, *etc.*, which exploded, for the first time, during the age of the Protestant revolutions in Germany, the Netherlands and England.¹⁰³

¹⁰⁰ Landau, note 91 *supra*, p. 633 *et seq.*, (with reference to the respective legal sources); E.-D. Hehl, “Krieg, Individualisierung und Staatlichkeit im ausgehenden 11. und 12. Jahrhundert”, in: K. Herbers (ed), *Europa an der Wende vom 11. zum 12. Jahrhundert*, (Stuttgart: Steiner, 2001), pp. 117-133, at 126.

¹⁰¹ P. Blickle, *Von der Leibeigenschaft zu den Menschenrechten. Eine Geschichte der Freiheit in Deutschland*, (Munich: Beck, 2003).

¹⁰² M. Weber, *Religionssoziologie I*, note 95 *supra*.

¹⁰³ J. Witte, *Law and Protestantism: The Legal Teachings of the Lutheran Reformation*, (Cambridge: Cambridge University Press, 2002); P.S. Gorski, note 68 *supra*; G. Griffiths, “The Revolutionary Character of the Revolt of the Netherlands”, (1960) 4 *Comparative Studies in Society and History*, pp. 452-472; H.J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition*, (Cambridge MA: Harvard University Press, 1983).

Here, again, all kinds of coalitions and inter-twinements increase the complexity of the social, political and religious/ideological basic conflicts of modern society. From the Protestant revolutions of the Sixteenth and Seventeenth centuries to the Iranian revolution of the Twentieth century, “claims for religious and political autonomy often coincide”.¹⁰⁴ The peasants combined social-class conflicts for freedom from serfdom with Protestant fundamentalism and an early democratic shift to popular Protestantism.¹⁰⁵ Calvinism regularly combined social-class conflicts, especially of the urban *bourgeoisie* with national autonomy as occurred in the Low Countries in the late Sixteenth century.¹⁰⁶ It was during the English Revolution that the English identified themselves, for the first time, as the predestined people of God, the paradigm of all later nationalistic coalitions of classes.¹⁰⁷ Successive religious groups played an important, if not constitutive, role not only in the American Revolution, but also on both sides of the social-class conflicts of the Nineteenth and Twentieth centuries, including the communism of brotherhood (which Weber calls *Liebeskommunismus*) and the atheistic beliefs of the Russian Bolsheviks and Anarchists. The making of the English working-class is a good example of the trajectory that leads from Calvinist “preaching” to proletarian and socialist “organisation”.¹⁰⁸

V.5. INTEGRATION-ORIENTED CONFLICTS

The social and political success of the national states depended on their ability to *exclude inequalities*.¹⁰⁹ The exclusion of inequalities is a *normative claim* which is reflected by a huge and still growing number of constitutional lists of human and civic rights, and many, more or less, effective legal programmes for their respective concretisation and implementation. On the other hand, the exclusion of inequalities is a *functional requirement* of highly-specialised social systems which are constituted by *open access* to the system because they are in need of a never ending stream of more and more variation and innovation.¹¹⁰ They are based upon the *partial* integration of everybody. Only then do they have a chance of coping with the selective pressure of the systems’ increasingly complex

¹⁰⁴ Tilly, note 59 *supra*, p. 47.

¹⁰⁵ Blickle, note 101 *supra*.

¹⁰⁶ Griffiths, note 103 *supra*, pp. 452-472, at 460 *et seq.*; Tilly, note 59 *supra*, p. 61 *et seq.* & 119.

¹⁰⁷ H.J. Berman, note 103 *supra*.

¹⁰⁸ Thompson, note 41 *supra*, p. 43.

¹⁰⁹ R. Stichweh, *Die Weltgesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 2000), p. 52.

¹¹⁰ H. Brunkhorst, note 90 *supra*, p. 81 *et seq.*

external and internal environment. Granting and producing sufficiently open access for everybody to all major social systems (such as education, the economy, law and politics) and the media of dissemination (such as newspapers, television, the internet), is one of the greatest evolutionary advances of mass-democratic regimes, especially in comparison with autocratic regimes, and hence, it is (or at least was in the past) a strong functional argument in favour of democracy.

Before the last great wave of globalisation, the exclusion of inequalities was restricted to the rich and powerful national states of Europe, Japan and North-America. The others from the “heart of darkness” (Joseph Conrad) were classified and treated either as objects of benevolent missionary, educational or developmental measures (for example, Asians), slave-work (for example, Africans) or extermination (for example, Native Americans, Jews, gypsies, Armenians, Palestinians). They were all excluded from equal treatment and equal access to the different functional and value spheres of modern society: “jurisdiction” for the civilised nations of Europe and “authority” for those in the heart of darkness.¹¹¹

However, since the revolutionary reforms of national and international law during and after World War II, *legal claims for a global exclusion of inequalities* were constructed, world society was *juridified* and even (in a way) *constitutionalised*.¹¹² Furthermore, during the last 60 years, all *functional systems* and *cultural spheres of value*, and the system of *national states* and *international organisations* were *globalised*, finally, after the fall of the Berlin wall in 1989. This increased the selective pressure for open access to all functional systems everywhere in the world, and led to an enormous increase in migration all around the globe. But, on the other hand, even if it is too early for a final judgement, it does, at least at present, seem that the *social and systemic integrative potential* of the now ubiquitously comparably modern world society does not suffice, either to guarantee equal access to everybody, or to open the systemic couplings (in particular of law, the economy and politics) at least far enough for the minimum of inclusion, variation and innovation that is needed for the autopoiesis of the respective systems. This insufficiency seems to lead to a *new constellation of inclusion and exclusion*, and a fourth structural social conflict between the

¹¹¹ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, (Cambridge: Cambridge University Press, 2001), 126.

¹¹² H. Brunkhorst, “Some Conceptual and Structural Problems of Global Cosmopolitanism”, in: R. Nickel (ed), *The Changing Role of Law in the Age of Supra- and Transnational Governance*, (Baden-Baden: Nomos, 2010, forthcoming).

included and excluded populations (Neves), or, roughly speaking, between *those who have access to the web and those who have not*: the haves and have-nots of the internet era (Castells).¹¹³

This dilemmatic development closely hangs together with the very logic of *systems integration*: complex social systems are constantly forced to expand, differentiate, form sub-systems, and re-construct new, inscrutable inner complexity.

“Operative closure produces irritating disturbance [German: *Unruhe*], and irritating disturbance produces operative closure.”¹¹⁴

Without irritating disturbance, the operative closure cannot continue, and the only source of this as a productive or as a destructive disturbance is the communicative productivity of human subjects – a source just as unpredictable and dangerous as it is necessary for the system. It cannot be produced by highly-specialised social systems themselves.¹¹⁵ Consequently, the rapid growth of complex systems inevitably leads to *problems in the social structure*. These are problems that systems cannot solve using their own means, but which, nonetheless, threaten their ability to function.

Heterarchically-structured functional systems pre-suppose, in the ideal case, the full inclusion of the population and a high level of individual productivity. The inclusion of a constantly-growing number of individually-produced, diverging, and unpredictable communicative actions is necessary for functional reasons if the constantly accelerating internal evolution of the sub-system is to continue. There is no equality of law if not enough people from *all* categories, classes, colours, religions, nationalities, *etc.*, of the population make use of the law. There is no equality of law if everybody (from everywhere) cannot (and, to a certain extent, does) sue everybody (from everywhere), and, without sufficient equality of law, the self-referential closure of the legal system finds itself in serious trouble and finally evolution fails, and is turned into devolution. Even if systems are robust enough to stand a

¹¹³ See M. Neves, *Verfassung und positives Recht in der peripheren Moderne*, (Berlin: Dunckel & Humblot, 1992); *idem*, “Zwischen Subintegration und Überintegration: Bürgerrechte nicht ernstgenommen”, in: (1999) 4 *Kritische Justiz*.

¹¹⁴ Luhmann, note 51 *supra*, p. 770.

¹¹⁵ This does not mean that the systems of science and economy would not spur the imagination, creating hypotheses and revealing market gaps (See Udo Di Fabio, *Offener Diskurs und geschlossene Systeme*, (Berlin: Duncker & Humblot, 1991), p. 173 *et seq.* fn 27). Exactly the opposite. But the subjects must fall out – precisely if one understands them, like Luhmann, or recently Dieter Henrich, *Versuch über Kunst und Leben*, (Munich: Hanser, 2001), 58, as autopoietic systems. And therein lies the problem.

high amount of damage for a certain time, there is always a limit that seems to be reached if the rates of over- and under-integrated people are as high as they were in Brazil at the turn of the century.¹¹⁶ The selection pressure weighing on the systems, forcing them, first, to reduce incessant environmental complexity by building up internal complexity and then to reduce its own overwhelming internal complexity through system-formation, can only be decreased through constantly growing variation. But variation increases with the number of, and individual productivity of, human individuals, who are included in functional systems via social roles, and only in this way can it meet the needs of each specific system for dissenting statements and forms of behaviour. When large segments of the population remain permanently excluded, function-specific operations run dry, for they depend on the reliable, large-scale distinction between assenting and dissenting voices, passing and failing tests, ownership and non-ownership, right and wrong. They become functionless. The media of communication – power, money, and law – lose their generalising force, political decisions are no longer generally binding, and the legal immunity system collapses. And if the number of active voters sinks below a certain percentage, democracy descends into crisis.

At the same time, in a fully-fledged functionally-differentiated world society, everybody depends existentially on effective participation in the achievements of the economy, transportation, law, politics, education, medicine, *etc.* There is no way out any longer. Nowhere. The “social bond” (Durkheim), which provides all persons equal access to the achievements of the functional systems on which they are dependent, must not be torn. Otherwise, when only a minority of the “over-integrated” participates in the game of highly-specialised communications, and a growing majority of the “under-integrated” (Neves) is denied access to political power, mechanisms for making legal claims, opportunities for consumption, work and profession, health care, *etc.*, expansion grinds to a halt and the flying system falls at full speed into reverse thrust. Variation subsides, the tempo of innovation slows down dramatically, the boundaries that separate the functional spheres from each other can no longer be stabilised, the structural coupling of law, politics and the economy decays, systems collapse and their well-ordered inner complexity is discharged into the diffuse and chaotic complexity of the world.

“Turning and turning in the widening gyre
The falcon cannot hear the falconer;

¹¹⁶ Neves, note 113 *supra*.

Things fall apart; the centre cannot hold;
 Mere anarchy is loosed upon the world,
 The blood-dimmed tide is loosed, and everywhere
 The ceremony of innocence is drowned;
 The best lack all conviction, while the worst
 Are full of passionate intensity.”¹¹⁷

The phenomena of regression and impoverishment, typical in former days for the (from a colonial perspective) so-called “developing countries”, can then be observed everywhere. An actual example can also be found in the financial crisis of 2008. Here, the “insiders” of the credit-bubbles were over-integrated, and the “outsiders” who had taken the mortgages were under-integrated, either as financial illiterates, or as “illegal” immigrants without documents, *etc.*

The first social consequences are the silent insurgencies of the Parisian and the global “*banlieue*”, the *class conflict between over-integrated and under-integrated populations*, between (a) the included in the *maximum security centres* of the big cities and the excluded in the *favelas, banlieues, etc.*; (b) those on the *cross-linked* and those on the *non-linked* side of the digital rift; and (c) those whose global mobility is *voluntary*: the cosmopolitanism of the few,¹¹⁸ and those whose global mobility is *involuntary*: global migration, the cosmopolitanism of the many – including those who stay at home and have to take the local consequences of global actions passively. Today, these kinds of class struggles are, in the main, still stuff for science-fiction films (or intellectual preaching as in Michael Hardt’s and Antonio Negri’s books on *Empire* and *Multitude*), but it may soon become the most important conflict of world society, in particular, if it is combined with economic crisis, religious fundamentalism, neo-nationalism and national liberation movements. But, even here, there are at least some hopeful constellations of class conflict that could lead to further learning processes.

Table 1: Class struggle and societal structure

Functional Differentiation	Life World Effect	Social Conflict
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¹¹⁷ W.B. Yeats, *The Second Coming*, from “Michael Robertes and the Dancer”, in: *W.B. Yeats, Selected Poetry*, (London: MacMillan, 1962).

¹¹⁸ C. Calhoun, “Cosmopolitanism and Hegemony”, in: H. Brunkhorst (ed), *Demokratie in der Weltgesellschaft, Soziale Welt Sonderband 18*, (Baden-Baden: Nomos, 2009), pp. 17-34.

Legal System (Twelfth century)	Individualisation	Belief-oriented conflicts
Political System (Sixteenth century)	Transformation of living into dead power	State-oriented conflicts
Economic System (Eighteenth century)	Transformation of living into dead labour	Capital-oriented conflicts
Globalisation of Law, Politics, Economy and other systems (Twentieth century)	Exclusion	Integration-oriented conflicts

VI. RELUCTANT ADVANCES

The *dis-embedment of individualised religious communities* in the Sixteenth and Seventeenth centuries (together with natural catastrophes and a long economic deflation period) caused a deep *crisis of motivation* that led to a series of wars and civil wars, insurgencies and revolutions, which finally culminated in three great revolutionary changes in Germany (Sixteenth century), the Low Countries (Sixteenth/Seventeenth centuries), and England (Seventeenth century). These conflicts changed the whole European world, the Catholic princes transferred nearly as much spiritual law from the Church to the state as the Protestant princes and magistrates did, and, in the wake of the Council of Trento at the end of the Sixteenth century, and the Catholic Church underwent a “protestant” reform of its own, which had already been intellectually prepared by the Late Scholasticism of Spain in the Fifteenth and Sixteenth centuries.¹¹⁹ Similarly dramatic were the effects of the *dis-embedment of coercive state-power and capital*. The co-original accumulation of coercive state-power, the transformation of the state’s increasingly oppressed subjects into *peoples*, who began to understand themselves *as peoples*, and the emergence of a dense European *public sphere of intellectuals* (Kant’s “*Freiheit der Feder*”: freedom of, at least, the scholarly class) escalated into a deep *legitimation crisis* which finally became one of the major causes of the American and French Revolutions and the revolutionary wars in the late Eighteenth

¹¹⁹ Berman, note 103 *supra*; J. Witte, note 103 *supra*.

and early Nineteenth centuries, once again changing the whole Western world.¹²⁰ Finally, the accumulation of capital caused a series of deep *economic* and *social crises* which (together with other causes) led to more than a hundred years of economic and social class-struggle from the middle of the Nineteenth century, and to wars and revolutions. All three of these massive changes in the world were revolutionary in character, and all of them were basically *legal and constitutional revolutionary events*, even if only the great revolutions of the Eighteenth century invented the modern form of a written constitution, which is both power-founding and democratic, at least, in principle.

These crises, at least until the end of the First World War, were crises of regional Western modernity. In Europe, the *national state*, which itself was both a product *and* one of the main causes of both the crisis and class conflict, finally (and, more or less, appropriately) solved the three crises of modernity in the long course of its *democratisation*. Democratisation changed the relationship between the state and the people from the unequal, oppressive, and authoritarian treatment of the *subjects* of states into the equal, protective, and consultative inclusion of the people as *citizens*.¹²¹ In the course of the original accumulation of coercive power, the body-consuming state increasingly had to rely on the resources of its own population, and the population became more and more recalcitrant and revolutionary; in short, it became a people in the emphatic meaning of the Eighteenth century (for example, a “sovereign people”, and “popular sovereignty”).¹²²

The conflict between recalcitrant people and the functional needs of growing state power was finally solved by democratisation, which was mainly accompanied by the invention of either revolutionary gained, or reluctantly conceded, national constitutional regimes. During the long and reluctant process of its democratisation, the state replaced monarchical confessionalisation with democratic legislation which ultimately led to the implementation of the equal freedom *of* religion together with the equal freedom *from* religious and other belief systems.¹²³ The solution of the *motivational crisis* of belief was

¹²⁰ For the totality of change in Europe, see the brief account in: E. Hobsbawm, *Revolution und Revolte – Aufsätze zum Kommunismus, Anarchismus und Umsturz im 20. Jahrhundert*, (Frankfurt aM: Suhrkamp Verlag, 1977).

¹²¹ Tilly, note 59 *supra*.

¹²² This is the polemical meaning of Kant’s invention of the distinction between population (“*Völkerschaft*”) and people (“*Volk*”), see I. Kant, “*Metaphysic der Sitten*”, in: *Werke in zwölf Bänden. Band 7*, (Frankfurt aM: Suhrkamp, 1977).

¹²³ T. Parsons, *The System of Modern Societies*, (Englewood Cliffs NJ: Prentice Hall, 1972).

accompanied by the constitutional solution of the *legitimation crisis* of the modern state. Again, democratic legislation finally brought about the implementation of the freedom *of* the public power of the people together with the freedom *from* the public power of the coercion-wielding state administrations. Only in the course of the formation of a normatively-integrated world society in the Twentieth century was the *economic* and *social crisis* of modern capitalism solved by the social welfare state and the invention of mass-democracy. In its turn, mass-democracy finally led to the implementation of the freedom *of* markets together with the freedom *from* markets and its negative externalities (expropriation, injustice, and oppression). The democratised national state established, on its territory, the legal and constitutional basic principle of exclusion of inequalities (see Section V.4. *supra*) together with a separation of powers (the constitutional law of checks and balances) which neither repressed nor harmonised the struggles of religious groups, peoples and social classes for their respective rights, but enabled the struggle *for* equal rights *within* the claim of right.

But this solution was a *particular European and Western* one, as we have seen (Section V.4.). The system of national states was still a regional, not a world, system, at least until the de-colonisation of the 1960s and the de-sovietisation of the 1990s. Even if the French and American Revolutions had already invented a new international law which – both in principle and in theory, at least as “the law of the books” (law without factual efficiency) – included universal human rights and the self-determination of all peoples, the basic relationship between the West and the rest of the world remained the same as it had been after the peace of Tordesillas, and things became worse with the accelerated growth of well-organised coercive state-power in the Nineteenth century.

The unequal and deeply unjust double structure of public international law and “private” prerogative law (the Congo was the private property of the Belgian King) only changed after 1945 when the legal exclusion of the Non-Western world from equal rights for the first time in history was *formally* rejected. Legal instruments such as the United Nations Charter (1945), the Universal Declaration of Human Rights (1948), and the Human Rights Covenants (1966) *universalised* (and constitutionalised) the legal principle of the *exclusion of inequalities*. The “human dignity” of the Universal Declaration articulated a new idea of freedom, which went beyond the grasp of the old American and French Declarations of 1776

and 1789 respectively, transcending their occidental, their national and their property-oriented social class-barriers.¹²⁴

These changes, roughly speaking, are due (1) to the emergence of a *world public* since the invention of oceanic and wireless telegraphy in the late Nineteenth century, and (2) the two catastrophic World Wars and bloody world revolutionary upheavals of the first half of the Twentieth century. The period of 1917 to 1945 saw an huge increase in the *negative integration* of the world society.¹²⁵ But, in the same historical period, series of plans, programmes and ideas for a new foundation of the world society were also developed, and implemented during the 10 years between 1941 and 1951. The World Wars were fought not only for national self-preservation and not only against authoritarian rule and fascism, but also *for the realisation of ideological and revolutionary goals*. In particular, the changes after 1945 were as rapid and as massive as the changes that were initiated by all the great revolutions.¹²⁶ During the 50 years between 1920 and 1970, *bourgeois* élite democracy transformed itself into social and mass democracy. The new deal between capital-owners and workers, and the wielders of coercive state-power and citizens was the Western functional equivalent to the Eastern bureaucratic socialism (and it was no less bureaucratic, but more efficient in the end). Property-centred equal rights were re-interpreted as systems of comprehensive anti-discrimination norms, for the first time, in the founding constitutional documents of the Soviet Union, the Weimar Republic, and Austria. Conditionally-programmed law was widely replaced, super-imposed or supplemented by final programming and planning law (successfully tried during the two Worlds Wars, as Max Weber had already observed). All of society, all human life and the whole human body were all juridified. Neither Parsons' "educational revolution", nor Foucault's "biopolitics" could have been performed without a deep change and extreme expansion of legal regulations. The changes within the national states at this time went hand in hand with the foundation and construction of a completely new international legal system which was *no longer* inter-national, and supra-national, trans-national *and* international law all became more and more the pacemaker of the

¹²⁴ J. Habermas, *Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte*, (unpublished paper 2009); H. Brunkhorst, "Some Conceptual and Structural Problems of Global Cosmopolitanism", note 112 *supra*.

¹²⁵ On negative integration, see Luhmann, note 43 *supra*.

¹²⁶ H. Brunkhorst, "Die Globale Rechtsrevolution. Von der Evolution der Verfassungsrevolution zur Revolution der Verfassungsevolution?", in: R. Christensen & B. Pieroth, *Rechtstheorie in rechtspraktischer Absicht*, (Berlin: Duncker & Humblot, 2008), pp. 9-34.

legal evolution. Even international welfarism preceded the formation of national welfare-regimes, the *proprium* of the late national state. The old international law of the co-existence of states was replaced by a universal law of the co-operation of peoples *and* states.¹²⁷ A law-making system of inter-national, trans-national and supranational organisations was created, and it evolved into a lasting, and ever denser net of political and economic, and administrative and jurisdictional bodies. The system of national states, far from withering away, itself became a world system of states.

Yet, 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. Thus, the deep revolutionary change since the Second World War cannot escape its own dialectic of enlightenment, whatever the outcome of all these changes might be in the end: a mighty rebirth of democracy or a universal system of prerogative states, global cosmopolitanism or global imperialism – between these extremes, everything is possible, but one result seems to be irreversible in terms of its evolution, the *normative integration of world society*.¹²⁸ This does not mean that it cannot be *destroyed* (see only the politics of the German government during the Greece crisis of the EU in 2010), it only means that it cannot be *revised*. In the same way as there is no way back to archaic egalitarian or to hierarchical societies, there is no way back to regional *bourgeois* and national parliamentary rule. The best proof, if it needs one, is the momentary blossoming of *bourgeois* nostalgia (*neue Bürgerlichkeit*). Nostalgia only comes when a form of life has already disappeared.

VII. THERE WILL BE BLOOD

To date, globalisation has led to a spread of democratic regimes all over the world, a considerable increase in the number of working, or normative, democracies, including continental regimes such as India or the European Union. In “the law of the books”, there are only a small number of exceptions left, such as Saudi Arabia, and some regimes have democratic constitutions with strong prerogatives (the clerics of Iran, the permanent members of the United Nations (P5), and the Communist Party of China). However, at the same time,

¹²⁷ B. Fassbender, *The United Nations Charter as the Constitution of the International Community*, (Leiden-Boston MA: Brill Academic Publishers, 2009); see J. Bast, “Das Demokratiedefizit fragmentierter Internationalisierung”, in: H. Brunkhorst (ed), note 118 *supra*, pp. 185-194.

¹²⁸ Stichweh, note 13 *supra*.

we must observe a daily growing number of often very important, legally-binding decisions made by regional and global legislative, executive and judicial organs. They are, to a broad extent, dominated by closely co-operating (and fragmented) executive state agencies. These legal organs and organisations are no longer just *complementary* to state-functions, but increasingly *replace* them.¹²⁹ The more indispensable they become, the *more* they transcend the classical inter-governmental structure of international treaty regimes, and the *less* inter-governmental they are, the more flexible, de-formalised and fragmented their legal regime becomes. Their *democratic legitimisation is shrinking rapidly*, and the *social difference of over-integrated and under-integrated populations* that undermines the equality of law, hence interferes with the autopoiesis of world law and the structural coupling of world law and world politics (see Section V.4. *supra*).

One of the major consequences of this intricate dialectical development is that national democracy loses its democratic substance and tends to become a façade of democracy, and post-national democracy is still a long way from compensating for these losses – even if the European Parliament resembles a ruling, shaping and effectively *democratic* parliament much more than the European national parliaments, which are all under the control of their respective governments, and are, already, for this very reason no longer normatively democratic.¹³⁰ Democratisation and de-democratisation are both proceeding at the same time. Whereas the *national state loses its ability to exclude inequalities effectively*, there is *no coercive power, no sufficient administrative mechanism to implement and enforce the exclusion of inequalities on a global, or at least a regional, level* (including the insufficiently empowered EU, which cannot break the economically exploitative hegemony of the North over the South, or of Germany over the rest, as we have seen during the world economic and financial crisis since 2008).

At the same time, the crises of early modernity seem to return on a global scale, enabled by world culture and a world public, world politics and world law:

¹²⁹ M. Albert, “Politik der Weltgesellschaft und Politik der Globalisierung: Überlegungen zur Emergenz von Weltstaatlichkeit”, in: B. Heintz, R. Münch & H. Tyrell (eds), *Zeitschrift für Soziologie. Sonderheft Weltgesellschaft*, (Wiesbaden: Verlag für Sozialwissenschaften, 2005).

¹³⁰ For the national state, see A. von Bogdandy, *Gubernative Rechtsetzung*, (Tübingen: Tübingen: Mohr, 2000); for the EU-parliament, see P. Dann, “Looking through the federal lens: the Semi-parliamentary Democracy of the EU”, (2002) 5 Jean-Monnet working paper.

- 1) The *regional system* of former *state-embedded markets* has been turned into a *world system* of *market-embedded states*.¹³¹ The effect is the same as in early modernity: *economic and social crisis*. The freedom of markets explodes everywhere at the cost of freedom *from* its negative externalities: the dramatic increase of social differences, inequalities and exclusion at all levels, national, regional and global.¹³² The inception of the formation of a global social and economic ruling class is, ironically, accompanied not by the emergence of a globally-organised working class or a global people and its parties (see 2 below) but by the unorganised “multitude” (Antonio Negri), and the withering away of the national working classes, and their Unions and Parties, instead. The emergence of a new variety of *capital-oriented global conflicts* between the haves and the have-nots, between the centre and the periphery, and, let us not forget, between the haves themselves, conflicts which are no longer regulated by normatively-effective constitutional law, exist, and hence have a good chance of fulfilling the prophecy of Paul Thomas Anderson’s film of 2007: *There will be blood*.
- 2) The same has happened with the executive bodies of the states. They have learned much faster to “act in concert” (Hannah Arendt) than peoples, parliaments, courts or unions. The *regional system* of *state-embedded executive powers* has turned into a *world system* of *power-embedded states*. The dramatic effect is the formation of a new kind of collective and pluralised Bonapartism at regional and global levels, followed by a *legitimation crisis* that affects all kinds of political regimes, in particular those which are more directly related to the people (such as the national states or the European Union). Here, again, we can, on the one hand, observe the emergence of a transnational class of power-holders, but – with the exception of the loosely-coupled INGOs of the critics of globalisation – no transnational people on the other, not even in Europe. Yet, there is a great variety of *state-centred conflicts* between the rich and the poor parts of the

¹³¹ W. Streek, “Sectoral Specialization: Politics and the Nation State in a Global Economy”, (2005) paper presented on the 37th *World Congress of the International Institute of Sociology*, Stockholm.

¹³² T. Judt, *Ill Fares the Land*, (New York: Penguin, 2010), p. 15 *et seq.*

World (humanitarian interventions, interventions of allied “democracies”, and free-trade imperialism¹³³) and even within the European Union (the Greek and the European Periphery), the United States (the South, Sarah Palin, Michelle Bachmann and Christine O’Donnell), between so-called “civilisations” (Islam *versus* the “West”), between regional people and national governments (Basques, Catalans, *Lega Nord*), between former colonial powers and national liberation movements (East Timor, Palestine, West-Sahara, Tibet) again beyond the constitutional form: thus, *There will be blood*.

- 3) Last, but not least, fundamentalist religious movements have emancipated themselves from state control, in liberal regimes such as the USA or Europe, as well as in authoritarian regimes such as Iran, Egypt, Russia or China. In the new religious scramble for Africa, Asia, and Latin-America, and this time from below, the network-religions of sects (de-centralised religions), together with the old Universal Church of Rome (with its 1,000 years of experience of world state-building) are the winners, and the losers are the Protestant state churches. Finally, the same turn occurs with religious communities as in the economy and in politics: *the state-embedded religions of Western regional society* have turned into the *religion-embedded states* and have re-inforced and tightened the *global crisis of motivation* together with *belief-centred conflicts* between all kinds of believers, in particular between religious fundamentalists and secular citizens; *Blood again*.

It is not easy to say what kind of new coalitions will arise, which movements will emerge, and if there are still some new or old movements and organisations which have the *power* both to support democracy, and to create new forms of post-national democracy and global solidarity. Religious fundamentalists quickly find themselves together in the same boat with nationalists (*Hamas*). But, are there other ones, as in the time of the making of the English working class? It was impossible to answer this question in 1810 for England, just as it is impossible to answer it in 2010 for the world. Which fanatical preaching will finally end

¹³³ R. Robinson & J. R. Gallagher, “The Imperialism of Free Trade”, (1953) 6 *Economic History Review*, pp. 1-15.

in emancipatory organisations and build coalitions with the remnants of the liberal and radical democrats who will have survived after the next crisis?

However, together with the globalisation of capital, religious fundamentalism, and administrative and coercive power, a *global public sphere*, and a *global civil society* network of free associations has already emerged, including *Amnesty International* as well as *Al-Qaeda* and the *International Chamber of Commerce*. The new global public sphere is the great trigger of religious fundamentalism. But it also was the trigger of the (now probably beaten and oppressed) opposition movement in Iran 2009, and it is the trigger of a critical public that came to the global fore for the first time after the “wake-up call” of Seattle in 1999. As Michael Byers then wrote in the *London Review of Books*, it is a public of “merely educated, informed people concerned about some of the effects of economic globalisation”, many of them “retired professionals with time on their hands and access to the Internet”, a public “for individuals everywhere, to exercise constructively this fragile yet powerful new form of democracy that has so remarkably appeared”, and who are forcing multinational corporations “to take other interests into account”.¹³⁴ They combine concerns about the environmental risks with the articulation of the globalisation of social injustice. They still emerge everywhere. However, they are *not* the emergence of a new workers movement or its functional equivalent, but, together with powerful national states and strong international organisations/federations (where, exactly, are they?) which use their (always deeply ambivalent) imperial power *also* for emancipatory purposes (for example, as in the continental federal regime of the United States which created the New Dealers under Roosevelt), they are “not nothing” (Hegel) - even if they are only the “representatives” of the *haves* of the Internet, and not of the *have-nots*.

“Surely some revelation is at hand:
Surely the Second Coming is at hand.
The Second Coming! Hardly are those words out
When a vast image out of *Spiritus Mundi*
Troubles my sight: somewhere in sands of the desert
A shape with lion body and the head of a man,
A gaze blank and pitiless as the sun,
Is moving its slow thighs, while all about it

¹³⁴ M. Byers, “Woken up in Seattle”, (2000) 1 *London Review of Books*, p. 16 *et seq.*

Reel shadows of the indignant desert birds.
The darkness drops again; but now I know
That twenty centuries of stony sleep
Were vexed to nightmare by a rocking cradle,
And what rough beast, its hour come round at last,
Slouches towards Bethlehem to be born?”¹³⁵

¹³⁵ See note 117 *supra*.

CHAPTER 7

THE CULTURE FORM OF CRISIS*

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I. PARADOX

A crisis is a crisis; *and* it is not. It is complex, positive and negative, real and imaginary. Its state is as unclear as its notion.¹ While it is unfolding, thus putting in jeopardy a range of communications and actions which are deemed ordinary in ordinary times, other actions and communications unconcernedly continue to function, reproduce, and thrive. People meet, read newspapers, watch television, blog, twitter, and pray. They study and work.

A first statement about crisis may thus read as follows:

crisis = crisis

(C1)

We use George Spencer-Brown's mark of a re-entry in order to indicate a distinction being drawn and re-entered into the space of its distinction. It marks a state, calls it "crisis", and watches for anything outside of this distinction, something from which the crisis may be distinguished, to come with the distinction.² Any crisis presumes a state of affairs in which not everything is in crisis, so that to call a state a "crisis" means to call for further specification and, at the same time, limitation.

Looking at the form of the distinction, *i.e.*, at its inside, its outside, the cross being made, and the space surrounding it and produced by the mark, we realise that the indication

* The author wishes to thank Adelheid Baker and Chris Engert for the English language editing of this chapter.

¹ R. Koselleck "Krise", in: O. Brunner *et al.* (eds), *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol. 3 (Stuttgart: Klett-Cotta, 1981).

² G. Spencer-Brown, *Laws of Form*, (Leipzig: Bohmeier, 2008).

of crisis implies something else going on as well, namely, the negation of the crisis as the indication of a state from which the crisis is distinguished.

A possible reading of statement C1 is to read “crisis” as the indication of a crisis, and as the negation of that indication to indicate the negation of the crisis. A crisis is a crisis; *and* it is not.

II. SOCIETY

A sociological way to be explicit about the paradox inherent in the indication of a crisis is to look at society by both calling the crisis a crisis, and by observing society reproducing itself while calling it a “crisis”.

Spencer-Brown’s notation of indications allows us to put the sociological observation into a second statement:



Now, there is a mark outside the first distinction, which is indicated by a value called “society”, and a new unmarked state at the outside of the distinction of crisis from society. Moreover, the distinction of crisis from society has re-entered into its own space, which indicates the complementary and circular structure of both values. The mark of re-entry operates to indicate, negate, and imply at the same time. In our case, it indicates a crisis, negates that very crisis – since, for a crisis to be possible, something else must reproduce ordinarily - and implies a society as the place in which both things are happening: a crisis unfolding, *and* its negation framing its indication.

There may be other ways to mark the outside of the distinction of a crisis, for instance, “God”, “nature”, or “history”,³ but the perspective of this chapter is to focus on “society”. Society, here, means nothing less than the ongoing operations of action and communication, even while certain problems, understood as crisis, are effecting the reproduction of these operations.⁴

³ M. Douglas, “A Typology of Cultures”, in: M. Haller, H.J. Hoffmann-Nowotny & W. Zapf (eds), *Kultur und Gesellschaft: Verhandlungen des 24. Deutschen Soziologentags in Zürich 1988*, (Frankfurt aM: Campus, 1989).

⁴ N. Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1997).

“Wie in einem unbeabsichtigten perversen Effekt kommt bei ständigen Krisendiagnosen nach und nach heraus, daß es sich gar nicht um Krisen handelt, sondern um die Gesellschaft selbst.”⁵⁶

III. IMMUNE SYSTEM

We do not attempt to dispel any diagnosis of crisis in favour of the picture of a society unconcernedly reproducing itself. Instead, the negation enacted by the crisis hits society to be sure, and this is its very meaning. Why else should there be talk of crisis? It is society in crisis that we are talking about, a society reproducing while in crisis, and, perhaps, through the very act of actually *being* in crisis.

A society provides good reasons for a crisis, whatever they may be. The crisis concerns a society in jeopardy. It is a crisis which both *negates* and *implies* society, and it is society both *negating* and *implying* the crisis.

We observe a paradox unfolding by proceeding from statement C1, “a crisis is a crisis, and it is not”, to statement C2, “a crisis negates the very society that it implies”. The paradox engages the observer with particular problems that he or she would otherwise not notice, and provides him or her with a frame – “society” - to produce the information that he or she would otherwise not deem necessary.

The particular place for such a paradox in society is the latter’s immunity system.⁷ It typically blocks routine observations while reproducing operations so that alternative observations are called for in order to re-direct operations. Society, here, is recursively producing its own non-linearity so that some of the problems that become apparent may henceforth be avoided.

IV. CODING

In order for a paradox to become creative, it needs to be translated into a code. A code combines a positive and a negative value into a form which is able to reproduce itself as the *eigen*-value of a recursive function.⁸ The positive value describes a certain state of the world

⁵ N. Luhmann, “Am Ende der kritischen Soziologie”, (1991) 20 *Zeitschrift für Soziologie*.

⁶ “As if we were dealing with an inadvertent perverse effect, all these diagnoses of crisis do but reveal that we do not deal with crises at all, but with society itself.” (author’s translation)

⁷ N. Luhmann, *Social Systems*, (Stanford CA: Stanford University Press, 1995), pp. 369-77.

⁸ H. von Foerster, *Understanding Understanding: Essays on Cybernetics and Cognition*, (New York: Springer, 2003).

as produced by an act of cognition. The negative value is not only the negation of the positive value, but also a generalisation of it with regard to some necessary, albeit indeterminate, implication. The negative value calls for an act of volition, an act of free will directed at determining the positive value.⁹

Coding thus assumes that nothing is what it is, but must, instead, be enacted to become something.

A crisis is only a crisis if something else is not in crisis, thereby “negating” the crisis. We have a positive value, which indicates some breakdown of things or expectations, and a negative value, which distinguishes the breakdown from the resources to draw upon in order to handle the breakdown. Without using the language which we are using here, Terry Winograd and Fernando Flores call this negative value “design”, because design consists of anticipating and pre-empting breakdowns.¹⁰

We thus have a coding of the paradox of crisis which constitutes an immune event of society, which reads as follows:



Phrasing this code in the form of the re-entry of the distinction into the space of distinction means that both values of the code inform each other. Design enables us to look at the breakdown, and the breakdown to look at design. When this happens, without further notice, paradox ensues. Issuing further notices means that the paradox is unfolded, be it with regard to time, matter, or culture.

With regard to time, breakdown and design occupy different moments in time, one preceding the other, although it remains unclear whether breakdown or design will emerge first. With regard to matter, the breakdown of one thing, allows us to look at another thing still working, or *vice versa*. And, with regard to culture, we look at a different perspective,

⁹ G. Günther, “Cognition and Volition: A Contribution to a Cybernetic Theory of Subjectivity”, in: *idem*, *Beiträge zur Grundlegung einer operationsfähigen Dialektik*, vol. 2 (Hamburg: Meiner, 1979); N. Luhmann, “Über die Funktion der Negation in sinnkonstituierenden Systemen?”, in: *idem*, *Soziologische Aufklärung*, vol. 3: *Soziales System, Gesellschaft, Organisation*, (Opladen: Westdeutscher Verlag, 1981).

¹⁰ T. Winograd & F. Flores, *Understanding Computers and Cognition: A New Foundation of Design*, (Norwood NJ: Ablex, 1986).

which leads one observer to indicate a breakdown where the other discerns design, and *vice versa*.

If this kind of coding works in specific situations, and works well, it condenses into an *eigen*-value of the recursive reproduction of society, which qualifies as a “crisis”.

V. CULTURE FORMS

To flesh out this idea of crisis, which is coded as a paradoxical event in the immune system of society, with social data, we focus on four different culture forms of crisis: crises in tribal society, in ancient society, in modern society, and in the next society. When speaking of the “culture form” of crisis, we refer to its way of registering and responding to the overflow of the information produced by the communication media of the respective society.¹¹

This follows the idea that a distributive medium of communication not only makes it easier to communicate, but also produces the problem of how – both structurally and semantically - to handle new ways of communication. There is a multitude of media, success media, distribution media, and mass media.¹² For the time-being, we adhere to a selection of distribution media, namely, to oral language, writing, the printing press, and the computer and its networks.

Oral language makes it possible to talk about what is absent, to say both Yes and No, not just to betray, but to lie blatantly. Tribal society emerges and sets topographical boundaries to control who may talk when, to whom, and about what.¹³ Boundaries are the culture form to handle the overflow of meaning of oral language.

Written language makes it possible to extend the time horizons of society both towards a possible future and towards a remembered past. Political and economic plans and strategies, whose aims, successes, and failures disrupt the social balance of tribal society, become possible. Ancient society with its social stratification, its state households, its private houses, and its cosmological belief in the purposeful pursuit of perfection emerges, telling

¹¹ Luhmann, note 4 *supra*, pp. 409-12; D. Baecker, *Studien zur nächsten Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 2007); D. Baecker, “The Network Synthesis of Social Action” (2007/08), “Part I: Towards a Sociological Theory of Next Society”, “Part II: Understanding Catjects”, 14 & 15 *Cybernetics and Human Knowing*.

¹² Luhmann note 4 *supra*, Chapter 2.

¹³ C. Lévi-Strauss, *Structural Anthropology*, (New York: Basic Books, 1963).

everybody which plans are legitimate and which are not.¹⁴ *Teloi*, Greek for “appropriate purpose”, are the culture form with which to handle the meaning overflow of written language. They provide for perfection, as distinct from corruption.

The printing press makes it possible for almost everybody to read and write. It forces everybody to acknowledge that others might have read whatever they deemed important as well. Society literally develops into a state which is critical of its very self, called “enlightenment”, since everybody has the possibility to criticise everybody else, and everybody has to be able to respond to criticism.¹⁵ Modern society emerges and invents individualism, reason, and the dynamics of democracy, markets, and schooling. Equilibrium, the ability to withstand unrest by re-stabilising dynamically, becomes the culture form which is able to handle the meaning overflow of the printing press. It is a concept which applies both to the (Cartesian, *i.e.*, doubting) individual - and his body and mind - and to an economic concept of society which highlights the search for, and the adaptation to, new opportunities (of both progress and decadence, as liberals and cultural critics are eager to show). Rationality is a concept which describes the possible exchange of means to pursue ends, and the exchange of ends to use the available means. It displaces ancient perfection.

The computer and its networks bring data memories and information algorithms to bear on communication, taxing many established forms of communication, including, for instance, the organised and institutionalised communication in the hierarchies of firms and offices, or in the asymmetries of hospitals and universities, for their ability to deal with them. Machines go “out of control”,¹⁶ forcing communication to monitor closely, *i.e.*, control itself with regard both to being tracked and to staying in step with procedure. The “next society” emerges,¹⁷ which invents satisfaction instead of rationality, *i.e.*, a reversible procedure, instead of a grand decision (Simon 1982),¹⁸ and invents a form of equilibrium that is able to deal with known ignorance and thus with necessary exclusion.

¹⁴ K. Polanyi, “Aristotle Discovers the Economy”, in: K. Polanyi, C.M. Arensberg & H.W. Pearson (eds), *Trade and Market in the Early Empires: Economies in History and Theory*, (Glencoe IL: Free Press, 1957).

¹⁵ I. Kant, “An answer to the question: What is enlightenment?”, in: *idem*, Mary J. Gregor & Allen W. Wood, *Practical Philosophy*, (Cambridge, Cambridge University Press, 1996).

¹⁶ K. Kelly, *Out of Control: The New Biology of Machines, Social Systems, and the Economic World*, (Redwood City CA: Addison-Wesley, 1990).

¹⁷ P.F. Drucker, *Managing in the Next Society*, (New York: St. Martin's Griffin, 2003).

¹⁸ H.A. Simon, *Models of Bounded Rationality*, 2 vols. (Cambridge MA: The MIT Press, 1982).

VI. PAROXYSM

Tribal society does not seem to have any notion of crisis. It does not need one since it would not know from what to distinguish it. Instead, it switches back and forth between different states of crisis as different states of society, which are always in a state of alert with regard to anything that might prove able to disrupt it.

Marcel Mauss' study of the social morphology of the Eskimo gives an example of this society with its own critical states of crisis reproduction.¹⁹ The Eskimos know two states of their society, a summer state and a winter state. In winter, they congregate in stations and endure the difficult months, especially towards the end of winter from March to May, using up their stocks while watching their quality deteriorate. In summer, they disperse, live in scattered tents, and go fishing and hunting.

Mauss describes the paroxysm in the winter months when the tribe is in an intensely-collective mood. Any disruption by storms lasting too long, by the ice breaking, or by the seals disappearing is taken to be caused by a fault or by some behaviour of the clan, and is answered by shamanistic rituals engaging the whole clan in a religious fervour in order to make sure that everyone is in step with the situation.

This intensely-collective mood and mode switches to a highly-individualised mood and mode in summer. Religion becomes almost invisible, individuals are self-reliant, are able to make up their own minds, and belong to their family instead of to their clan, which is, in a way, the collective mind of all of them in winter, and a different understanding of law now specifies what belongs to whom, with items of property being individually assigned. Mauss calls the summer state the atrophied and depressed state of society, thus making it clear that what we, today, may regard as an unconcernedly normal state is a thoroughly critical state because the collectivity and its religious rituals, with the exception of some birth and death rituals, is almost completely lacking.

In winter, Eskimo society is in a crisis preparing for summer, and, in summer, it is in a crisis preparing for winter. It is always negating itself, thus implying itself. It is constantly oscillating. The price which is paid for this is evident, as Mauss shows by giving many examples of Eskimo society being unable to innovate. It is trapped by its oscillation, which amounts to a code whose negative value is the seasonal complement to its positive value. The

¹⁹ M. Mauss, *Seasonal Variations of the Eskimo: A Study in Social Morphology*, (London: Routledge and Kegan Paul, 2004).

seasonal distinction between summer and winter, together with its specifications of summer items and people, and winter items and people, provides a routine interpretation of the overall state of Eskimo society, which identifies both summer and winter states as the respective crisis of winter and summer states. The breakdown of collective sociality in summer reflects the design of the winter state, whereas the breakdown of the provision of supplies in winter reflects the design of the summer state.

Thus, both states of crisis enable the Eskimos to adapt perfectly to their ecological and cultural environment. Both states draw boundaries in order to control who to talk to whom, when, and about what. The collective winter state is a comment of everybody about everybody else, culminating in specific nights of free sexual intercourse among all the members of the clan, whereas the individualised summer state forces each family to be on its own and to come up with its own ideas regarding how to get along. Highly consequential, yet ritualised language in winter oscillates with the rather individual or informal, yet inconsequential, language in summer.

VII. DECISION

The word “crisis” appears with the ancient Greeks. They call *krisis* the moment of uncertainty, suffering, and test, when the future is unknown, and yet a decision has to be taken, for which there is not sufficient time for consideration.²⁰ Examples of this include the decisions to be taken in warfare (*Thucydides*), in medicine (*Hippocrates*), or in court (*Aristotle*).

The crisis, which, at the same time, is no crisis, but implies that a society is out there, and is both present and willing to step in and help out, adopts a new culture form. The decision is framed by drama, which means that it is both rare and important. In terms of ancient wisdom,²¹ any important decision is one to be avoided due to its unknown consequences. This turns the situation into a crisis. You have to take a decision which you would rather avoid.

The crisis is marked by a pointed alternative like that of success *versus* failure, of lawfulness *versus* unlawfulness, of life *versus* death, of salvation *versus* damnation, and is

²⁰ R. Koselleck, “Einige Fragen an die Begriffsgeschichte von ‘Krise’”, in: *idem, Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und sozialen Sprache*, (Frankfurt aM: Suhrkamp Verlag, 2006), pp. 203-5.

²¹ F. Jullien, *A Treatise on Efficacy: Between Western and Chinese Thinking*, (Honolulu HI: Hawaii University Press, 2004).

thus considered to be final, irrevocable. Two of the most important features of ancient society thereby become visible, the belief in (1) a cosmological order, and, hence, (2) a teleological order, which knows what is perfect and what is corrupt, what is appropriate and what is inappropriate, and which, nonetheless, has to account for the plans and strategies developed with reference both to remembered pasts and to envisioned futures. Such plans and strategies become possible through writing. They unbalance the former tribal order of almost completely living only in the present, framed by the distant past of their ancestors, which has been a secure lifeline to them. Crisis means that decisions which will change the course of things are, indeed, possible, and that these decisions will, in no way, escape their destiny of playing in vain to the teleological order that is already established and will remain so.

The coding generated by crises in ancient society comes almost naturally. Breakdowns are to be expected in a society which considers corruption to be highly probable in a sub-lunar world full of passion, vanity, and *hubris*, and, indeed, looks to it as the affirmation of a design of the cosmological order which, nevertheless, reigns and awaits the order's contemplation both by watching the calm passing of the stars and the wisdom of political rule. Thus, again, there is a rather narrow line between breakdown and design, enabling everybody to look at the former in terms of the latter: thus, the coding becomes more apparent. It helps to attract the events that immunise the order of society against its states of disorder.

Another word for crisis is "catastrophe", which either means destruction, if a form provides for variables with little room for variance, or implies a sudden change between two or more equally possible states of affairs.²² Considered a catastrophe, a crisis in ancient society either leads to the destruction of what is already corrupt, or to a change between states, say, illness and health, or defeat and victory, which are equally consonant with the order of the cosmos. Crises and catastrophes bring both the exceptional and the singular back to normal, thereby - since they do, indeed, happen - confirming that what is normal is not to be taken for granted. There is space for change, but let us not exaggerate. This seems to be the ancient message of a crisis.

²² R. Thom, *Mathematical Models of Morphogenesis*, (Chichester: Ellis Horwood, 1983).

Poets go a step further in their reflection. What if, or so Ovid seems to ask,²³ a *metamorphosis*, due to the passion that it unleashes, becomes undecidable with regard to its possible iteration, that is, with regard to either leading back to an appropriate form or leading forth to yet another, inappropriate one? Triggered by crises and catastrophes, metamorphoses re-establish order and disorder in the distinction between order and disorder, up to the point that almost everything and almost nothing simultaneously becomes possible.

Crises thus reveal themselves to be ambivalent calls to action, to a fate or destiny which is inevitable. This is their culture form in ancient society.

VIII. ITERATION

Modern society is becoming so used to crises that it has almost stopped noticing when one crisis ends and another begins. Although some reference to final decisions, to a possible apocalyptic fate, even to a divine *judicium*, continues to resonate with us,²⁴ the leading idea about crises now is that a crisis is an accelerated course of events, which somehow helps to restore a state of equilibrium.²⁵ Equilibrium, however, is no longer defined with regard to some state of nature to be regained or some fate to be accepted. Instead, it is embedded in an open-ended and rather unqualified history of either progress, for optimists, or decadence, for pessimists. The pursuit of happiness or its complement, the melancholy of resignation, thus displace the ancients' search for appropriateness and justice. No crisis will alter the belief in happiness and wealth, whether it be gained or lost forever. Any crisis helps to put the course of events back on track.

The code of breakdown, as distinct from design, still works well even if design no longer refers to a divine order of things, but to laws of history, on the one hand, and some invisible supervisors of events which are about to tilt an equilibrium, on the other. Breakdowns refer to an - as yet - imperfect human nature, which still awaits its insights into the virtues of reason, while design stems from the guarantee that things can only get better, even if cultural critique weighs in against this optimism by pointing out that the majority of people will never live up to the expectations of reason, and will need other forms of "opium", instead.

²³ T. Hughes, *Tales from Ovid: Twenty-four Passages from the Metamorphoses*, (London: Faber & Faber, 1997).

²⁴ R. Koselleck, note 20 *supra*, pp. 207-12.

²⁵ J. Burckhardt, *Reflections on History*, (Reprint: Indianapolis IN, Liberty Classics, 1979).

Economists play an important role in developing an understanding of the concept of a crisis, which does not change the possibility of an equilibrium being restored, and, by outlining the necessity to take some rather extraordinary decisions, helps to search for new resources to invest in the course of events. Crises, if they are overcome, help to unleash gains in productivity. They do so by making visible whose routines are running out of wisdom and whose ideas may lead to further steps forward.

Again, we may notice how a crisis calls upon society and lets it react *against* society, thus protecting society from itself. However, its culture form is now determined by the dynamic *equilibria* of modern society brought about by a printing press which swamps it with the possibility of criticising just about anything. “Enlightenment” is a society challenged by its own crisis, with no other purpose in sight but the end of all prejudice, which is somehow confused with the happiness of all.

Crises are iterations of a society in crisis. And crisis is society reflecting upon itself in order to make sure how to reproduce itself. Progress and decadence are thus inevitable.

IX. SWITCH

Next society seems to continue, in a way, to normalise the polarisation of the understanding of crisis. On the one hand, the acceleration of possible runaway processes in the realms of demography and ecology becomes ever more apparent. On the other hand, crises are nothing more than indications of opportunities, either to switch away from them in order to recover ground elsewhere, or to switch over to them in order to gain from possible action. Possible breakdown is the element upon which any project thrives. Possible design is everything that everybody seeks.

Switch means network, and network means that any concept of identity and any attempt to control are always in a state of crisis, *i.e.*, anticipating possible, if not imminent, failure.²⁶ Next society’s crises radicalise on modern society’s crises and its search for the reversibility of irrevocable decisions. Yet, next society adds crises in technology to its repertoire. These are not just accidents like before. They are “normal accidents” in that society participates in the risks that manifest themselves by setting up technology in the way

²⁶ H.C. White, *Identity and Control: A Structural Theory of Action*, (Princeton NJ: Princeton University Press, 1992); *idem*, “Network Switchings and Bayesian Forks: Reconstructing the Social and Behavioral Sciences”, (1995) 62 *Social Research*.

that it does.²⁷ This concerns high-risk technologies as much as the extremely complex hardware and software in computers and their networks. Crises, here, become part of the design processes as well, because only crises can reveal what has been done so far. If a technology has not yet withstood a crisis, it has not really been tested. The same applies to the design of organisations, procedures, beliefs, marriages, or peer groups. Without being tested, nobody knows what they are worth.

Any design becomes a design with regard to a possible network of identity and control. This is why switches are becoming so important. Modern society presumes that designs may be repaired, or networks overhauled, with regard to a possible rationality of both the ends and the means inherent to them. Next society, however, no longer believes in rationality, which is a state of affairs which is much too self-assured and thus insensitive towards the changes in any given situation. Instead, designs and networks, or links and ties, are switched until they fit. And they fit *only* for the present situation, which, however, is the only place to start looking for further possible switches.

One may expect the notion of crisis to disappear, because it no longer has any specific information. It literally does not make any difference. It remains important only as a rhetorical device to communicate an assumed necessity to act and to call for the necessary resources. And it certainly remains useful for invoking and activating a paroxysm of collectivity, grand decisions which are bound to hurt somebody, and even some distinctions in regimes caused by just another iteration in social procedure. But these invocations and activations, again, do not boil down to crisis, they simply indicate society itself.

Thus, next society's culture form of crisis is tantamount to the culture form of society, even to the form itself, if "form" means a distinction in jeopardy all by itself, namely, by being drawn, by invoking an unmarked state which is excluded from the marked state, and by re-entering the very distinction between the marked state and the unmarked state in this distinction, which thereby begins to oscillate in paradox.

We are looking at the immune system of society. It is about to absorb the rest of society. Whereas an enlightened society might still believe in latent structures somehow coming to the rescue of society if failures become manifest,²⁸ be it the powers of the world

²⁷ C. Perrow, *Normal Accidents: Living with High-Risk Technologies*, (New York: Basic Books, 1984); N. Luhmann, *Risk: A Sociological Theory*, (Berlin-New York: Walter de Gruyter, 1993).

²⁸ R. Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society*, (Cambridge MA:

which are sure to have their sway, technological progress hidden in unknown pipelines, or even a democratic consent materialising when danger becomes imminent, our monitoring of next society only knows about tracking and correlating. There is almost nothing that we do not track and monitor, including galaxies, species, populations, payments, opinions, the corresponding oxygen states of blood circulation in the brain, and the occasional considerate thought; all appear and disappear. A computational knowledge engine like *Wolfram Alpha* in the Internet is putting the data of the world at our fingertips.²⁹

All one needs in order to navigate this world of crises both everywhere and nowhere is to know how to switch to which data, and which algorithm is able to put them together, and to draw the conclusion that one might need.

X. BUBBLES

The series of economic and financial crises of the last fifteen years, beginning with the Internet bubble of the so-called new economy in the late 1990s, is a case in point which reveals the nature of crises in the next society.³⁰ Crises are the tipping-points at which one bubble is revealed and then substituted by the next one emerging. Crises signal to all other systems in society that they will have to adapt to a new situation, perhaps unleashing a crisis of their own in so doing.

Bubbles emerge when extreme behaviour becomes probable.³¹ Extreme behaviour is behaviour which no longer obeys a Gaussian probability distribution, but, instead, follows power laws or Zipfian probability distributions.³² Network effects or positive feedback make deviations from mean variance behaviour all the more probable if they are embedded in overall uncertainties which induce an imitative form of behaviour which, in turn, is more robust the more the possible rivalry that it entails.³³ So-called regimes enforce themselves all

²⁹ The MIT Press, 1988).

²⁹ See <http://www.wolframalpha.com>.

³⁰ D. Sornette, *Why Stock Markets Crash: Critical Events in Complex Financial Systems*, (Princeton NJ: Princeton University Press, 2003); *idem*, "Dragon-Kings, Black Swans and the Prediction of Crises", (2009) *Swiss Finance Institute Research Paper*, No. 09-36; *idem* & R. Woodard, "Financial Bubbles, Real Estate Bubbles, Derivative Bubbles, and the Financial and Economic Crisis", (2009) *Swiss Finance Institute Research Paper*, No. 09-15.

³¹ D. Sornette, "Nurturing Breakthroughs: Lessons from Complexity Theory", (2008) 3 *Journal of Economic Interaction and Co-ordination*.

³² G.K. Zipf, *The Psycho-Biology of Language: An Introduction to Dynamic Philology*, (London: Routledge, 1936); H.A. Simon, "On a Class of Skew Distributed Functions", (1955) 42 *Biometrika*.

³³ A.A. Alchian, "Uncertainty, Evolution, and Economic Theory" (1950) 58 *Journal of Political Economy*; G.

the more convincingly as a feeling for, and knowledge of, the alternatives diminishes, and as the regime in question offers sufficient fluctuation and flexibility for any social position involved to compete with others for advantages, be they big or small.

This means that bubbles manage to develop their own context.³⁴ The more co-operation there is among people, the more probable it becomes that critical situations will become super-critical by attracting more behaviour which corrects minor deficiencies than behaviour which seeks exit strategies. Systems become meta-stable³⁵ on their flight to a catastrophe which brings about alternative states that nobody was able to foresee or to enact before. There seems to be a self-similar pattern emerging, which repeats the overall power law of a hyperbolic world population growth³⁶ both for single areas of activities and for experiences in politics and business, in sports and the arts, in sciences and religion, which means that congregating, and facing breakdown together is a more attractive form of behaviour than keeping a distance, pursuing solitary projects, and opting for loose coupling. Whether there is an evolutionary reason in this self-similarity which consists of enabling us to watch in ever-different detail the processes involved and possibly even to develop an exit strategy, nobody knows and nobody is able to know because super-critical situations peak in singularities which are physically impossible to reach, let alone to maintain. This is why the system is bound to try all the forms of behaviour which are able to help it to break out of the path-dependence.

In financial markets, we begin to opt for new risk management systems that account for Gaussian distributions, not as the general, but as a specific, albeit rather improbable, case, and for Zipfian distributions as another specific, but more probable, case.³⁷ Other examples of modelling human-behaviour by the means of physical statistics help us to gain a certain distance from the modern belief in the probability of what we prematurely learned to call a reasonable state of affairs in human society, and which actually turn out to owe more to

de Tarde, *Laws of Imitation*, (Gloucester MA: P. Smith, 1962).

³⁴ D.H. Zanette, "Zipf's Law and the Creation of Musical Context", (2006) 10 *Musica Scientiae*.

³⁵ P. Bak & K. Chen, "Self-Organized Criticality", (1991) 264 *Scientific American*.

³⁶ H. von Foerster, P. Mora & L.W. Amiot, "Doomsday: Friday, 13 November, A.D. 2026", (1960) 132 *Science*.

³⁷ Y. Malevergne & D. Sornette, *Extreme Financial Risks: From Dependence to Risk Management*, (Berlin: Springer, 2006).

Gauss than to Kant.³⁸ If Zipf gets the upper hand, we had better start to re-think sociological theory.

One of the concepts of a sociological theory which is determined by the probability of extreme behaviour may well be to think about crises as events which help the first bubbles to emerge and then to exit. Crises thus are complex in the mathematical meaning of the word, in that they are neither positive nor negative, but “lateral” as the very Gauss, whom we are trying to overcome, proposed to call imaginary values.³⁹ They are not positive, as, indeed, they do not define desirable states to be maintained. However, they are not negative, either, because they send strong signals, whereas all weak signals merely enhance an uncertainty, thereby inviting more of the same imitative behaviour. They are imaginary or lateral in that they signal the breakdown of a situation which calls for a new form of behaviour, instead of an already learned one, in order to create a new, possibly more sustainable, situation. They are imaginary events in that they resist any definition of the situation which may absorb them.

We had better habituate ourselves to switching states, switching forms of behaviour, and also switching experiences.

XI. CONCLUSION

We end up with a theory of crisis, which takes it as a complex variable of a social calculus. We did not go into the mathematical complexity of the variable, yet it may, in conclusion, help us to emphasise the three steps of the introduction and use of a complex variable in social calculus, as there are:

$$\text{différance} \quad a = a \quad (C4)$$

$$\text{supplément} \quad a = a \quad b \quad (C5)$$

$$\text{complexity} \quad a = a \quad b \quad (C6)$$

³⁸ P. Ball, “The Physical Modelling of Human Systems”, (2003) 1 *Complexus*; *idem*, *Critical Mass: How One Thing Leads to Another, Being an Enquiry into the Interplay of Chance and Necessity in the Way that Human Culture, Customs, Institutions, Cooperation and Conflict Arise*, (London: Arrow Books, 2004).

³⁹ P.J. Nahin, *An Imaginary Tale: The Story of $\sqrt{-1}$* , (Princeton NJ: Princeton University Press, 2007), p. 82.

Anything else would make one believe that *a* is *a* for everybody, at any time, in any situation. Yet, *a* is in crisis. It is its own *différance*.⁴⁰ And it needs a *supplément* to contextualise itself. However, we should also recall that the context is a complex variable as well.

⁴⁰ J. Derrida, “Différance”, in: *idem*, *Margins of Philosophy*, (Chicago IL: Chicago University Press, 1982).

CHAPTER 8

WHAT IS A CRISIS?

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The question that was put to me at the beginning of the project was the following: *Are systems self-destructive? Do systems have a self-destructive character?* My answer grew into a voluminous paper – written in French and forming the conclusive chapter of a book of mine, which has recently been published.¹

This indirectly means that the question is crucial for me, it is inspiring and cannot be left unanswered. My argument here builds upon the descriptions, concepts and theories, which form the core of the above-mentioned book. This is why the following exercise is not very easy, as the book presented a large amount of new theoretical insights and constructions, while this chapter has to stay within usual limitations of scope and detail.

In the following, I shall try to develop only a few aspects of my answer, leaving aside what would have been very instructive if space had been available: the rendering of my argument in its very systematic form. I therefore refer to the above-mentioned work for a more detailed exposition of the argument and a more precise elaboration of its central concepts.

I. THE INSECURITY OF TODAY'S WORLD AND SOCIETY

Today's world is commonly described as a place of manifold tensions and pervasive unrest. The media as well as some scientific discourses - like those of the political scientists - observe it as both perplexing and disquieting. The canonical description goes systematically from open conflicts to subversive tensions, finally reaching the structural flaws which condemn the world to permanent insecurity.

¹ Jean Clam, *Aperceptions du présent. Théorie d'un aujourd'hui par-delà la détresse*, (Paris: Ganse Arts et Lettres, 2010).

A great number of regional armed conflicts, of various intensities, are taking place in various parts of the world, and have a tendency to spill over into neighbouring and non-neighbouring parts of it. Against the background of a clash of civilisations which escalates to the extremes of global terrorism and counter-terroristic warfare, no place in the world seems safe from the blows of such a planetary *agôn* anymore. Fear of escalation and thereby of a mutation of the confrontation to an exchange of hyper-terroristic attacks, on the one hand, and mass-destructive retaliation, on the other, is in minds of the public at large as well as in the headquarters of military and political agencies. And it seems to be partially justified.

Many states are plagued by internal and external violence. Endemic forms of non-armed, non-military violence – such as corruption, despotism, terror-based governance, organised crime – seem to participate in the very structure of many societies and to show that no reform programmes or efforts are able to pull these societies out of the vicious circle of their non-emergence to self-shaping development.

The picture has to be completed by taking into account forms of threats that have less to do with flagrant and impressive violence than with the very regular, steady and profoundly pacific and beneficent process of the major systems of world society. The ecological threat traumatises large parts of the public in the central regions of world society. It is perceived as extremely serious, almost irremediable already, and necessitates revolutions in attitudes, ways of thinking and behaviour, which constantly present a challenge of huge dimensions – one which almost crushes the consciousnesses of those who confront these problems. Other threats are seen as being poised by the sheer magnitude of the quantities involved in the global integrated-economy as well as by the dwindling time-buffers available for the processing of these magnitudes in real time. There is a feeling that the globalisation of the major processes of social communication is a serious risk and overshadows the progress, growth, and results of individual concrete processes. The economic and mainly financial crises of the last two decades are examples of this threat and the way in which it is perceived.

On the whole, today's world is perceived by its inhabitants as being surrounded by major threats. Even the central regions of it, living *de facto* in a state of enduring, almost unchallengeable, peace and general affluence, are sites of deep insecurity. My thesis is that the *oecumene* of the present, which means the inhabited world in a new and inversed meaning, *i.e.*, the world as consisting of nothing other than the human habitat or the single “global”, spheric inter-subjectivity of social communication, is a structurally and definitively pacified, doubly spheric whole with no outside, whose quietude can only be challenged by a

new type of insecurity or crisis. The question that I am asking in the following is about the nature of these new forms of insecurity, and is directed at a theory of crisis phenomena under conditions of a world society, or, as I shall put it, of *oecumenic* consociation.

II. THE GENERAL SCHEME OF UNDERSTANDING OF A CRISIS: THE SYSTATIC CONCEPT

The concept of crisis, both in its current sense and as applied to social realities, was, as such, unknown in the ancient world and in traditional cultures and societies. However, in these settings, one is very much aware of the constitutive moment of the concept, which is its rhythmic nature. Crisis is a term borrowed from the medical theory of *Hippocrates*, whose accurate observation of the course (*systasis*, *Verlauf*) of morbid processes, especially fevers, led to the distinction of a special period in which things seem to be driven to an acme, a climax, at which the following progression of the sickness is decided (*krinein*: to decide, to judge). Thus, we can say that it is the site at which the decision of bifurcation, and of the determination of the path along which the process will henceforth unfold, is taken.²

Pre-modern cultures had no use for such a concept for the description of social processes. The social sphere had, in order to be described by such means, to be observed in a “clinical” manner, so to speak. This means that a distance to the process itself had to be invented, which was not possible for a mind that tended to ascribe divine, cosmic, and destinal causations to the social sphere. The evolutions of the social sphere were seen as rhythmic, and as embedded in comprehensive super-social evolutions, with rhythmicities of their own, like those of the various ages of the world – with successive stages of florescence and decline. Pre-modern apprehensions of the social sphere could not see the firmness of the autonomic lines of process that the social sphere was able to show in an understanding which emerged with the perception of specific legalities in the sequences of social action. The autonomy of the social sphere could not appear in relation to the individual (the great man, for instance, the main author of history) or to cosmic and divine agency. The contingency of the historic process had to be displaced from the chance of the emergence of an egregious individual and the arbitrariness of his or her will into a dimension in which the continuity and reproduction of social processes prevailed.³ Contingency had to be discovered as the

² I refer to the entry “crisis” of Robert James’ *Dictionnaire universel de médecine, de chirurgie, de chymie, de botanique, etc.*, translated from the English by Mrs. Diderot, Eidous et Toussaint, (Paris: Briasson, etc., 1746), vol. 3, p. 827 *et seq.*

³ The autonomy of the historical process as such was stressed by Hegel against the ancient historians

openness of the processes of social communication in spite of, or on the grounds of, the legalities and continuities that modern observation was able to construct into it.

From the moment that the social sphere could be made visible as process in its legality as well as in its contingency, the concept of crisis was able to be applied to it. Thus, its systatic nature came to full validity, out of a process-oriented observation which concentrated on the precise qualities of the course of a succession of events which formed a unified set of becoming. The concept became central to the self-description of politics and economics in the period which could be called maturing modernity (1800-1900) and has become diffused since then into all systems and domains of social communication.

As a systatic-rhythmic component of the course of processual evolution, a crisis is seen as a “bracketed” phenomenon. Crisis is the climactic moment of chaotic mutation or “*catastrophé*” (overturning, tipping) leading to the rapid, intense and de-regulated oscillation of the process, which produces alternating extreme values with irregular variations of amplitudes (very small ones being immediately followed by very high ones). It is preceded by the regular process and followed either by the restoration or by the modification of it, sometimes by the instauration of a new regular process. Crises are those moments of local disorder which are bracketed by the steady ordering of regularly unfolding social processes.

The mechanism of agitation at the core of the crisis is mainly understood in terms of the interference and the accumulation of deviation differentials which sum up, desultorily, to excessive ones. Thus, the steady process encounters perturbations that cause a series of small and tolerable deviations, which may, however, enter into interference with other such deviations and lead to an amplification of the deviations on both sides. From a certain moment onwards, these deviations can no longer be brought into a reasonable relationship with the amplitude of the perturbation at stake. They become erratic and chaotic, and lose all common measure with the process both in its regular and its perturbate form. This is the basis for the opaque, non-readable nature of a crisis in its chaotic moments.

The de-regulating interference and the accumulation of deviation which lead to excessive variation, constitute a “black box”, which is the core of the crisis. Crises are unreadable only so far as their chaotic attractors are yielding their moment. If calculation potentials which were able to model the behaviour of systems under dissipative conditions

(*Vorlesungen über die Philosophie der Geschichte*, in *Werke* vol. 12, (Frankfurt aM: Suhrkamp Verlag, 1970), p. 44 *et seq.*)

with chaotic evolutions or catastrophes discontinuing the course of orderly causality were at our disposition, then crises would cease to be cognitively impenetrable chaos bubbles.⁴

Short of this, and given that the de-regulating oscillations remain incalculable and cannot be modelled, the critical dissipation would itself remain punctual and intelligible in its principle. In other words, it would be comprehensible in its generation of the cumulative interference of the deviations which accelerate immensely in the very short periods of time, and which form the time frame of the critical breakdown; it would not be comprehensible, however, in its concrete detail. The crisis itself would, in any case, cease with the loss of the intensity of the interferential shocks of its elements, and initiate the return to the regular course of the process.

This is the way that social systems interpret the critical phenomenon, with their own schemes of observation: such as systatic-rhythmic and bracketed schemes. They have a tendency – or the tendency of social discourses developing from this representation – to complement this view with a supposition: that of the societal-embedding of the crisis. Societalising conceptions of crises are those which ascribe the causality of, and, therefore, the responsibility for, the critical development to society itself – or to the variety of the systemic poiesis taking place within society. Society understands itself as being at the origin of the crisis by allowing things to happen in the way in which they happen in society. Society imputes to itself the responsibility for what is going wrong within itself and ascribes to itself the capacity of mending dysfunctional and critical situations.

Late-modern societies have experienced in the last decades a robust societal closure. The range of societal self-ascription of world phenomena reaches quasi-universality. This has to do with the parallel closure of a sort of “consciousness” of the social-constructedness of anything encountered in the world: social systems and social communication, as a whole, act and react – process and re-process their poiesis – as if such a constructedness were a universal supposition, common to all consciousnesses and underlying the distinctions of all social systems. Not a single fact occurring in the social world does not entail an ascription of it to the social sites responsible for its handling in a manner which assimilates them to its

⁴ On dissipative and catastrophic structures, see Ilya Prigogine & Isabelle Stengers, *La fin des certitudes: Temps, chaos et les lois de la nature*, (Paris: Odile Jacob, 1996), and René Thom, *Paraboles et catastrophes. Entretiens sur les mathématiques, la science et la philosophie réalisés par Giulio Giorelli et Simona Morini*, (Paris: Flammarion, 1983).

producing instance. The handling of crises by emergency cabinets, commissions, task forces, *etc.*, suggests such a representation of the matter.

The societal closure is enhanced by the fact that all social communication occurs under conditions of high tension due to the improbability of the formulae, the codes, and the accomplishments which social communication, in particular, possesses in order to enhance their probability by inventing their functional dynamics and make their meanings plausible. In other words, all systemic poiesis is directed at the de-paradoxisation of the order of the very meaning of the synthesis which they are weaving. In a sense, a crisis is always inscribed in the structure of the poiesis of communication in the same manner as a paradox is at work at the ground of the order of the meaning in question. There is no guarantee that the poiesis can always cope with the paradox, *i.e.*, that de-paradoxisation can always succeed. The latter is a contingent and risky process, prone to the launching of crisis dynamics with their de-regulating or disrupting effects.

At this junction of the argument, there emerges the idea of a “critical grid” of reading, or a “critical bias”, which is produced by the supposition that almost all social processes can be observed and read from the angle of their “crisis” understood as the supposition of societal causation and responsibility for any dysfunctional or critical development. This critical bias tends to be insufficiently complex to be able to give an understanding of what is happening in the new settings of world society.

III. ANTHROPOLOGICAL THESES ON PERIODICAL CRISES AND SELF-DESTRUCTIVITY

In order to establish my own theoretical approach to the concept of crisis, I still have to exclude two theses which do not correspond to such a societalising critical grid. The first is an anthropological one, the second a sociological and systems-theoretical one.

The first thesis is Freud’s conception of a death instinct (*Todestrieb*) brought in correlation with the conception of the transmission of neurosis in human culture.⁵ I take it into consideration because it can stand for all other theses grounded in a theory of culture or

⁵ It has to be stressed that these are two different, in themselves, non-related strings of theory. Freud’s theory of culture [exposed from *Totem und Tabu* (1912-13) till *Der Mann Moses und die monotheistische Religion* (1939); see Sigmund Freud, *Werke, Studienausgabe*, (Frankfurt aM: Fischer, 1969-1975), both vol. IX] and the theory of a death drive (exposed in *Jenseits des Lustprinzips*, same edition vol. III) belong to different thematic and heuristic contexts.

in general anthropological assumptions, which affirm the inherence of self-endangering, self-destructive tendencies in human social behaviour.

Freud's claim is a psycho-constitutive and psycho-collective (*massenpsychologische*) one. The thanatological drive is a component of the pulsional organisation of the psychic apparatus (*Apparat*). It is a major drive in the psychic economy and is exerted in all forms of destructive aggressiveness. It is ultimately non-resilient and cannot be neutralised or brought under control by individual effort or conviction, or by collective understandings or ascendance to higher cultural levels. On the contrary, culture is a factor of the exacerbation of the tensions within both the individual and the collective psyche. The cultural process itself is a form of neurosis, building conflict potential within the psyche and requiring violent discharges of the stowed energies. The "death instinct" combines with this process and runs across human history like a stream of blood. The neurotic tensions of culture find a well-fitting outlet in those destructive energies whose tendency would go to the limits of mass annihilation.

A psycho- or socio-anthropological thesis of a similar kind is that of René Girard on mimetic desire and the sacrificial crisis taking place at the origin of the institution of society.⁶ All such theses work with periodical models such as Freud's cyclic return of the repressed. In all these theses, there is a repetition pattern of the crisis, and this enhances their plausibility. Human history with its unending succession of wars and destruction, with groups not learning from, or forgetting, the tragic experiences of the past, lends them a strong intelligibility and sometimes an impressive explanatory potency.

Such theses lose their pertinence when applied to the new *oecumene*. This has to do with ruptures in structural-anthropological continuity, which are at the core of my theory of an anankastic and post-anankastic age, in particular, with the de-symbolisation of the orders of meaning and the disjunction of desire and *anagkè*. However, I do not enter into the details of the theory, but refer to my book, entitled, *Aperceptions du présent*. (note 1 *supra*)

If we can exclude such theses, we remain then with the conception of a crisis as a catastrophic inflection of the course of a process which culminates in a chaotic agitation of its operations and their value outputs; an agitation bracketed by a regular course before and after

⁶ See René Girard, *La violence et le sacré*, (Paris: Grasset, 1972).

the crisis; the whole being plunged into a societalising paradigm in which crisis tends to be seen as a concomitant aspect of the poiesis of communication itself.

IV. THE CRISIS OF COMPLEXITY

There is still another thesis which has to be examined and whose type has still to be acknowledged. It is the very frequently-cited complexity or hyper-complexity thesis, which explains the chaotic drift of systemic poiesis by the fact that the relevant systemic processing potentials have been overwhelmed by environmental stresses or challenges; or that the complexity production/reduction of the concerned systems themselves soars in a manner which makes it impossible for them to continue to be adequately self-processed.

The new crises would be intelligible as the effects of the growing-complexity of systemic syntheses as well as that of their couplings. Control of both become impaired. The growth of complexity can go to extremes where it elicits a transformation of the understanding of complexity itself, motivating the introduction of a new notion, that of hyper-complexity. What was then assumed of systems in terms of their capacities to reduce complexity can no longer be assumed when they face hyper-complex settings.

Thus, is hyper-complexity a particularly high form of complexity whose reduction becomes impracticable? Is the difference between hyper-complexity and complexity only quantitative and oriented upon the success or failure of the relative control of the implied poiesis?

The argument in favour of an understanding of hyper-complexity as a form of increased complexity would show the relevant syntheses of the regulatory regimes under the pressure of a specific context of systemic operativity.

The context would be characterised by:

- 1) the *annihilation of temporal and spatial buffers* entailed by the new technologies which allow vast quantities of information to be processed in real time throughout the whole planet;
- 2) the *de-construction of all types of legal, political, cultural and technological boundaries* which tended to isolate territories and groups or to insert a time-lag between the emission and the reception of information in world exchanges;
- 3) the *reflexivisation and entanglement of conditionality* in certain poiesis – like those of the international finance system which invents forms of conditional

futurabilisation in which it is licit to suspend agreements with agreements on the probability of the profitability of those agreements – or with agreements on the probability of the profitability of those agreements on the probability of the profitability of the former agreements.

Thus, in this conception, hyper-complexity is the quality of complex systemic processing which would be outpaced, on a current basis, by the burdens of the information processing which it encounters, this outpacing taking place under conditions which transform and potentialise those of “simply complex” processings.

Complex processing have to face such additional burdens quite regularly – this being the defining trait of their complexity - but succeed in operating in a manner which reduces these burdens to a level at which what is real becomes consistent and thus merges to its reality. What is real is the result of the resistance which the system encounters within itself to its own observation, and which gives it the robustness of such a “realising” observation. No other resistance can take place without breaking the tension of realisation inherent to the system.⁷

In a reference space of hypothetic hyper-complexity, the reductions of complexity would have to perform the reality of the observed by experiencing its resistance to a process of re-dilution in an overwhelming additional complex matter. In such a reference space, these reductions, while being performed, would be constantly questioned through the flowing back of an excess of complexity – precisely seen as hyper-complexity – which would maintain a principal and irreducible indeterminacy in the system. Such indeterminacy would not hamper its operation nor its stabilisation throughout the whole breadth of its field, but would place it under the risk of a retroactive crisis which would take its departure from this indeterminacy.

Hyper-complex systems as such cannot be conceived because they would represent systems whose – complexity reductive – operations would not suffice to give univocality to the meaning of their environments, and would, therefore, leave them without outlines and reality. Nowhere can an excess-of-complexity, a mundane hyper-complexity which would exceed all the available capacities of complexity-reduction operating in the relevant field, exist. This complexity which would not be reduced, which means that it would not be

⁷ See, on the subject, Heinz von Foerster, *Wissen und Gewissen: Versuch einer Brücke*, edited by Siegfried J. Schmidt, (Frankfurt aM: Suhrkamp Verlag, 1993), and N. Luhmann, H. Maturana, M. Namiki, V. Redder & F. Varela, *Beobachter: Konvergenz der Erkenntnistheorien*, (Munich: Fink, 1992).

resistant to, and, in an operation of its reduction, would be nothing else than, a potential of vagrant and non-representable non-intelligibility which would not be able to correspond to any real object at all.

Complexity is its own reduction or its proper tension in its realising resistance to its own reduction. A very high complexity would be a complexity grounded in very strong resistance, very high tension of reduction which would outline the shape of an entity that could be encountered in the world. Between complexity and very high complexity, there can be no difference if not that of attributing to the latter a higher tension of reduction. The surplus tension does not change anything in the fact that the resistance, whose expression this tension is, delineates, on the same plane of what is real a real object in exactly the same manner in which non-surcharged complexity does. Whereas hyper-complexity, meaning an excess of complexity which would remain irreducible and floating, would not make any sense, it would come out to be complexity plus nothing beside it, this nothing having no link with its tension or its realisation.

We should therefore dismiss the hypothesis of such a hyper-complexity when dealing with the insecurisations of the *oecumene*. It would describe nothing but a complexity whose reduction would always be very strained, and which would be very vulnerable to a sort of indeterminacy which one would like to ascribe to the entanglements of its partial complexities. Now, precisely such entanglements cannot lead to a simple accumulation of the complexities from the different systems concerned by the process, nor to interference which would enact oscillations which would quickly grow to reach dissipative thresholds. The contact surfaces between systems are extremely narrow and correspond to structural couplings based, to be sure, upon the perfect closure of systems to each other.

One has, therefore, to search for the crisis potential somewhere else than in such hyper-complexity. One possibility of saving the use of the concept of hyper-complexity could be to transport it in the new theoretical framework projected with the concepts of transfinity and “world” pressure – which will be presented in the next paragraphs. Hyper-complex would then qualify the operation, the regular regime, as such, of a system which would operate continuously in a state of over-stimulation due to the existence in it of an indeterminacy that has to be situated at the points of its opening on the transfinite. These are the points at which the gratifications grounded in the non-resistance (or irresistance, to be

closer to my French terminology) of the “world” to the systemic thrust within it, as well as the crisis perturbations which it goes through, have their occurrence.⁸

This means that, if one is willing to operate with this concept, one would have to adapt it to the theory of the double closure of the *oecumene*. The concept of hyper-complexity is crucial because of the very strong tendency, both within the field of systems theory and outside of it, both in the different discourses practiced in other systems and in society at large, to represent today’s crises as reactions to bursts of complexity within the different systems of society and to understand this excess of complexity as hyper-complexity in the sense that we have been discussing in this paragraph.

V. THE CONCEPTS OF “*OECUMENE*”, “DOUBLE CLOSURE”, “WORLD” AND “WORLD CONTACT”.

The crises taking place at present are conspicuously global crises. Their global dimension is obvious in the sense that they do not stop at any type of boundary, but are diffusive in the medium of global communication. Global phenomena are co-extensive to a global world whose definition can be empirically based upon the experience of the multiple factuality of the integration of the great majority of social processes into networks of global processing. However, the globality of world communication requires a theoretical consideration of what it means for social communication to become global. There are specific modes along which global wholes have to define their boundaries when they reach total sphericity, that is, when there is nothing more left outside of them.

Niklas Luhmann tried to deliver such a theory and gave it the title: world society. He reflected on the systemic aspects of world socialisation, but did not enter into the details of the structural-topological consequences of such a closure of world society on itself.

Within the limits of this chapter, I cannot propose a re-construction of my projection of the concept of *oecumene* and of its double sphericisation and closure. Roughly speaking, the first closure corresponds to the sphericisation of the human habitat on the *globus terraqueus* as Kant described it at the end of the Eighteenth century. The second closure can be best acknowledged using Teilhard’s concept of noosphere and his ideas on the building of the inside and the outside in wholes which undergo a “*ennoïement*” (drowning) of their inside

⁸ Hyper-complexity would thus be a manner of interpreting the system and its regime from the angle of the crisis with the notable difference, however, regarding the critical readings cited earlier in this chapter, that, this time, the starting-point would be taken in a new conception which would not borrow its grid of interpretation from an inadequate concept of crisis.

by the inside of the other. The doubling of symmetrisation as a process of building insideness can then be seen as the re-introduction of a sphere in itself.

There is thus a need to substitute Luhmann's world society concept with a concept capable of hosting the topological as well as the anthropological dimensions of the new globality. This is why I speak of *oecumene*, instead of world society, by which I mean something different, which corresponds to a developed form of the theory, which uses - both crucially and centrally - the Luhmannian concept of "world".

World society is not a mere sphere, a whole encompassing all communication taking place on the globe, and enhancing its temporal contraction and networking in a multiplicity of institutionalised or not institutionalised, organised or not organised, self-organising processes. It is a sphere re-entering itself in itself and bringing forth, upon the basis of this topological entanglement, and the very specific modes of observation, reflection and action within it.

In effect, the new *oecumene* has no environment, which means that it has no related outside – as in the case of systemic boundaries where the line running between the system and the environment is that of a form distinction. World society is the first *oecumene* which does not have any "other" – any "neighbouring" otherness known to itself. The new *oecumene* emerges on the ruins of alterity and of the "category" of the "social understanding" – to put it in a Durkheimian vein⁹ – which is its matrix, that of auto-preference: there are no longer means to prefer the self over the non-self while the self is – noospherically – invaded in its inside by its non-self. Its non-existing outside is an unrelated one, the "world". The "world" is the nothing which constitutes the last outside of the *oecumene* with no outside.

This means that social communication lies directly on the "world". It touches it without mediation. Its envelopes are those of the doubly-sphericised, in itself re-entering *totum*, and are "pressed" by the direct contact of the "world". This creates an absolute novel structure that has to be described and theorised.

VI. DOUBLE CLOSURE OF THE OECUMENE AND THE IRRUPTION OF TRANSFINITUDE

The societalisation of the risks and dangers which gain consistence in the *oecumene* and take the form of crises, does not constitute a novelty, if not precisely, in so far as such a societalisation correlates with the end of the firmness and stabilities of the old regime of

⁹ The analogy of the categories of the social and those of human understanding in general is exposed by Durkheim in *Les formes élémentaires de la vie religieuse*, (Paris: PUF, 1960), p. 12 *et seq.*, & 621 *et seq.*

modernity as they appeared in the last decades of the Twentieth century. The societalisation of all crisis phenomena has its eminent site in this period and in the *oecumenical* structure which is associated to it and is perfectly consonant with it. While perpetuating itself beyond the threshold of the emergence of the new *oecumenical* structure, it begins to function as a dissonance of the self-perception of the new world society. In effect, risks and dangers which gain consistence and are suspended in that society have, henceforth, a structural and irreversible relation to the “world”, to the nothing which lies beyond the circle of its double closure.

This new configuration of the dangerousness of social communication is a novel form of insecurity of the global habitat. Whereas, hitherto, risks and dangers were internalised into the poiesis of *oecumenical* communication and had to find within them the resources to bring them under control, their constant and radical provenience from the “world” prolongs them beyond these poiesis, into depths where all systemic rectification takes the form of a drowning of finite potentials into transfinite apertures or densities.

In the new *oecumene*, it is no longer possible for any insecurisation of its poiesis not to stem from the open voids of the envining transfinite, not to have a path of origin from that place where all cognitive comprehensions as well as all causality attributions recede to nothingness. The transfinite into which they vanish is absolutely unknowable and indeterminate. This means that the global *oecumene*, that is, the planetary whole doubly spherical and doubly immanent of communication, touches, henceforth, the “world” directly. The “world” lies at its boundaries, not next to it, but on it, pressing it with the same tension it, the *oecumene*, exerts while deepening its surfaces to re-enter into itself.

The “world” never had this proximity and direct contact with it. The novelty in the new *oecumenic* situation is precisely this immediacy of the influx of the “world” at the boundaries of the social and its irruption into it each time that a “critical” insecurisation occurs – in any of its poiesis.

The new crises of today motivate the apprehension of the existence of transfinite buffers, *i.e.*, of sites at the junction of things which are capable of absorbing all the intelligibility potentials that we can mobilise without any recognisable effect. These buffers do not deliver anything back of those potentials. They swallow them in their unfathomable voids, leaving no trace of their passage and effort. The dimensions involved in their apprehensions immeasurably outgrow all that could be done with those potentials. So much

so, that the surge of the “world” at the boundaries of the *oecumene* enigmatises it, while it is still very strong and protected by its double closure. The crises of the new *oecumene* show gaps of inexplicability, places of constellation of disruptive moments which no analysis nor any distribution of causalities would be able to elucidate.

Thus, the claim is then that it is inescapable to encounter that transfinite when one theoretically observes the social in its novel and double globality/sphericity. It is the fact that the new globality has no other outside than the “world” which transfiniteises the grounds/depths/voids where communication has to enter when some of its processes touch, in the course of crises, the points of failure of their poiesis.

On the other hand, by letting social communication touch the “world” as its last outside, crises represent the contingency of emergence of the new *oecumene* and represent in the same movement its exact reflection in the absolute contingency of its de-emergence.

The emergence of the new *oecumene* can be observed in its contingency by those who inhabit it, and can, at the same time, be assumed by them as such. This *oecumene* is quite capable of affirming its contingency and its being born by it and its most lively dynamics. In effect, the challenge of contingency, assumed and overcome, is precisely that which constitutes the agility as well as the affirmativeness of the poiesis of the new human world, that which gives it its independence of any transcendent instance which would lie behind its emergence and its conservation. Thus, the assumption of contingency endows the new *oecumene* with its capacities to disengage itself from any massive meaning projections and to accept itself with lightness as well as to close itself upon its own gratifications.

With the emergence of the crises of a new type, which reveal how near the “world” is to the *oecumene*, how the “world” weighs on its last membranes and can bring insecurity into its reproduction, this contingency (of emergence) can no longer accept itself nor apprehend itself for its own sake. It doubles itself immediately with a contingency of de-emergence which nothing can de-presentify from the horizon of global communication any longer.

What then takes place is typical of an oscillation, which seems to establish itself in our *oecumene*. On the one hand, the *oecumene* confirms itself as the dwelling of a mankind sheltered under its double closure and enjoying the gratifications of its new condition. On the other hand, a certain number of events with high potentials of insecurity which crystallise under the novel form of crises have the particularity that they convoke the “world”, so to say, into appearance at the boundaries of the social global body. While doing so, they bring to the

fore the radical contingency of the de-emergence of everything. The oscillation within world social communication goes from a pole of quietude and confidence which underlines the consistency of the new *oecumene*, to a pole of apprehensiveness which represents its radical contingency.

VII. THE “WORLD” AND ITS CONTINGENCY

One could question our theses and the plausibility of a chasm or a mutational threshold which I have stressed very strongly as shaping the passage from late modernity to what I call the present. While the double closure of the *oecumene*, its re-entry into itself and its contact with the “world” as the constituting moments of this mutation may be conceded, their reach could be relativised: the crystallisation of a contingency of emergence/dis-emergence may be placed in doubt since such an emergence does not seem to be substantially different from the contingency of modernity as such, the structural phenomenon that one has thoroughly learned to describe and to conceptualise in Luhmannian sociology – as well as in general sociology. These doubts must be addressed.

One should, first of all, insist on the fact that the “world”, as I understand it – following Luhmann’s insight – does not come to concretion with these decisive moments of the mutation of the present. It does not come to being with the doubling of the *oecumenical* closure, nor with anything announcing the new *conditio humana* born out of it. The “world” is a structural moment of communication as such, of the communication of today, yesterday, before yesterday and of any time in which communication takes place.

Every time that communication comes to pass, it pre-supposes the opening of a “world”, that means of something which gives it the space for the unveiling of the *poiesis* of an aspect of being taking place within it and involving the relatedness of the intentionalities which are intransparent for each other, which means they are doubly-contingent on their relatedness to each other.

This way of understanding and projecting the structural setting of communication is a composite figure which brings together a central insight of Husserlian and Heideggerian phenomenology and an axiom of systemic sociology.¹⁰ The “world” as the condition of the

¹⁰ On this thematic complex (of world and horizon), see Heidegger, *Sein und Zeit*, (Tübingen: Niemeyer, 1979), §§14-24; Husserl, *Ideen zu einer reinen Phänomenologie und phänomenologischen Philosophie. Allgemeine Einführung in die Phänomenologie [Ideen I]*, (Tübingen: Niemeyer, 1922), §§80 *et seq*; Luhmann, *Soziale Systeme. Grundriss einer allgemeinen Theorie*, (Frankfurt aM: Suhrkamp Verlag, 1984),

possibility of the unfolding of the world of communication can be understood philosophically – with Husserl and Heidegger – as a transcendental or existential entity, as such, not occurring in the world, but being the pre-condition of the whole of *ontic* reality, *i.e.*, the world as such. It can be also understood, with Luhmann, as the unity of the distinction of the system and the environment, which is neither on the side of the systemic *poiesis*, nor of that of its worldly, *ontically* given environment, but that which makes possible the drawing of a notch (*i.e.*, a distinction) on the surface of the world thereby inaugurating the systemic processing of that distinction - the operations of the system being nothing else than the continuous position and effectuation of the system/environment distinction.

The braiding of both (phenomenological and systemic) “world” ideas brings to the fore their convergence in their decisive difference to the *ontic* total reality of the world. It stresses the indispensability of a term from which reality is made possible and which does not and cannot occur in it. Luhmann may be as a-philosophical, as averse to transcendental reasoning as he will, he may be as attached to the factuality of the givenness of the phenomena which he deals with in his theory as he will, he is not able to dispel the figure of absolute facticity and non-factual givenness of the ultimate enabling ground of the world of communication. He cannot refute the doubling of the meaning of worldliness.

On the one hand, the factual *ontic* world is the place, the dimension of the reality and the factuality of the operation of the system and the horizon of the givenness of its environment; on the other, the “world” is the unity of the system/environment distinction, and cannot therefore be encountered on any side of the distinction. When we say that a system has to do with a sort of outside world, which is its environment, we mean that it has to do with a reality of a “horizontal” nature, that means by which it is always infinitely richer than what it is able to process along its own distinctions and code, but which touches or concerns the system only to the measure that it is able to admit it into the informing actuality/operativity of its distinctions. The horizontal nature of the environment does not mean that it has factual reality beyond the system, as if it were an immense reservoir of fuzziness that cannot be totally processed by the system. It is of the same factual reality as the system, and is, in a way, nothing else than the always possible further extension of its reach into the world. In a sense, the *ontic* world with its own horizons of non-processed nor actually processable pieces of reality, with the depths of its systemic environments remains

p. 283 *et seq.*, and “Die Weltgesellschaft”, in: *idem*, *Soziologische Aufklärung 2*, (Opladen: Westdeutscher Verlag, 1971), pp. 51-71.

principally processable and cannot emerge from its potentiality to dense reality if it is not admitted into the spaces where systemic distinctions make it visible to its environment. Environments do not pre-exist to the systems as if they were out there and a system would emerge in their spaces and begin processing the pieces of them. The horizontal-worldly environments of systems are co-extensive to the factual worldly position of systems and do not pre-exist them. They are the virtual depths into which the processing of the systemic distinction by the system moves ever further. They are not incommensurable to it, but fundamentally commensurable.

One has then to retain this first meaning of the world as the factual *ontic* reality of systems as well as of their environments. It is the sense in which Luhmann speaks of systems as given, and speaks of the reality of their environments as also given. It is the sense in which Luhmann speaks of a world time (*Weltzeit*) in which all world events (*Ereignisse*) take place, in particular, those decisive events that are the operations of the systems. These are conceived of as instant events taking place in the world and concatenating in the sequences of the worldly time to build ultimately a consistent poiesis in which the world of social communication acquires its masses and densities.

This first meaning of the world can lightly be confused with the “world” as the unity of the distinction of system and environment which is the non-worldly and non-attainable condition of the possibility of both: the distinction itself and the factual world which is projected with it.

The horizontal nature of the world induces, on its part, the confusion of this world with the spatial, indeterminate, fuzzy, immense or infinite surroundings of the systems as though systems had a finite reach to their immediate environments, but would basically still swim in an unbounded cosmic ocean of amorphic vastitudes.

What should be said here is that the world as *totum* of factual *ontic* reality is actually the cosmic world, but not in the sense – where its cosmicity and vastness is at stake – of a second layer of unreachable amorphic surroundings of the systems – which, as meaning systems are, in their totality, hosted in human societies on earth. The factual world is never amorphic: it is always related to the operative “relationings” (*Relationierungen*) currently effectuated by the systems. If it is surrounding the systems, environing them with their environments, stretching before them like horizons of their mobility and reach, it remains always commensurable to them. The factual world is the *totum* of what is the fact in the

world and occurs as such within it without re-entering itself. It is not a pre-worldly condition of the possibility of world and communication in general.

In contrast with this, the “world” is not cosmic in the sense of immensely extended space, nor is it commensurable, nor related to the system – it is irrelative to it. It is horizontal in a transcendental sense, not that of the surroundings environing the system like its spatial environments. It has only a metaphorical vastness which reflects its structural non-objectivability.

To bring more clarity into the distinction of the “world” and the world, we will have to ascertain that the “world” cannot be influenced by any historical change. What its concept indicates within a theory of society which overlooks the decisive ranges of change in societies of the past and the present is that the “world” is what it is for any configuration of communication. What changes is the relation to the “world” of societies which have undergone a topological transformation of their self-relatedness. My thesis is that when social communication comes to engulf the sphere of world which is projected in it, and does it like a sphere ever growing within a sphere, crossing the limits of it and revolving around those limits and thereby drawing a larger sphere, encompassing the first sphere, wholly swallowing it and re-infolding into itself; when this takes place, then society/social communication lies in direct contact with the “world”. By doubling its closure, social communication envelops the world by exceeding it and covering its envelops with its own ones. It becomes the whole world, the entirety of it, ceasing to be simply that to which the world is always and fundamentally related. The medium which constituted the environmental horizons of social communication vanishes, leaving it without an environmental outside and subsisting in direct contact with the “world”. It is, in a sense, a sort of aspiration which absorbs and annihilates the stretches lying between the world (of communication) and the “world”.

These stretches are filled by what one could call the environmentally diverse or the diversity of the elements lying within the environment. It is the space of environmental contingency in which change occurs in the relationship of the systems to the world. This is the space which is affected by the transformation of the structure of social communication, such as the transformation taking place since the advent of modernity. Here are the margins in which the strictness and the rigidity of the rejection of contingency can vary, and it is the vanishing of this space which occurs with the direct contact with the “world”, transforming environmental contingency into a contingency of emergence/dis-emergence.

VIII. SOCIETALISING CONSTRUCTIONS OF THE CRISIS

One has, however, to be aware that the presentation of the “world” is only mediate and fleeting, that it takes place through small breaches, lesions of the screen which is being constantly woven by the conventional constructions of the crisis, those which societalise its causalities, the circumstantiations of its course, the control of its handling, the scenarios of exiting it and of restoring the normal regime. One has to insist on the fact that these breaches are only fleetingly visible against the background of anxiety which the new crises produce at the moments of great confusion which they sometimes elicit.

These breaches opening on the “world” and representing the contact of social communication with it are almost never recognised in the public discourse, which remains congruent with the societalising dogmatics of the different systems concerned with the crisis. Politics, the economy, law, science, the principal and most integrated social systems – building together a sort of global production regime¹¹ – do nothing else than continue the societalising approach of the crisis as a whole, from its genesis to the mobilisation of social action against it. They constitute, mainly by virtue of the function that they fill in the basic reproduction of social communication, an epicentre of each “critical” commotion, which means a site at which the effects of such commotions are felt with the greatest intensity.

At the same time, these systems take charge of the handling of the crisis emergency and the mission to set up the mechanisms to exit from the critical zone of agitation. The crisis transforms them into a systemic *bloc* to which all interrogations and social demands whirling in the critical disorder are addressed, as well as into a central actor in whose comprehensions of what the crisis is originate as well as the strategies of return to the normal course, the array of measures taken to intercept current perturbations, the building of memories where learning from the crisis is stored, *etc.*

This rapid evocation of what a crisis brings into motion from its outburst is meant to render explicit the meaning of the societalisation of its genesis and its effects. It shows how “crisis scenarios” are seen as intensive mobilisations of all systemic potentials and their operation through the central systems. These are activist settings which underline the societal causality of disorder and allow to put it into perspective and to apprehend it as well as the efficiency of the applied measures and strategies.

¹¹ On the concept of production regime, see Gunther Teubner, “Eigensinnige Produktionsregimes: Zur Ko-evolution von Wirtschaft und Recht in den varieties of capitalism”, in (1999) 5 *Soziale Systeme*, pp. 7-25.

This means that such a conception occults, in the new crises, what can be felt of the transfinite of the “world” through the breaches of the last membranes enveloping the social sphere. Certainly, the systemic dogmatics of the crisis knows about the chaotic mutation or the “catastrophe” towards the accelerated and de-regulating oscillation characteristic of every serious crisis and takes it into account. However, it does not make room for what can only be conceived of from another plane of vision that opens up at the membranes of the social sphere. This non-concession of the possibility of perception of the transfinite coming to experience through the contact of the “world” with those membranes cannot be compensated for. In order to concede such a perception, systems would completely have to re-project their vision of themselves. In effect, the de-societalisation of such major phenomena of the social sphere would entail a de-societalisation of the systemic operation itself and bring forth a new conception of social systems as well as of their environments.

If the chaotic effects of the crisis only correspond to local disorders consisting of excessive agitation of certain process variables interfering with other normal or excessive agitation of other variables and summing the de-regulations to a major one; if these chaotic effects are unreadable for no other reason than the fact of the non-readability of de-regulating chaotic accumulations; if crises are caused by nothing else than these causal accumulations, then crises would have, in their black box, nothing else than such multipliers of de-regulation. They would constitute “black holes”, chaotic attractors only to the extent that such multiplications are able to unfold. Their kernel would remain impossible to analyse for the single reason that no calculatory devices which would enable us to make a model of the behaviour of dissipative structures, of chaotic evolutions and catastrophes discontinuing the course of orderly causality, exist. The “critical” dissipation would only be punctual, understandable in its principle, while remaining incomprehensible in its details. No element of de-societalisation would ever come to expression in the observation of the crisis.

Societalising visions have the advantage of restoring confidence into the continuities of the closure and the constancy of the new *oecumene* at the price of the non-perception of the new quality of some insecurisations of the world of our present. However, the new type of crisis which we have been confronted with in the last two decades does not show any restriction of its structural moment of intelligibility to chaotic agitation. It seems that, at this juncture, the non intelligibility of the critical phenomenon undergoes a mutation. The commensurability of world phenomena with human understanding seems to be decisively weakened.

Such a loss comes to apperception in the new crises of the new *oecumene*. These crises have a curious characteristic which can only be put in relation to such a loss of commensurability: they are no longer structurally transient – although their phenomenon is and has to be constructed as such. Two instances of these new crises can be cited: the ecological and the financial crisis. I begin with a discussion of the former which functions as a paradigm of this new type and requires it to be conceptually elaborated.

IX. THE ECOLOGICAL CRISIS – AS A CRISIS OF A NEW TYPE

To speak of the ecological crisis can be misleading. One should, in my opinion, speak of individual ecological crises and mean the array of events which have their spatial and temporal identity from a collective experience with “critical” natural phenomena, that is, with the chaotic effects and the breakdown of intelligibility which have been described above. “The” ecological crisis would then mean the generality of the recurrent ecological crises of the past decades. The repetition of individual ecological crises gives a sort of permanence and unity to the crisis. My thesis here is precisely that the permanence, non-transience of the crisis does not stem from this repetition, but from a radical contingency which it acquires from a non-intelligibility which goes beyond the chaotic phases and adheres at different places of the relevant processes of the regular regime.

Whether the crises are repetitive or not, the individual crisis presents a radical contingency of de-emergence grounded in the irruption of this type of non-intelligibility in the universe of social meaning constructions. Such an irruption makes the “critical” phenomenon enigmatic and entails, beyond its waning, a sort of continuance of the disruption that has occurred in the course of the world, *i.e.*, the chains of social meaning constructions.

Certainly, social communication has strong tendencies to forget what hinders its regular reproduction and what is in a state of momentary recession within it – tendencies which go so far as to render invisible and to forget hindrances and crises of its continuation which are not at all recessive, but fully active and acute. It, thus, does not come to an awareness of the fact that the “critical” phenomenon has become enigmatic, nor does it feel insecure about the absolutely new level of contingency which has been reached. It is more comfortable with societalising readings of the critical phenomena and their dissemination.

However, the enigmatisation which follows from the irruption of the incommensurability or non-intelligibility does not remain without consequences. It establishes the crisis and a consciousness of crisis “somewhere” around a point or a line of

escape from which the texture of the meaning woven at the place of the communicational envelopes can be unwoven. The exit from the crisis and the restoration of the regular regime of social poiesis do not really close the critical episode, of which an acute consciousness of the contingency of what social communication constructs as its objects, in the instance of the ecological crisis, nature and the natural phenomena, remains. These objects no longer appear as constituted by distinctions and relationships which have gained firmness and stability, thus reflecting the consistency of the constructions of their meaning. They appear as incommensurable to those constructions themselves.

This means that a cleavage has occurred in the object which, in its construction, digs voids, and buffers, absorbing all possible intelligible projections without letting them reach the consistency of anything. The object, which has no outline and no reality besides those given to it in its construction, is not duplicated in an object which has to be placed behind its phenomenon like a noumenal entity (a *noumenon*, a *Ding an sich*) which constitutes its non-knowable reality. The cleavage does nothing else than radicalise the contingency of the schemes of observation that construct the object and let it lose, through such a radicalisation, at some of its articulations, all resistance and all firmness. All what can be put into it in terms of constructive efforts, the means of tension and resistance of the observation to itself, has no consistency building or enhancing effect and is lost in a transfinite sphere where the greatest calculatory potentials, were they to give us an idea of what is happening in those breaches, are utterly annihilated.

Straddling beyond the strictly “critical” oscillations, these insecurisations reach the ecological objects themselves and ensconce themselves in them. There appears a new type of constant crisis, which stretches itself over long ranges of time, reaching very far into a future which has already begun as a continuous degradation, an entropic evolution. The “critical” insecurisation trespasses the bands of marginal variation and brings its phenomenon into the light of the macro-dimension of perceptible things: it emerges to the obviousness of things apprehended with the natural senses and retained in personal memories of short scales of time, of seasons, years, lustrums, and decades.

An instance of this can be found in the phenomenon of global warming as an ecological crisis established in a form of social permanence, adhering to the conditions of continuance of the new *oecumene* and insecurising it through a pressure of the “world” on its envelopes; a crisis which, at the same time, is engulfed in the structural quietude intrinsic to this new *oecumene* and therefore is not read by it as such an insecurisation coming from the

transfinite voids of the “world”. The new *oecumene* substitutes, to such an understanding of the crisis, the one deriving from the scheme of a self-produced crisis whose genesis and causalities are internal to the social process and the conditions of its production regimes, and whose evolution can therefore be influenced by its action. The new *oecumene* is prone to maintain the postulate of the societality of the whole of the ecological crisis, and to ignore the aspects of it which hint at the so-to-say generalised dissipative effects which open up spaces of transfinity under the ground of the social apprehension and determination of the phenomena itself.

X. THE FINANCIAL CRISIS – AS A CRISIS OF A NEW TYPE

An other example of the new type of crisis is the financial crisis. Unlike the ecological crisis, there is here no confusion between the temporally-bracketed phenomenon and the permanent structure of the crisis. Whereas the ecological crisis is seen as permanent for other reasons than those which really gives it its constancy, the perception of the financial crisis remains within the canonical scheme of projection of critical phenomena, *i.e.*, it is perceived as individual, bracketed within a short period of time, with the typical chaotic or erratic accelerations and oscillations, its returns to the regular course, its late repercussions, its definitive absorption by adjustments which it, itself, induced.

However, as for the ecological crisis whose non transience is neither an effect of its repetition, nor of its stretching over the long periods of time of a physico-biological planetary process, but only of the irruption of transfinity into the determinations of its genesis and quality, here, too, in the case of the financial crisis, one has to acknowledge the eruption of the transfinite at multiple places within it. As a consequence of it, one has to recognise a permanence of the crisis, a permanence itself lacking in the phenomenon of the crisis, but grounded in its nature as a crisis of the new *oecumene* born from the pressure of the “world” upon the envelopes of the social sphere.

The thesis must then be asserted that the globalised finance of today does harbour a radical contingency which effects the points of irruption of transfinite orders of complexity. These points are no longer restricted to the points of impact of the crisis in its phases of chaotic oscillation, but are disseminated henceforth over the whole global financial process. Along such lines of analysis, the financial system appears to be marked by an intrinsic indeterminacy which establishes dissipative effects which are conceivable throughout the (regular and irregular) process, launching, at some junctures, “catastrophic” developments

(i.e., of profoundly de-regulating nature) which correspond to a radical contingency of de-emergence. To be marked by such a type of contingency stemming from the irruption of the transfinite at a multiplicity of points of the regular regime makes the crisis intrinsic to the systemic operation itself. Such a contingency is permanently pulsating under the entire systemic weaving of the social world without, however, eliciting any critical perturbations.

Thus, the non-manifestation of such effects between two critical episodes does not mean that the critical dynamics are not active under the form of possible, or even real disconnections of the effective and always strained relationships observed at the heart of the systemic poiesis by this poiesis itself. The presence of pockets of transfinity is active in a specific manner: that of an action without noticeable outcomes, since, most of the time, the active plenitude of these pockets nullifies the effects of its own disconnections – probably because its activity pertains to a quite different periodicity than that of the macro-relationships of tension which give things their consistency to our observation. Active without outcome, it is the reflection of the constant and radical indeterminacy of the system. It verifies, under the new conditions of observation and theoretisation of the *oecumene* of our present, the non-intelligibility of the canonic operation itself of the system.

The recession of the financial crisis after surpassing its point of culmination, gives way to the decline of the chaotic agitation and endows the crisis with a clear profile of an individual and punctual perturbation. It occults, however, the persistence of areas of strong indeterminacy which can induce, in the wake of a disruption specific to the regular process, a dynamics of crisis as well as the unexplainable continuation or the re-launching of the regular systemic operation. In a reference space of radical contingency and indeterminacy, the whole of the systemic operation becomes enigmatic.

An instance in point is the financial crisis of October 2008 which was impenetrable to an understanding not only in its phases of chaotic effervescence, of the hyper-acceleration of its course and the hyper-interference of its effects in sections of time brought to implosive contraction. The crisis is non-intelligible in both its genesis and its evolution, in the scenarios and arrays of measures which have been conceived and applied to control it, in the extremely quick, unexpected recession which terminated it. It is still non-intelligible in as far as nobody seems to understand thoroughly how the system, as a matter of fact, continues to work and to restore the integrity of its procedures at a time when it is still full of “toxic products”, effects made out of the aggregates of the non-values and values in which mainly the former are predominant, at a time when its political and economic environments have been put in a situation

which impairs the fundamentals of the economic cycle themselves. The crisis, while conserving the profile of a classical crisis with the rhythmicity of a phenomenon clearly articulated in its phases, makes the whole of the systemic structure and operation enigmatic. It makes it uneasy to validate upon a current basis the standard description and understanding of both.

Most disquieting is the emergence of the phenomenon of non-resistance of the world, *i.e.*, of the generality of environments, to systemic action. It seems as if it were measures taken by governments which had a decisive impact to rein in the catastrophic progression of the crisis. It seems as if the political and economical actors have pushed with extreme voluntarism to decide and implement courses of action which have revealed themselves to be salutary. It went so far as to motivate a revival of a belief in the capacity of politics to change things against the imperatives and the logics of the other systems, in the capacity of the actors within systems to promote changes in directions unanimously thought to be non-viable, and in the capacity of systems to challenge their dominant dogmatics and to operate against what seemed to be axiomatic for their poiesis. Systemic and “objective” constraints (*Sachzwänge*) could be denied for a while and “decision”, in the strong sense of the word, occupied the floor.

However, the sums, for instance, involved in the political rescue plans of the financial economy are in themselves, in their unimaginable magnitude, exemplary figures of non-control. They are, in a sense, speculative, and represent simple expressions of a will to act, but in no way represent the means of such will and action. They are not capable of being 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. They do not belong to the range of tension within which systems exert the effects of their operations on the grounds of the resistance that they offer to their own operative projection and effectuation. They lie beyond the range of such “realising” resistance.

In spite of all this, what is still working is the image of systemic or personal intervention with effective consequences on its environments. It is a systems-internal dogmatic as well as a general cultural fiction of societies within which the ascription of effectiveness to intentional agency is still the main form of envisioning relationships of determination between meaning systems and their environments. What should be seen is that, in this case, the effectiveness of reactions and interventions does stem from the non-existence of any outside within which consequences could be pushed: world communication has no

alterity, no externality within which the perplexities of one system could be transferred to another which would then bear the burden of a drastic, often violent, reduction of engulfing complexity. On the other hand, the thorough and far-reaching sub-differentiation of systems – like the economic into a financial sub-system and the variety of sub-systems subsumed under the concept of real economy – makes it possible to undo large numbers of operations of one system without hampering the dynamics of the others. A fictitious rewriting – during the last financial crisis – of those undone entries enables both systems to restore their couplings. The combination of the disappearance of the spaces of alterity in which the destructive consequences of crises could have been born into, on the one hand, with closure enhancing sub-differentiation, on the other, accounts for the texture in which the world's non-resistance is made invisible and is covered by the gratifying images of effective intentional intervention. Such a combination is very typical of the modes of self-projection and the comprehension of systemic operating in the new landscape. It makes it much harder to get an insight into what this very specific worldly non-resistance is and how it works as an index of “world” contact.

Thus, one can say that the crises of the new type which I am trying to delineate bring to light a specific non-intelligibility emerging in relation to the eruption of radical contingency and its effects of aspiration and annihilation of intelligibility potentials. In every crisis of this new type, it is the “world” which is present in its unfathomability; the “world's” unfathomability transforms such potentials into small packages of awareness immersed in the transfinite where they dissolve and vanish.

XI. MODERN CONTINGENCY AND THE CONTINGENCY OF THE PRESENT

At this juncture, we will have to return to the concept of contingency, and try to elucidate its meaning against the background of the possible confusion of what it comes to mean under the new conditions, and what it meant within those of the modern transformation. Such a confusion would be profoundly misleading for the theory of the world society of today.

Luhmann's conception of the contingency of social communication views it as that which is neither impossible nor necessary, but solely possible, and which has to be especially admitted into the sequences of communication by the procedures of the plausibilisation of its occurrence. The socially contingent is neither prescribed, forbidden or permitted, nor familiar or customary; it is the multitude of thinkable communications which have not been explicitly made probable by lifting the restriction of admission lying upon the entire diversity of the possible communications lying in those spaces of environmental contingency.

The advent of modernity initiates an inversion of the coding of this contingency by transforming its initial negative value into a positive one, seeing in it the chance of change as such, and, in change, a wholly positive dynamic of progress and improvement. The primary gesture of communication will thus be one of openness in relation to the contingent as the new which is entering the realm of communication and increasing its future – as Luhmann puts it when he speaks of “*Wachstum der Zukunft*” in modernity.

The primary proclivity to admit large contingency potentials which is characteristic of modernity results in a double effect: a relativisation of the real, of what is, as it is, and as it ends to be seen as durably such; and 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. Maximising the influx of the new contingent is the primary tendency of the new structure.

These are well known theorems of the Luhmannian theory of modernity. The perspective which I have elaborated here legitimises, beyond those theorems, the distinction between an environmental contingency, on the one hand, which can be thought along the Luhmannian lines of theoretisation, and a contingency of emergence/dis-emergence, on the other, which blows away those lines themselves. The contingent lying on the boundaries of the systems is fundamentally commensurable to them as lying in their environments, be it as contrary to, challenging and disrupting for both the systemic order and the format of processing as it be. Any environmental contingent always projects itself in relation to the systemic distinctions and enters the straits of its probabilisation and admission in them. Systems are always capable of constructing their environmental contingency in one way or another. Even where it is vehemently and radically rejected, it is never constructed as something which falls out of every relation to the relationings (*Relationierungen*) of the system.

Where the double closure of the *oecumene* reduces the environment of the whole of communication to nothing, contingency can no longer stem from this space, but directly from the “world” and thereby becomes of transfinite nature. It has to be distinguished from “modern” contingency and in general of variable contingency as such, which concerns any totality of communication which does not attain the threshold of the topological transformation which doubles its closure in so far as the new contingency cannot be made

plausible or be admitted by any systemic processing, however it is coded – restricting, enhancing or over-enhancing contingency. No proclivity nor openness of systems to novelty and uncertainty is dynamically able to include such a contingency in the making of communication and the world which is constructed by it. Its provenience from the “world” lets it reach the system in a plane in which the distinction itself of system and environment tends to dissolve in a unity, the unity of the “world” as a plane of immanence and non-differentiation. “World” contingency represents the possibility of emergence as well as of dis-emergence, at any moment and with no reason, of any communicational construct.

An argument against the thesis would be one which affirms a mutational change in the present and which claims that a new form of contingency has succeeded one which gave its profile to modernity by sweeping away the spaces where it lay and leaving communication exposed to inexplicable crises; the argument would be that one can make no such claims if one is not able to show major changes in social reality. The answer to such an argument is that as long as one is not able to see how systemic poiesis are entering, at many a place of their operating, into constellations where any amount of self-description seems to stay very far behind what is necessary to give insight and make representable what is the fact both in them and around them; as long as crises are systematically societalised in their etiology and their processing, there can be no understanding of the new contingency and the changes it elicited. By continuing to attribute to persons, interests, powers or systems the agency and responsibility of crises; by continuing to describe the systemic poiesis of the present in terms of complexity, paradoxity, hyper-complexity and (failing) de-paradoxisation, there can be no entry into the new dimension of intelligibility and non-intelligibility imposed by the irruption of the “world” at the boundaries of social communication and its non-mediated contact with it.

To admit the thesis and the counter-argument makes it possible to understand the ambiguity of the present situation. The new instance of the transfinite at the boundaries does not necessarily disrupt the simple emergence of the systemic poiesis as such. It only pulls open, at the ground of those poiesis, the interstices through which huge intelligibility potentials slip and disappear. This is the meaning of the formula of a non-knowledge why the *oecumenic* establishment is thriving, sustaining itself at a level of ease which is not commensurable to the efforts invested in its pursuits. The astonishing lack of resistance of the world to many incursions into its deep structures, which deliver enormous potential of mastery upon it, relates to the new contingency structure and illustrates it tersely. The

“world” allows the relativity of the worldly environments to the systems to which they are related to continue, and therewith allows the systemic poiesis to adhere to them and further to produce their operations and their effects in the world. It does not of necessity interrupt them. But it does not, of necessity, interrupt it, either. It has no reasons for either alternatives. There is in the dimension of the transfinite no recognisable, re-constructible necessity, but only enclaves of system/environment relatedness and commensurability.

This has profound consequences on the understanding of time. All structural traits of *ontic* world time are liable to be inverted from its linearity, to its extensiveness, through its irreversibility, instant divisibility and sequentiality. In the transfinite dimension, time is a recess, a bubble from within which the transfinite cannot be seen or constructed as an external environment. Time, system, environment, contingency are all worldly entities which lose their univocality as well as their efficiency, without, however, losing the relatedness and the closure which belong to them.

The “world” is not a place or a transfinite space into which the double sphere of communication is plunged: while it is very difficult to dispense with the spatial metaphor and its intuitivity – it undoubtedly makes the picture sharply visible – one has to remind oneself of its permanent inadequacy. The “world” is that possibilising pre-condition of communication as such which shows, now and then, vividly on the surface of today’s *oecumene*. It pierces through all environmental landscapes and insists at places where they seem to sustain a sort of unweaving of their texture. The world of today’s *oecumene* is, more than any other world before it, exposed to such surfacing of the “world” because of its topological eversion.

Cognitive theories are not simply impaired by such a new configuration. If the contingency of the present introduces irreducible indeterminacy into worldly states of being, and troubles the systemic poiesis in new ways of crisis liability, it does not set off the regular processing of those poiesis themselves. However, today’s *oecumene* is a folded world whose inner surfaces exceed their outer ones, enwrap them and re-enfold in themselves. One central consequence of this topology is that, as I alluded to a bit earlier, any array of reasons which account for a state of affairs in the world tend, when they are forced back to their paradoxical beginnings, to revolve around themselves and to attain a point of indifferentiation of their main meanings. The observed paradoxity in them is not the same as that which pushes the de-paradoxisation activity of the systems. The figure of entanglement of the world transforms the paradoxity involved here and opens it to the irruption of the transfinite. It radically tends

to perplex any knowledge, even that which sums up the most clear, most undoubted, precise and extensive pieces of science. Cognitive theories should not view themselves as losing their objects, their specific scope and their utility in the process of such emergences of the transfinite. On the contrary, they build the first line of the approach of the new phenomena. They have to explore both *how* and *why* the new contingency is so challenging for theory and science in general; what is changing with it in the dimension of the mind, and how these changes are to be met by intellectual activity. They have to describe and propose a theory of all these disorientations as well as of the new possibilities of co-ordination of the elements which have left their anchors in their poiesis.

On the whole, they have to tell the new *oecumene* that it does not know how and why it is doing so well, and that all it can learn by itself about its own continuance, in spite of its crises, is made of the discursive constructs based upon the elements that can be societalised and re-introduced in the double sphericisation of the whole of the actual poiesis of meaning. And this is, in the present day, precisely, very little. Cognitive theories have to establish the limits of the new knowledge and non-knowledge: what it knows is that, as far as the radius of its sphere – which is re-introduced in itself – reaches, it can reckon with the very strong predominance of its contingency of emergence, which means with the well-groundedness of its establishment – over the contingency of de-emergence co-extensive to it. Within this radius of the established *oecumene*, a multitude of crises may occur and seriously challenge the stability of the *oecumenic* whole. They may be disquieting, perturbing, destructive. However, they do not allow us to challenge the solidity of the poieseis and to admit more than limited interruptions of their regular regime. These take the form of chaotic oscillations which come to an end when the system returns to continuous and self-steering operativity.

Behind the robustness of such a paradigm, there lies a void produced by the doubling of the *oecumenic* closure itself; a depth of nothingness and outsideness that never did lie on the envelopes of the human habitat, but comes in our present to press upon them. It is the very doubling of the closure itself that transforms what is lying outside the incurved surfaces of the *oecumene* (wrapping themselves to an absolute and total inside) into a last and empty outside. Society has thus become the world with its boundaries and nothing could be left outside of it, if not the “world”. In this outside, any thrust to intelligibility and orientation becomes lost and all syntheses of meaning disperse like airy clouds immersed in cosmic winds.

Section III

REACTIONS

Section III.1

Regulatory Reactions

CHAPTER 9

ERODING BOUNDARIES ON FINANCIAL CRISIS AND AN EVOLUTIONARY CONCEPT OF REGULATORY REFORM

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Crises are *incomprehensible*. In other words, the existing notions, concepts, and language games readily at our disposal are not capable of comprehending the phenomenon of “crisis”. This incomprehensibility also implies something further: crises, by their very nature, are uncontainable. They, quite literally, know *no bounds* - and the boundaries which they transgress are not only notional, conceptual or linguistic, but also - and most importantly, I would argue - *systemic*.

The concept of *boundaries* in systems theory refers to the fact that a system, in order to become and to remain functionally operational, must achieve and maintain *closure*. This process of systemic closure can also be described as the establishment of systemic boundaries, in that, as will be shown later, through it, the system selects the types of operations which it can perform, thus defining its specific function within the systemic environment to which it belongs and within society at large. Thus, any *erosion* of these boundaries inevitably has manifold implications for the system itself, for its environment, and for society as a whole. It is to the consequences of such *erosive processes*, I would argue, that the word “crisis” customarily refers. To put it in the simplest terms: crises *are* boundary disorders. That is to say, *the closure mechanisms of one or more social systems deteriorate to such a degree that that they become dysfunctional, leading to the emergence of deleterious links and dependencies between the systems*. The result is a disruption of the systems’ ability to carry out normal operations and thus also of their ability to perform their designated functions within the web of society.

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What is it *precisely* that one observes when systemic boundaries begin to dissolve? Can such processes, indeed, be subsumed into the binary world of systems theory?¹ The dissolution of systemic boundaries should logically lead to a commingling of what was once separated by the boundary that has vanished. Are blends, amalgamations, hybridisations even conceivable in terms of systems theory? Are there some systems that are more susceptible (“boundary challenged”) than others? And how does this relate to the ongoing global financial crisis? Which systemic boundaries have been blurred? What part do the operations of the various systems involved have in the dissolution of their own boundaries and of those of others? If financial crises are, in fact, an instance of systemic boundary dissolution, what are the conclusions to be drawn in terms of market regulation, or, more specifically, in terms of financial law? Can the existing regulatory regimes, which are evidently unable to deal adequately with crises in financial institutions, be supplemented or replaced by more appropriate instruments of supervision?

I. CRISIS NARRATIVES

As an avenue of approach to the abstract theoretical questions to be discussed here, it will be useful first to consider *three narratives* that have begun to establish themselves among the urban legends of New York’s Wall Street, the London City and the Frankfurt *Börsenstrasse*, as well as in the recent scholarship on financial regulation. The narratives have been chosen so as to resemble, metaphorically, the layers of an onion being peeled. The point of departure is the financial system (as a sub-system of the economic system) and the internal dynamics of its boundary dissolution (*Narrative 1*). This will be followed by a look at the interplay between the internal and external dynamics involved in the dissolution of the financial system’s systemic boundaries, that is, the erosion of the boundaries between sub-systems of the financial system, and the effects thereof on the larger economic system (*Narrative 2*).

¹ Implicit in such a question is, of course, the statement that the present remarks are meant as an attempt to construe the financial crisis in terms of *communicative* theory. The intent is to offer an alternative to the mainstream *economic* explanations of the crisis. Because of their reliance on *ceteris paribus* theories and, in particular, on models that posit invariably rational behaviour, proponents of such economic interpretations are increasingly seen to have reached the limits of their ability to explain real phenomena; on this see, in detail, Dietmar J. Wetzel, “Elegant verrechnet – zur prekären Lage der ökonomischen Wissenschaften”, in: Claudia Honegger, Sighard Neckel & Chantal Magnin (eds), *Strukturierte Verantwortungslosigkeit: Berichte aus der Bankenwelt*, (Frankfurt aM: Suhrkamp, 2010), pp. 293-301. The prevailing doctrine today relies on *behavioural economics* as a means of filling the theoretical gaps; see, for example, Robert J. Schiller, “Human Behavior and the Efficiency of Financial Markets”, in: John B. Taylor & Michael Woodford (eds), *Handbook of Macroeconomics*, Vol. 1C, (Amsterdam *et al*: Elsevier, 1999), pp. 1305-1340. This approach is, however, based upon theories of individual behaviour, which, according to the standpoint argued here, misses the mark; see note 2 *infra*.

Finally, we shall observe the process of disintegration that has also affected other functionally-differentiated sub-systems of society (such as the economic, political and legal systems) but whose epicentre lies in the financial system (*Narrative 3*). Upon the basis of these narratives, it will be possible to formulate the working hypotheses that will serve as a foundation for the considerations that then follow.²

Narrative 1: The Millenium Bridge

This narrative, taken from Danielson and Song Shin, provides an example of the simplest of the possible constellations, in which a system's own operations bring about the obliteration of *its own* boundaries.³ This so-called *endogenous* risk arises when a system - in our example the financial system - performs operations that lead to shocks within the system, the effects of which are then aggravated by the system's own reaction to those shocks.⁴ Its opposite is *exogenous* risk, which relates to shocks coming from without, to which a given system is exposed. With regard to the financial system, Danielson and Song Shin argue that endogenous risk is a far greater threat than any exogenous risk. In order to illustrate the nature of this threat, they relate the example of London's *Millenium Bridge*.⁵ Spanning the river Thames, it was opened to the public, by the Queen, in a ceremony that took place on 10 June 2000.

On that day, there was a light wind blowing in the London City. Several thousand people turned up for the ceremony, strolling leisurely back and forth across the bridge. The structure had been designed to be able to bear such weight without any problem. Within a very short time, however, the bridge began to wobble. This so-called "lateral excitation" became so violent that some of the visitors were obliged to cling to the side-rails in order to

² The systems theoretical investigation of financial crisis does not require any analysis of individual "responsibility" for what happened. A recently published study of events on the financial markets since 2007, based upon personal interviews, revealed that the overriding tendency among market participants is to shift the responsibility to others. The bottom line of all such arguments is that the "system" was to blame for everything that went wrong; see Claudia Honegger, Sighard Neckel & Chantal Magnin, "Schlussbetrachtung: Strukturierte Verantwortungslosigkeit", in: *idem* (eds), *Strukturierte Verantwortungslosigkeit: Berichte aus der Bankenwelt*, (Frankfurt aM: Suhrkamp Verlag, 2010), p. 309: "In the view of the world encountered here [among those financial market participants who form the last link in the chain of responsibility], responsibility lies with the system, with capitalism..." From this standpoint, as well, a systems theoretical approach would appear to have greater heuristic consistency than a study based upon the individual psychology of the players.

³ Jon Danielson & Hyun Song Shin, *Endogenous Risk*, available at: www.riskresearch.org, and www.nuff.ox.ac.uk/users/shin/working.htm.

⁴ See, in general, Wetzel, note 1 *supra*, p. 296.

⁵ See, for this example in more detail, Danielson & Song Shin, note 3 *supra*, p. 4-5.

steady themselves. Others became nauseous. The severity of the wobbling was so great that the bridge had to be closed almost immediately, and could not be re-opened for a full eighteen months. What had happened?

Tests performed by engineers charged with fixing the problem showed that, in addition to the normal vertical force that had been produced by the strollers on the bridge, horizontal forces had also been at work, which had caused the bridge to move from side to side. While the wind gusts that passed through London that day accounted for part of the force, the main source, as it turned out, had been the sway of the pedestrians as they walked. Such sway is, in principle, normal, and results from the fact that the human body, as it moves forward on two legs, touches the ground at a slight angle, with each step involving a shifting of the weight from one foot to the other and thus the exertion of a horizontal force. Even when there are several people walking at the same time on a suspended structure, the sway is not normally a problem; however, since the pedestrians will not, as a rule, be moving in unison, the lateral force exerted by one is balanced out by that of another. What happened on the Millenium Bridge was different. The light gusts of wind that struck the bridge, as it turned out, had created a slight, barely perceptible motion of the ground beneath the stroller's feet. Each of them had reacted instinctively to those shifts by adjusting his or her stance. Because they were all reacting to the same motion of the bridge, however, their reactions came simultaneously, so that their motions became synchronised and they began to walk in step, as if in military formation. The cumulative horizontal force which they exerted created an even greater lateral motion of the bridge, to which they reacted, again instinctively, by exerting additional pressure in the opposite direction. This gave rise to a *circulus vitiosus*: each reaction by the pedestrians caused the bridge to wobble more violently, leading to an even stronger reaction by the strollers as they attempted to keep their balance, and so on, literally, *ad nauseam*. For Danielson and Song Shin, this narrative exemplifies the underlying structure of endogenous risk in financial markets:

“What lessons can we draw from the Millenium Bridge for the practice of financial risk management? Financial markets are the supreme example of an environment where individuals react to what's happening around them, but where individuals' actions drive the realized outcomes themselves. The feedback loop of actions to outcomes back to actions has a fertile environment in which to develop. Endogenous

risk appears whenever there is the conjunction of (i) individuals reacting to their environment and (ii) where the individual actions affect their environment.”⁶

Analysed from a systems theoretical point of view, however, the events described are open to a different interpretation. To begin, it is first necessary to identify which system it is that has entered into a crisis. To do this, the construction placed on the narrative by Danielson and Song Shin must be inverted. The bridge structure, in their eyes, represents a “fertile environment” in which actions and reactions develop. From a systems-theoretical point of view, in contrast, the bridge structure is a closed (so-called “autopoietic”) system,⁷ and, more specifically, it is *that* system which has entered into crisis. On the other hand, the strolling pedestrians, as they gradually fall into lockstep, would appear to represent, for Danielson and Song Shin, the system whose operations are at the root of the crisis. From a systems theoretical point of view, however, the pedestrians are, in reality, only an element of the environment in which the bridge’s suspension system was designed to operate. Seen in this way, it becomes clear that the risk identified by Danielson and Song Shin cannot be described as merely endogenous. The problem is not one of system operations in reaction to external irritations⁸ - which is, in this case, the irritation of the bridge’s suspension system, first by gusts of wind, then by the sway of the pedestrians. To these irritations, the bridge reacted as designed, but there was a fault in the design, the presence of which only came to light due to *an additional circumstance*. The situation became critical only when the operations of the suspension system became *so enmeshed in a communicative loop with a second system* that had arisen in its environment (the synchronisation of the strollers’ steps) that they were no longer able to operate as required. From a systems-theoretical point of view, the crux of the matter lies in the emergence of such *inter-systemic* communicative feedback loops, which - in contrast with mere environmental irritations - have a highly disruptive effect on systemic boundaries, threatening the closure of the systems involved, and thus, also threatening their ability to function effectively.

In terms of the present considerations, the narrative, as presented by Danielson and Song Shin, nevertheless retains a certain interest. It shows quite clearly that endogenous risks

⁶ Danielson & Song Shin, note 3 *supra*, p. 5.

⁷ The notion of “autopoietic system” is particularly well explained in Hugh Baxter, “Autopoiesis and the ‘Relative Autonomy’ of Law”, (1987) 19 *Cardozo Law Review*, pp. 2003-2014.

⁸ On the classical concept of systemic irritations, see Elena Esposito, *Soziales Vergessen: Formen und Medien des Gedächtnisses der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 2002), p. 293.

inherent to the financial markets cannot be comprehended simply by observing the isolated behaviour of the *individual* entities (banks, financial intermediaries, advisers and so on) who are active on those markets. The central focus must be on the emergence of inter-dependencies between altered communications internal to the financial markets and the external communications that go on in the environment surrounding those markets. It is only by observing such inter-dependencies that it becomes possible to recognise the dynamics of the process that gives rise to the breakdown of systemic boundaries.⁹ The wobbling of the Millenium Bridge is nothing but a dissolution of the “spatial bounds” of the bridge’s suspension system as conceived by the architect. Endogenous risk consists in the danger that a given system will inadvertently cause its own operations to become entangled with those of other systems in its own environment. If the risk is actualised, the system becomes caught in what Danielson and Song Shin describe as a “*feedback loop of actions to outcomes back to actions*”¹⁰ that threatens the system’s closure, leading to a breakdown, or possibly even to a complete dissolution of the system’s boundaries. *The system’s autonomy becomes compromised and its operations come to be guided by heteronomous references.* Where the system involved is the financial system, this reduces the ability of that system to perform adequately its function (the transfer of risk)¹¹ within the overall economic system, whose ability to perform its function within the society (the distribution of goods and services) is then compromised in turn. A breakdown in the financial system’s boundaries creates a situation in which its function is directed, at least in part, by other systems, based upon criteria which are foreign to those intrinsic to the normal communications of the financial system: a balanced correlation between *accepted risk* and *potential return* is no longer seen as the *determinant factor* in risk transfer transactions.

⁹ This proposition finds increasing acceptance today; see, most importantly, Markus Brunnermeier *et al.*, *The Fundamental Principles of Financial Regulation: Geneva Report on the World Economy 11*, (Geneva: ICMB/CEPR, 2009), pp. 31-33.

¹⁰ Danielson & Song Shin, note 3 *supra*, p. 5.

¹¹ On the functioning of the financial system, see Joanna Benjamin, *Financial Law*, (Oxford *et al.*: Oxford University Press, 2007), pp. 3-4. The financial markets, Benjamin argues, “treat credit risk as measurable, manageable and transferable. The media through which risk circulates are contractual arrangements referred to as financial positions, whereby the risk taker typically agrees to receive the protection buyer’s risk in exchange for a return. The exposure of the risk taker under financial positions may result in unforeseen losses, and therefore attracts regulation.” (*ibid.*, pp. 3-4). The function of financial law, according to Benjamin is “to permit risks (and the rewards associated with taking them) to be transferred from protection buyers to risk takers”, so that the risks may “circulate amongst risk takers in the financial markets”. (*ibid.*, p. 3).

Construed in this way, the Millenium Bridge narrative can serve as the basis for a first working hypothesis (Hypothesis I): a breakdown in systemic boundaries, as the actualisation of “endogenous risk,” can result from a “heteronomisation” of systemic operations. Where it occurs, the resulting crisis can be traced to an entanglement between a system’s own internal communications and the communications of the systems in its environment. It is interesting to note, in this context, that the solution devised by the bridge engineers to correct the wobbling of the Millenium Bridge consisted in the installation of “shock-absorbers”, that is, in an alteration of the system design so as to prevent the normal operations of the suspension system from again becoming caught up in a “feedback loop” with lockstepping pedestrians¹² – a question to which we will return at a later stage.

Narrative 2: The Goodhart Boundary Problem

A second narrative involving a “*boundary problem*” is suggested by Goodhart.¹³ At issue in this case is not (as in that of the Millenium Bridge) the dissolution of systemic boundaries due to a defect in the system, which allows its own operations to become confused with those of other systems operating in its environment. Rather, the crisis situation described by Goodhart results from the *oscillation of communications aggregates from one system to another*. In Goodhart’s “boundary problem”, the crisis results from regulatory interference, the effects of which consist of the introduction of what are termed “*substitution flows*”, that is, the transfer of whole “operation packages” from one financial sub-system to another. The effect of such operation-transfers is that the boundaries of the sub-systems involved are rendered permeable to a degree that - in the hypothesis proposed here - a systemic crisis, over time, becomes inevitable.

The point of departure for Goodhart’s narrative is the observation that financial regulation is *reactive* by nature. It requires the regular use of *ad hoc*, stop-gap measures in order to fill the “loopholes” that arise through constantly changing market-conditions and variables. The difficulty lies in the fact that such short-term solutions can often create what

¹² See John Cassidy, “Annals of Economics. Rational Irrationality”, *The New Yorker*, 5 October 2009, available at: http://www.newyorker.com/reporting/2009/10/05/091005fa_fact_cassidy.

¹³ Charles Goodhart, “The Boundary Problem in Financial Regulation”, (2008) 206 *National Institute Economic Review*, pp. 48-55.

Goodhart terms, a “long-term generic problem”.¹⁴ This so-called “boundary problem”, he summarises as follows:

“[This problem] arises because effective regulation, one that actually bites, is likely to penalise those within the regulated sector, relative to those just outside, causing substitution flows towards the unregulated...The question [is] ... how and where to set the boundary...Such boundaries will always be criticised as leading to disintermediation, competitive inequality (no level-playing field), inefficiency and higher spreads and borrowing rates; and such criticisms will be valid up to a point.”¹⁵

The boundary problem arises naturally out of the rational economic behaviour of financial institutions. Where regulation is effective, it necessarily imposes limits upon the freedom of such institutions to choose the optimal behaviour for the maximisation of their profits. Compliance with regulatory requirements leads to a lower return on capital. There is, however, also a second consequence: regulatory distinctions inevitably lead to a systemic sub-division of financial operations into those that are regulated and those that are not. This gives rise to two differentiated financial sub-systems, often referred to as the “narrow” (regulated) and “broader” (unregulated) banking systems. In Goodhart’s words:

“One of the more common proposals, at least in the past, for dealing with the various problems of financial regulation has been to try to limit deposit insurance and the safety net to a set of ‘narrow banks’, which would be constrained to hold only liquid and ‘safe’ assets. The idea is that this would provide safe deposits for the orphans and widows. Moreover, these narrow banks would run a clearing-house and keep the payments’ system in operation, whatever happened elsewhere. For all other financial institutions outside the narrow banking system, it would be a case of ‘caveat emptor’, They should be allowed to fail, without official support or taxpayer recapitalization.”¹⁶

The undesirable side-effect of this internal sub-division of the financial system is that it creates an incentive for market participants to circumvent the regulatory restrictions by shifting as many operations as possible from the regulated to the unregulated sector. The mechanism used to effect these *substitution flows* consists, for the most part, of the creation

¹⁴ *Ibid.*, p. 48.

¹⁵ *Ibid.*, p. 48.

¹⁶ *Ibid.*, p. 48.

of so-called “*associated entities*” by the narrow banks, set up in such a way as not to be subject to regulation. Goodhart again:

“There will be a switch of business from the regulated to the non-regulated sector. In order to protect their own businesses, those in the regulated sector will seek to open up connected operations in the non-regulated sector, in order to catch the better opportunities there. The example of commercial banks setting up associated conduits, Structured Investment Vehicles (SIVs) and hedge funds in the last credit bubble is a case in point.”¹⁷

This switching of business operations is crisis-related, in the sense that there is a *cyclical* dimension to it. When financial crises arise, it is usually the unregulated sector that is hit first, as was the case with SIVs in 2007, for example.¹⁸ When this happens, the systemic differentiation created by regulation gives rise to an acceleration of the crisis dynamic. Sudden losses generally cause panic accompanied by an extreme aversion to risk. Investments that had been transferred to the *broader banking* system in order to maximise returns are now transferred back to the regulated *narrow* system for maximum safety. The massive exit from risky investments places the unregulated sector under increasing pressure, often necessitating rapid emergency measures (such as *fire sales*), which only aggravate the situation further. Rather than stabilise the economic system, regulation thus produces unintended, even perverse, cyclical effects. In good times, regulation leads to an outflow of investments from the regulated to the unregulated sector, in which the lack of regulatory restrictions tends to encourage the use of higher risk financial instruments. Where market conditions begin to deteriorate, a movement in the opposite direction takes place, thus leading to a disproportionate exacerbation of the crisis in the unregulated sector. As Goodhart puts it:

“The combination of a boundary between the protected and the unprotected, with greater constraints on the business of the regulated sector, almost guarantees a cycle of flows into the unregulated part of the system during cyclical expansions with sudden and dislocating reversals during crises.”¹⁹

From a systems-theoretical point of view, the salient point in this economic analysis of the regulatory boundary problem is the fact that it entails a *system duplication*: the original

¹⁷ *Ibid.*, p. 48.

¹⁸ *Ibid.*, p. 49.

¹⁹ *Ibid.*, p. 49.

boundaries of the overall financial system are eradicated by the emergence of two parallel financial systems – one regulated, the other not – both of which are intended to perform the same function of allocating risk, but each operating according to different rules. The differentiation of one overall system into two bounded sub-systems, with each designed to perform specific functions is not, in principle, problematical.²⁰ This is, in fact, considered to be the very point of regulation. The establishment of regulatory norms that have a restrictive effect for certain financial transactions, while leaving others unrestricted, is intended to create distinct categories of investments as suited to the different categories of investors. In this way, the financial system is re-designed, so that it can perform its function in a more highly-specialised manner. The function of providing what Goodhart describes as “*safe deposits for orphans and widows*” is to be performed by the *narrow banking* sector.²¹ Attached to such deposits are expectations of security, which the financial system does not provide in the performance of its other economic functions. The intent is to establish two distinct systemic performance categories – one for “*crisis-proof*” investments, another for all other *risk transfer instruments*. While this seems reasonable enough in theory, in practice, the resulting internal differentiation of the financial system into two parallel systems has proved to have a highly de-stabilising effect on financial system as a whole. The *ease with which financial market communications are able to oscillate between the two parallel sub-systems* leads to pro-cyclical movements of capital, the effects of which are highly-destructive to the economy as a whole. In terms of systems theory, once again, we are dealing with a crisis characterised by a *breakdown of boundaries*.

The oscillation between the narrow and broader banking systems is a natural consequence of *economically rational behaviour* on the part of the participants of the systems. Unfortunately, it is this very logic that serves to sabotage, and eventually disable, the safety mechanisms - in the form of regulatory norms - that were installed to render transactions in the narrow banking system virtually “*fail-safe*”.²² The sabotaging of the narrow banking system is perpetrated not in the form of a direct attack; there is no wholesale

²⁰ See Niklas Luhmann, *Law as a Social System*, (Oxford: Oxford University Press, 2004), p. 467, who notes that “society tolerates such differentiations if they maintain a functional relation to the problems of society”.

²¹ Goodhart, note 13 *supra*, p. 48.

²² One may also speak, in this context, of a “structural corruption” of the regulated system by the unregulated system; on this notion, see Gunther Teubner, “Ein Fall von struktureller Korruption? Die Familienbürgschaft in der Kollision unverträglicher Handlungslogiken (BVerfGE89, 214 ff.)”, (2000) 83 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, pp. 388-404.

destruction of financial market communications within the system. The debilitating effects are brought about in a much more subtle fashion: economic *reason* leads to an ever-increasing stream of communications circulating between the two systems, rendering the boundary between them increasingly *permeable*. As the differentiation between the narrow and broader banking systems is worn down, the ability of the overall financial system to function, perform and reflect upon itself is inevitably compromised as well. Both the narrow and the broader banking systems lose their “functional relationship” to the fundamental needs of society as a whole, since neither is able to perform properly the specialised function for which its differentiation into a distinct, closed sub-system was intended. The disintegration of the boundaries by which they were originally defined leaves them exposed to manipulation from the outside, open to be preyed upon by the ravaging logic of economically-rational behaviour. Specifically, the narrow banking system – whose function is to allow low risk to be transferred at low cost (the protection of deposits and the provision of commercial loans) and thus maintain the circulation of funds within the overall economy – experiences massive influxes and outflows of funds for reasons *unrelated* to this function. At the same time, the broader banking system - whose ostensible function is to allow high risk to be transferred at high prices (high risk/high yield investments) and thus allow for large-scale movements of capital - by effecting the displacement of funds through the narrow banking system, creates dangerously distorted expectations with regard to the level of risk involved in any given transaction.²³ As the boundaries between its constituent sub-systems disintegrate, infringing their ability to perform the functions for which they were originally designed, a crisis in the overall financial system becomes increasingly inevitable.

Our second narrative thus provides us with a second working hypothesis (Hypothesis II): a breakdown of boundaries can be brought about by the occurrence of cyclical communication transfers between two systems, *i.e.*, by the fact that a communications aggregate oscillates from one system to another upon a cyclical basis. Where this occurs, the resulting crisis is traceable to untimely displacements of the operations from one system to

²³ Through the use of complex derivative instruments, in which a secure element deriving from the narrow banking sector is used as a selling point, it becomes possible to mask high risk as (relatively) low risk, thus attracting investors who are unaware of the actual risks that they are taking; similarly, low risk can be masked as high risk and sold at inflated prices to investors with a higher risk appetite. The motivation behind such risk dissimulation by financial institutions is, of course, profit maximisation; the willingness of individual employees to participate therein can be raised or lowered by appealing to the same motivation at the individual level (manager bonuses); see Elena Esposito, *Die Zukunft der Futures: Die Zeit des Geldes in Finanzwelt und Gesellschaft*, (Heidelberg: Carl-Auer-Systeme, 2010), pp. 151-170.

another, so that both lose their ability to perform their functions as required by the circumstances.

Narrative 3: “The legal assessment does not worry me”

The nature of the financial crisis is not merely economic. It is also a *social* crisis, that is, a crisis that extends *beyond* the economic system to *other* functional sub-systems of society. A telling example, in which it is possible to observe clearly the disintegration of the boundaries of these systems as they enter into crisis, is supplied by a narrative taken from the legal domain. It is the tale, still ongoing, that originated with the investigation by U.S. government authorities of the cross-border banking activities conducted by *UBS, Inc.*, (hereafter “*UBS*”) on behalf of American clients, and which, particularly following a ruling by the Swiss Federal Tribunal of 5 January 2010, has since been transformed into something of a *cause célèbre* in Switzerland. The development of this narrative makes it possible to follow the stages by which the financial crisis unveiled itself as a kind of monster, spreading its tentacles, like an octopus, to break through not only the internal systemic boundaries of the economic system, but also those of the *political* and *legal* systems.

The story began as *UBS* came under suspicion of having infringed U.S. law in its international business dealings, and for having done so regularly, over a period of several years.²⁴ The matter was resolved, provisionally, on 18 February 2009 with the signing of a Deferred Prosecution Agreement (hereafter “DPA”) between *UBS* and the U.S. Department of Justice (hereafter “DOJ”), accompanied by a Consent Decree finalising settlement with the U.S. Securities and Exchange Commission (hereafter “SEC”).²⁵ In addition to the payment of a fine of USD 780 million,²⁶ the agreements called for *UBS* to hand over certain information

²⁴ See, for example, United States Permanent Sub-committee on Investigations, Tax Haven Banks and US Tax Compliance: Staff Report of 16 July 2008, pp. 81-110, available at: [http://abcnews.go.com/images/Blotter/REPORT-Tax%20Haven%20Banks%20\(July%2017%2008\).pdf](http://abcnews.go.com/images/Blotter/REPORT-Tax%20Haven%20Banks%20(July%2017%2008).pdf).

²⁵ See, for a report on the matter in general, the Message of the Federal Council (*Botschaft*) of 14 April 2010, “Zur Genehmigung des Abkommens zwischen der Schweiz und den Vereinigten Staaten von Amerika über ein Amtshilfegesuch betreffend UBS AG sowie des Änderungsprotokolls vom 14. April 2010”, BBl 2010, 2965, 2969.

²⁶ The amount of the penalty was based upon a calculation of the presumed unjustified enrichment of the bank from its transnational activities, to which were added *U.S. Federal Backup Withholding Taxes* plus a penalty (with interest) for violations of the double taxation agreement between Switzerland and the U.S. with regard to certain accounts involving, among other things, the fraudulent sham offshore structures to front transactions; see *UBS AG*, Investor releases of 18 February 2009, available at: <http://www.ubs.com/1/g/investors/releases?newsId=162298>.

relating to accounts held by clients from the U.S.²⁷ This latter element of the settlement quickly became a matter of serious contention in Switzerland, leading to an unexpected shattering of confidence in the country's leading government institutions and their ability to function. The crux of the matter lay in a refusal on the part of *UBS* to assume the responsibility for divulging the information in question. From a legal point of view, there was no question as to its obligation to do so, since it had voluntarily entered into a settlement with the U.S. government agencies, acting independently, as a subject of private law, and that settlement called for it to turn over the information. The fact that respecting the agreement represented a legal risk, as it would potentially have brought *UBS* into conflict with Swiss banking secrecy rules, in no way altered the bank's contractual obligation towards the U.S. authorities.²⁸ Rather than bear this risk itself, however, *UBS* sought help from the political system - as represented in this case by the Federal Council of the Swiss Confederation - which then took the matter into its own hands.

The decision by the Federal Council to allow the "translation" of matters intrinsic to the economic system into political communications – that is a kind of "passing off" of economic communication loops as being political in nature – was grounded in the belief that *UBS*, was to be treated as a "systemic institution", that is, that it was "*too big to fail*".²⁹ Explicitly, as stated in the opinion of the Switzerland's Federal Administrative Tribunal, handed down on 5 January 2010, the Federal Council considered that failure on the part of *UBS* to hand over the information in question would constitute a real and present danger to the bank's existence, and that the potential ramifications of its demise were serious enough to justify recourse to any and all of the political means available.³⁰ Upon what evidence was this assessment of the situation based? On 17 February 2009, the DOJ had informed *UBS* of its

²⁷ The information was requested in cases in which clients were suspected of having committed tax fraud or related offences; see, *inter alia*, UBS AG, Investor releases of 18 February 2009, available at: <http://www.ubs.com/1/g/investors/releases?newsId=162298>.

²⁸ See *Tagesanzeiger* of 9 January 2010, "Die Herausgabe der Kontendaten war katastrophal", available at: <http://www.tagesanzeiger.ch/schweiz/standard/Die-Herausgabe-der-Kontendaten-war-katastrophal/story/20425185>, in which Prof. Dr. Urs Benisch, offers his legal assessment of the matter: "The [financial market] supervisory authority should have demanded that *UBS* settle the problem itself, in the USA. After all, [the bank], not the Swiss supervisory authority, had caused it. In consequence, a representative of the *UBS* could have handed over the information. Günter Stratenwerth, the noted criminal law expert, has pointed out that a bank under that kind of pressure is entitled to infringe banking secrecy. Had it come to a criminal trial, a verdict would determine whether the violation of banking secrecy was justifiable. If it was, there would not have been criminal consequences."

²⁹ See, also, the Message of the Federal Council (*Botschaft*) of 14 April 2010, note 25 *supra*, pp. 2971-74.

³⁰ Federal Administrative Tribunal, 5 January 2010, B-1092/2009, consideration 8.2.

intention to press criminal charges against the bank in the event that it failed to deliver immediately the client information requested. In the view of the Federal Council, this scenario was sufficient to justify the declaration of a Swiss, and global, economic emergency.³¹ The realisation of the American threat, it reasoned, would “*nearly inevitably*” have drained the bank’s liquidity to the point of rendering it insolvent.³² In the event of a criminal indictment, the Federal Council feared that, “innumerable withdrawals, also on the part of institutional investors”, were to be reckoned with.³³ This being the case, averting the threatened indictment was seen as being “in the interest of the stability of the Swiss and of the global financial system”.³⁴

Once this political “reasoning” of the problem had been accomplished, there still remained the question as to what was to be done about it: What was the political decision to be made? It is precisely here that - following the infiltration of the *UBS* into the domain of the political system - the second dramatic turning-point of this narrative occurs. The Federal Council did an “about-turn” and decided not to act on its own. Although it had considered promulgating emergency measures, in the end, it decided against such a move, as it was highly questionable as to whether, in Swiss legal doctrine or practice, a constitutional basis for such action could be construed. A further consideration was that the Federal Council had already, as early as 19 December 2008, issued a decree - preventively, as it were, since the bank’s problems with the U.S. Authorities were already highly publicised - ordering the Swiss Financial Market Supervisory Authority (FINMA)³⁵ to “take all necessary measures to avert unilateral enforcement measures on the part of the United States against...[*UBS*]”.³⁶

Having reached this point in the narrative, there are two things to be considered: (1) if we accept the thesis that the Federal Council lacked the necessary emergency powers to

³¹ Federal Administrative Tribunal, 5 January 2010, B-1092/2009, consideration 8.

³² Federal Administrative Tribunal, 5 January 2010, B-1092/2009, Facts lit. C.

³³ Federal Administrative Tribunal, 5 January 2010, B-1092/2009, Facts lit. R.

³⁴ Federal Administrative Tribunal, 5 January 2010, B-1092/2009, consideration 8.3.1.

³⁵ An overview of the FINMA, the statutes it applies, and the scope of its powers can be found in Jean-Baptiste Zufferey & Franca Contratto, *FINMA: The Swiss Financial Market Supervisory Authority*, (Basle: Helbing Lichtenhahn, 2009).

³⁶ Federal Administrative Tribunal, 5 January 2010, B-1092/2009, consideration 8.3.2.; see, also, the detailed account in NZZ Online of 8 January 2010, “Entscheid der Finma nach Rücksprache mit dem Bundesrat”, available at:
http://www.nzz.ch/finanzen/nachrichten/entscheid_der_finma_nach_ruecksprache_mit_bundesrat_1.4468412.html.

simply order the *UBS* to turn over the client data to the U.S., this means it also lacked the required legitimacy for political communications of this kind, that is, for the taking of collectively-binding decisions;³⁷ and (2) the granting of powers to the FINMA to take “all necessary steps” was, fundamentally, a further communications transfer. Political communications were funnelled into the legal system, as one of the parties to the proceedings before the Federal Administrative Tribunal rightly pointed out:

“The Federal Council... did not wish to apply emergency law to the turning over of the data. For this reason... it... commissioned [the FINMA] with the implementation and justification of a political decision.”³⁸

Fully in keeping with this pattern of transfers, the FINMA, in turn, took its reference from the Federal Council decree just mentioned in issuing its order to *UBS*, on 18 February 2009, “by means of which it instructed [*UBS*] to hand over to it all client data that fell under paragraph 9 of the... DPA, so that it could surrender the data to the DOJ and possibly other authorities charged with the prosecution of punishable tax offences”.³⁹ The FINMA grounded this order on Articles 26 and 26 of the Swiss Banking Act of 1934 (hereafter the “Banking Act”), which empowers it to take measures in cases of imminent insolvency. The legal argument put forward was that an indictment by the U.S. authorities would have created a dramatic loss of confidence in *UBS* on the financial markets. This, it was maintained, would have created a severe shortage of liquidity, entailing, implicitly, an imminent danger of the bank’s falling into insolvency.⁴⁰ The FINMA order was immediately challenged before the Federal Administrative Tribunal by clients about whom bank documents were to be surrendered. The complainants’ request that their challenge be granted suspensive effect was denied, so that the information in question was handed over towards the end of February 2009. Nevertheless, in its final ruling on the matter, nearly one year later, the Federal Administrative Tribunal declared the FINMA order to be illegal and reversed it. In its opinion, the Court argued, in essence (1) that, to the extent that the Federal Council is deemed to be vested with emergency powers in such instances (a proposition which, as noted, is highly contentious), it was, in any case, not authorised to delegate its powers to take the

³⁷ See Niklas Luhmann, *Die Politik der Gesellschaft*, (Frankfurt aM: Suhrkamp, 2000), p. 84.

³⁸ Federal Administrative Tribunal, 5 January 2010, B-1092/2009, Facts lit. U.

³⁹ Federal Administrative Tribunal, 5 January 2010, B-1092/2009, Facts lit. B; see, also, the Message of the Federal Council (*Botschaft*) of 14 April 2010, note 25 *supra*, 2969-70.

⁴⁰ Federal Administrative Tribunal, 5 January 2010, B-1092/2009, Facts lit. B.

appropriate measures to the FINMA, so that the Federal Council decree of 19 December 2008 cannot serve as a legal basis for the supervisory authority's powers to instruct in this case;⁴¹ and that (2) Articles 25 and 26 of the Banking Act are not a sufficient basis for ordering the release of client data, so that, in citing them as grounds for the contested order, the FINMA had infringed the principles of legal certainty and predictability.⁴² The Court's opinion amounted, in essence, to a determination that the FINMA, *in casu*, had made a political decision that was beyond its legal province.

A highly revealing sequel to the Court's ruling followed in the press. In a newspaper interview published on 9 January 2010, Eugen Haltiner, the Chairman of the FINMA Board of Directors, expressed himself at length on the ruling by the Federal Administrative Tribunal.⁴³ Among other things, he declared that, even in cognisance of the Court's opinion on the matter, he still held that "Articles 25 and 26 of the Banking Law furnish a sufficient basis [for the order that the court reversed]". He explicitly referred to his "doubts" as to the validity of the Court's argumentation on this point, and maintained that he continued to take it for given that the FINMA had, in fact, been vested with the required powers of instruction by the Federal Council in its decree of 19 December 2008. The pinnacle of the remarks by the FINMA Chairman came with his statement that, "The legal assessment [*viz.* by the Federal Administrative Tribunal] does not worry me" – indicating thereby that even after the Court ruling, in the same circumstances, the FINMA would still take the same decision.⁴⁴ Finally, he re-iterated his stance, affirming that he had no intention of stepping down as Chairman of the FINMA Board after having been discredited by the Court's ruling, as he had been appointed to the office "not by the Court...but by the Federal Council in plenum". The question may be raised here - and we will return to it below – as to whether the FINMA Chairman's statement is to be understood as a general declaration of intent, to the effect that

⁴¹ Federal Administrative Tribunal, 5 January 2010, B-1092/2009, consideration 11.

⁴² *Ibid.*

⁴³ All quotations of remarks by FINMA Chairman, Eugen Haltiner, are taken from the *Neue Zürcher Zeitung* of 9 January 2010, "*Die juristische Beurteilung verunsichert mich nicht*": Finma-Präsident Eugen Haltiner nimmt Stellung zum Urteil des Bundesverwaltungsgerichts", available at: http://www.nzz.ch/nachrichten/wirtschaft/aktuell/die_juristische_beurteilung_verunsichert_mich_nicht_1.4470944.html.

⁴⁴ This was the assessment of Christof Brändli, President of the Federal Administrative Tribunal, on the FINMA Chairman's remarks. See *Neue Zürcher Zeitung* Online of 10 January 2010, "'Gericht ist solche Aussagen nicht gewohnt': Präsident des Bundesverwaltungsgerichts kritisiert Finma-Präsident", available at: http://www.nzz.ch/nachrichten/wirtschaft/aktuell/bandli_haltiner_finma_1.4476378.html: "As a court of law, we are not accustomed to such statements. Our ruling was: that is not permitted. And he [the FINMA Chairman] would still do it again."

the supervisory authority's obligation towards the law must yield before the political decisions of the Federal Council in the event of conflict between them. The central issue touched upon in the interview, however, lies elsewhere, namely, in the fact that the disintegration of the boundaries between the political and legal systems, as tangibly evidenced in the behaviour of the FINMA, is apparently not the result of a single individual event. Rather, it is a process that went on throughout the crisis (at the very least), thus suggesting that it is a long-term phenomenon that was reflexively re-inforced in that context.

This third narrative (like the first two) can also be construed in systems-theoretical terms. At first glance, the relationships between *UBS* (the financial system as a sub-system of the economic system), the Federal Council (the political system), and the FINMA (the legal system) appear to be in the nature of what is referred to in systems theory as “*structural couplings*” between different functional systems.⁴⁵ This immediately raises the question, however, as to how these couplings were formed, and, in particular, how they function and how they affect the social environment. In this connection, Teubner has posited the existence of a specific type of structural coupling, which he terms “*interference*”, and “which is distinguished by the fact that every event in a subsystem of society is, at the same time, always an instance communication within the whole of society, and is therefore ‘linked’ to events in the coupled system in a very specific way”.⁴⁶ The difference between “structural coupling” and “linkage”, he explains as follows:

“While structural coupling denotes the mechanism of actual intersystem contact, namely, use of perturbation of one system to build the structure of the other, linkage denotes the set of conditions necessary to make structural couplings possible. Without linkage, structural coupling would be confined to the extreme case of single chance contacts in which a single event acts as a perturbation and affects a single structural formation. Linkages are responsible for the fact that structural couplings can take on different values of duration, intensity, quality and institutionalization.”⁴⁷

⁴⁵ See, on the notion of “*structural coupling*”, Marc Amstutz, “Widerstreitende Götter: Zu Manfred Aschkes Rekonstruktion der systemsoziologischen Evolutionstheorie und ihrer rechtstheoretischen Bedeutung“, (2003) 2 *Rechtsgeschichte*, pp. 20-21.

⁴⁶ Gunther Teubner, “Autopoiesis and Steering: How Politics Profit from the Normative Surplus of Capital”, in: Roeland In’t Veld *et al.* (eds), *Autopoiesis and Configuration Theory: New Approaches to Societal Steering*, (Boston MA: Kluwer, 1991), p. 133.

⁴⁷ *Ibid.*, pp. 133-134.

Such links are held together by *social institutions*, most effectively by *formal organisations*, which establish “*micro-synchronisations*” between functional sub-systems of society, so that these are “brought onto a common path of development”.⁴⁸ The terms used to describe these phenomena are indicative of a clearly positive bias: linkages (and, accordingly, “interference”) are seen as producing an *added social value*. They are, in sociological terms, “*virtuous*”, in that – as hypothesised by Teubner – they bring about “*evolutionary advantages*” by enhancing the mutual responsiveness of the functional systems in question.⁴⁹ They contribute, in other words, to the *integration* of functionally-differentiated societies.

So far, so good. However, this idyllic notion of virtuous interference is not reflected in the reality of the social communication loops set into motion by the DPA between *UBS* and the U.S. authorities. In this narrative of systemic interaction, the result which we encountered was not a re-assuring increase in social coherence, but rather an alarming acceleration of *institutional decadence*. The autonomy of the respective functional sub-systems is anything but enhanced. What we witness, instead, is a form of institutional sacrifice: systemic boundaries - and, with them, the performance of systemic functions within the fabric of the overall social system - are immolated upon the altar of self-serving economic, political and legal interests. Even if it is true that here we are dealing with the structural couplings which arise out of the links established by formal organisations (private corporations, government bodies, regulatory authorities, *etc.*), we are hardly in the presence of a form of *social responsiveness* that can, in any way, be considered virtuous. On the contrary, the overall impression is one of economic arrogance, political indecision and legal surrender, with an aggregate result of institutional decay and severely lowered societal functionality.

It is obvious, therefore, that structural couplings, even in the presence of institutionally-based linkage, are subject to irritations that can compromise the autonomy of the interacting systems. In their inability to perform their functional operations properly, the compromised systems do not just *fail* to provide an “*evolutionary advantage*”; they begin, instead, to have a manifestly pernicious influence on the social system as a whole. Institutional links, by means of which the systems are able to interact and thus - in differentiating between internal and external references – in order to define their own

⁴⁸ *Ibid.*, p. 134.

⁴⁹ *Ibid.*, p. 136.

structures, create an environmental dependency which, contrary to what Luhmann assumed, is not necessarily always a fortunate “opportunity” to observe environmental conditions.⁵⁰ Under certain circumstances, the interplay of such institutional links may culminate in an *effet pervers*:⁵¹ the “docking” of the systems to their environmental conditions, as the process is referred to in structural coupling theory, may give rise to a communicative loop that disrupts the formation and maintenance of systemic boundaries. How is this phenomenon to be termed? In a word: *parasitism*. The communicative loops that arose in reaction to the DPA between *UBS* and the United States government are not simply another example of the multifaceted nature of events, which allows them to operate in several systems simultaneously.⁵² What happened, following the conclusion of the agreement, was not that each of the various sub-systems in question - economic, political, and legal - incorporated the event into its own system and re-interpreted it in the context of its own systemic logic. Rather, entirely new channels of communication between the systems were opened, violating the existing boundaries which provided those same systems with closure, and which, in turn, gave rise, instead, to a *parasitic* relationship between them: in its quest for profit maximisation, the economic system (*UBS*) exploited the concern of the political system (Federal Council) to avert collective dangers (the collapse of the national and global financial systems) as a means of coaxing it into the performance of extra-systemic operations (emergency protective measures for the bank). The political system, in turn, relieves itself of the burdens of questionable constitutionality (the lack of emergency powers) and policy uncertainty (public intervention in private affairs) by commandeering the legal system (FINMA) as a means of propping up its dwindling legitimacy (“Why doesn’t the Federal Council take action?”). Finally, the legal system dispenses with the doctrine of legality in order to ensure the economic survival of the *UBS*, and this it does, not least, in the interest of obscuring its own regulatory failure. We thus come full circle, as is to be expected according to the parasitic model of society posited by Michel Serres, to which we will return further below.

This third narrative thus provides us with a third working hypothesis (Hypothesis III): the parasitic use of specialised inter-systemic communication loops can lead to a breakdown

⁵⁰ Niklas Luhmann, *Wirtschaft und Recht: Probleme struktureller Kopplung*, (Bielefeld: Manuskript, 1989), p. 8.

⁵¹ See, on the notion of *effets pervers*, Suzanne Vromen, “Perverse Effects: Merton Revisited”, (1983) 12 *Contemporary Sociology*, pp. 372-374.

⁵² See Gunther Teubner, “Contracting Worlds: The Many Autonomies of Private Law”, (2000) 9 *Social and Legal Studies*, pp. 399-417.

of systemic boundaries. The crisis that emerges under these circumstances results from the combined operations of two or more of the functional sub-systems of society.

II. FORMS OF CRISES

II.1. THE NOTION OF CRISIS

The three hypotheses that emerged from the foregoing narratives - as an attempt to define objective criteria for a scientifically-testable theory of crisis - all rely on the assumption that crises are a function of the *breakdown of systemic boundaries*. It will be useful, therefore, to consider first, in somewhat greater detail, what is meant by the term (*systemic*) *boundary*. In principle, it would be simplest if systemic boundaries could be defined by analogy with *physical* boundaries – that is, as the line that separates a system from its environment.⁵³

Unfortunately, this immediately raises the question as to whether the boundary is a part of the *system*, or a part of its *environment*. If we assume that it is neither, then “logically, the difference itself is something third”.⁵⁴ The difficulty with the analogy to physical boundaries lies principally in the fact that communication between systems cannot be conceived of in “*spatial*” or “*territorial*” terms.⁵⁵ Systems in communication with each other are not bounded by “membranes, skins, walls and doors”.⁵⁶ The bounds of each system are perpetually being produced and reproduced in the course of *each individual communicative event*.⁵⁷ To put it slightly differently, each communication draws its own boundaries, differentiating itself from all other communicative events by defining itself in the operational terms of the functional system to which it belongs. The boundaries thus created have no “physical, chemical or

⁵³ An illustration of the fact that this conception of boundaries is still widespread in the social sciences can be found in: Ingeborg Maus, “Die Bedeutung nationalstaatlicher Grenzen: Oder: Die Transformation des Territorialstaates zur Demokratie”, (2001) 46 *Blätter für deutsche und internationale Politik*, pp. 313-323. Maus uses the term “boundary” clearly in the sense of *tertium* that exists between the two sides it divides, without taking other possibilities into consideration.

⁵⁴ Niklas Luhmann, *Social Systems*, (Stanford CA: Stanford University Press, 2004), p. 29.

⁵⁵ One could enrich this conception with the addition of a “teleological” element as a means of compensating for its analytical limitations, as attempted in Roland Lippuner, *Raum, Systeme, Praktiken: Zum Verhältnis vom Alltag, Wissenschaft und Geographie*, (Stuttgart: Franz Steiner, 2005), p. 35: “In consequence, even the boundaries of fields are always determined by operations in the field itself. A field consists of a ‘virtual’ space in which a certain “field effect” is at work. The boundaries of the field ‘lie there, where the field effects cease...’ The effect of such an approach is, of course, to merely shift the explanatory burden from the term “boundary” to that of “effect”.

⁵⁶ Luhmann, note 54 *supra*, p. 29.

⁵⁷ See Andreas Kött, *Systemtheorie und Religion: Mit einer Religionstypologie im Anschluss an Niklas Luhmann*, (Würzburg: Königshausen & Neumann, 2003), p. 45.

neurophysiological components”.⁵⁸ In this sense, it may be observed that each systemic operation, in defining itself, through that very operation, as *intrinsic to the system*, simultaneously “contributes to the system’s ongoing process of self-differentiation”⁵⁹ – that is, to the creation of the system’s boundaries.

The drawing of systemic boundaries is thus – contrary to that of “spatial” boundaries – *internally oriented*, a function of the *system’s own operations*:

“A systemic boundary is nothing but... the concretion of its operations, by which the system is individualized.”⁶⁰

The centrality of this observation, and its implications for an understanding of systems, can hardly be over-estimated. What Luhmann is saying is that it is a *system’s own operations* that give the system its form, and differentiate it from its surroundings.⁶¹ Whatever form a system may take, it always has two sides to it: the *interior* - the system itself - and the *exterior*, namely, all that is not part of the system and thus, through the closure of the system, becomes its environment.⁶² This concept of systemic boundaries, not as something physical, but as an *ongoing process of differentiation inherent in the operations of the system*, further implies that these boundaries are capable of *evolving*. They are not permanent fixtures within the system - just as communicative events, the building blocks out of which a system is constructed - are not lasting, but *momentary phenomena*, following in constant succession like the notes of a never-ending fugue.⁶³

Systemic boundaries, in other words, *develop over time*, that is, they emerge out of successions of communicative events linked to each other functionally by the operations of

⁵⁸ Niklas Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1998), p. 76.

⁵⁹ Luhmann, note 54 *supra*, p. 76.

⁶⁰ Luhmann, note 54 *supra*, p. 76 *et seq.*

⁶¹ On the concept of form from a systems theoretical point of view, see Niklas Luhmann, “Die Paradoxie der Form”, in: Niklas Luhmann, *Aufsätze und Reden*, (Stuttgart: Reclam, 2001), pp. 243-261.

⁶² Luhmann, note 54 *supra*, p. 77. This same notion can be expressed with reference to the differentiation between auto-reference and hetero-reference: because the reproduction of systems always takes place through the performance of this differentiation, it is true that a meaningfully operative system can never overstep its own boundaries (Luhmann, note 58 *supra*, p. 77). At the same time, however, the observations that accompany differentiation always refer to something that does not belong to the system – the environment that lies on the “other side” of the boundary. This means that the information contained in communications are actualised by something that is not part of the communication: the hetero-reference is constantly present by virtue of the very fact that it is excluded; see Luhmann, note 54 *supra*, p. 77).

⁶³ To carry the analogy further, the ordering of the notes can be compared to the operations of a system, while the boundaries would be that combination of factors that enable the hearer to recognise which sounds are elements of the composition, and which are not.

the system. The “*form*” that the system takes on, is thus *constantly evolving*.⁶⁴ Because of this, any attempt to avert the occurrence of systemic crises - here understood as disruptions of systemic closure, or breakdowns in systemic boundaries - or to deal with them when they do occur, must *also* be evolutive in nature. The implications of this, with regard to the financial system and the possible means of regulating it, will be discussed further below. For the time being, however, it may be noted that, in order for a regulatory regime to succeed, systems theory suggests that it must be designed in such a way as to be capable of adapting itself *continuously over time* so as to prevent financial operations from threatening the closure of the system, while, nevertheless, allowing the system and its boundaries to evolve.⁶⁵ The question, of course, is how this is to be done. Before attempting a response, however, it will first be necessary to consider in greater detail the nature of systemic boundaries and their function in the interaction between the systems and their environments. Crucial to an understanding of this function is the *double-sided nature* of systemic boundaries.⁶⁶ Systems exist not as free-floating forms in a void; they come into being by differentiating themselves from their environment, and thus, *per definitionem*, remain at all times inextricably *linked* to that environment.⁶⁷ The boundary between them simultaneously serves both to *mark the difference* and to *maintain the link*.⁶⁸ Each side defines itself in relation to the other, and neither can exist without the other.⁶⁹ The distinction between societal events (communications, actions) that belong to the system, and those that belong to its environment inheres not in the events themselves; it is established for each new event by the operations of a differentiated system. The assimilation of events not previously defined as belonging to the

⁶⁴ For more detailed explanation, see Luhmann, note 61 *supra*, p. 245.

⁶⁵ It is here that the weakness of current regulatory systems lies, as has become painfully obvious through the financial crisis that broke out in 2007: having focused their attention on fixed solvency criteria (Basel I and Basel II) rather than on the nature of the financial operations being conducted and the inevitable effects of such operations on the system and its ability to perform its function in the economy, regulators around the world failed to foresee both the advent and the proportions of the crisis. It thus seems all the more surprising that the crisis has not provoked greater demand for a fundamental re-examination of the theory underlying the present regulatory regime - and that the proposed modifications to that regime are, for the most quantitative, rather than structural, in nature; see, in this context, also Brunnermeier *et al.*, note 9 *supra*, pp. 31-32.

⁶⁶ See Helmut Willke, *Systemtheorie I: Grundlagen*, 7. Auflage, (Stuttgart: Lucius & Lucius, 2006), p. 55.

⁶⁷ See, for example, Kött, note 57 *supra*, pp. 44-52.

⁶⁸ See, still illuminating in this respect, Jay W. Lorsch & John J. Morse, *Organizations and Their Members: A Contingency Approach*, (New York: Cottler, 1975), p. 13.

⁶⁹ Luhmann, note 54 *supra*, p. 63. As Luhmann points out (*ibid.*, pp. 62-63) this conception of systemic boundaries is a specific case in the general theory of forms as developed by George Spencer Brown, *Laws of Form*, (New York: Bantam, 1979). See, also, Kött, note 57 *supra*, p. 45.

system requires a “crossing” of the existing systemic boundary - and it also is by means of such “crossings” that systemic boundaries *evolve*.⁷⁰ In defining, naming, taking cognisance of, or processing a given event, the system re-defines its own boundaries by assimilating that event to the system by its own operations. The newly-defined boundary then serves as the point of departure for further operations.⁷¹ In order to carry out those operations, the system must, of course, be aware of its own operational capabilities and boundaries, and is, in this sense *self-referential*. At the same time, it must also be aware of that which is found *on the other side of the boundary* as *potentially available* for further operations. The differentiation between those events that can be assimilated to the system, and those that cannot, is made, of course, by the system itself, taking its reference from previous operations. This necessarily implies that the re-defining of the system’s boundaries is a process that occurs *sequentially, over time*, with each adjustment of the boundary taking up *the amount of time* required for the operation through which the new event is assimilated to the system.⁷²

The question that remains, however, is: *Upon what basis* does the system differentiate between those events that are processed in the system’s operations, and those that are not? To put it differently: What is it that gives a given system *its unity*? Systemic closure, that is, the creation and maintenance of systemic boundaries, provides the system with what Luhmann refers to as its “*form*” – that which makes it identifiable as a unified, differentiated system within its environment.⁷³ For new elements to be integrated into that form, thus “re-forming” it without causing it to lose its identity, its unity as a system, these new elements must be capable of being *discriminated* according to the same criteria as those already belonging to the system.⁷⁴ In speaking of the legal system, for example, any element to be included within the scope of that system must first be capable of being categorised as either lawful or unlawful. Such systemic distinctions are an ongoing process in all societies, regularly reflected even in the seemingly banal discussions that begin with questions such as “Is it Art?” or “Is it Literature?” – or, in the language of systems theory: “Is the event in question

⁷⁰ See Luhmann, note 54 *supra*, p. 61, who cites Spencer Brown’s two axioms on the difference between repeated operations and those involving “crossings”: (1) “The value of a call made again is the value of the call”; and (2) “The value of a crossing made again is not the value of the crossing.”

⁷¹ Kött, note 57 *supra*, p. 46.

⁷² See Thomas Drepper, *Organisationen der Gesellschaft: Gesellschaft und Organisation in der Systemtheorie Niklas Luhmanns*, (Wiesbaden: Westdeutscher Verlag, 2003), pp. 257-262.

⁷³ Luhmann, note 58 *supra*, p. 61.

⁷⁴ See Urs Stäheli, *Sinnzusammenbrüche: Eine dekonstruktive Lektüre von Niklas Luhmanns Systemtheorie*, (Weilerswist: Velbrück, 2000), p. 49.

suitable for assimilation to a given social system, such as the economy, law or politics?” And it is in this way that the boundaries of the systems in question are constantly being re-drawn. The respective distinction used by each system in that process – lawful/unlawful, art/not art and so on – is a structure internal to the system, a “code” by which the system identifies itself.⁷⁵ The code is the glue that holds systems together.

In addition to this internal function, codes provide systemic operations with the means by which to cross their own systemic boundaries and thus to include the *potentialities* present in their environment in their calculus.⁷⁶ Each system sorts out the events that it encounters in the environment in keeping with its own respective systemic code. By so doing, it creates a relationship even with those events that it rejects (termed “rejection values”⁷⁷): an event rejected by the legal system as unlawful is dealt with as such by the operations of the legal system; that same event may also be categorised as art – or not art – and dealt with as such by the operations of the art world, or as newsworthy – or not newsworthy – and dealt with accordingly by the media, and so on *ad infinitum*. By means of such codes, the process of operational assimilation thus serves as a kind of link between each system and its surroundings, allowing them to deal autonomously with the same event, each in its own way, and thus to fulfil their various social functions.⁷⁸ The possibility that each system may, at any given time, re-categorise events - decide that what was lawful is no longer so, or that what was unlawful is now permitted, that what was not considered art, is now *avant-garde*, or that what was newsworthy is now boring, and so on - provides the whole social system, and each of the sub-systems within it, with the *dynamism* that they require *in order to evolve*. Everything that exists in the environment represents a future potential for each system as it perpetually re-defines its own boundaries. And it is by crossing those boundaries and

⁷⁵ See, for example, Dirk Baecker, *Information und Risiko in der Marktwirtschaft*, (Frankfurt aM: Suhrkamp Verlag, 1988), pp. 180-185 (exemplifying the notion of code in the context of the economy); Stäheli, note 74 *supra*, pp. 299-307 (exemplifying the notion of code in the context of politics); Thomas Huber, *Systemtheorie des Rechts: Die Rechtstheorie Niklas Luhmanns*, (Baden-Baden: Nomos, 2007), pp. 90-94 (exemplifying the notion of code in the context of the law).

⁷⁶ Luhmann, note 58 *supra*, p. 142.

⁷⁷ See Gotthard Günther, “Cybernetic Ontology and Transjunctional Operations”, *Vordenker*, February 2004, pp. 32-35.

⁷⁸ Stäheli, note 74 *supra*, pp. 48-49.

classifying the events that it encounters, according to the terms of its own operational code, that each system is able to ensure *that its own future remains open*.⁷⁹

In and of itself, however, a code is *not* able to provide sufficient guidance for systemic operations. In order for the code to find application, it must be fitted out with a *set of criteria* (“*Zusatzsemantik*”), upon the basis of which its operations can make the decision as to whether a specific event is to be *assimilated* into the system or *rejected*. These criteria are contained within what is termed the system’s *programme*.⁸⁰ Quite simply, the programme tells the system *how to distinguish between the two alternatives contained within its code*. It is sufficiently specific to allow a determination of whether any given event is lawful or not, is in the public interest or not, is valuable or not, is art or not, or is newsworthy or not. Just as the *codes* underlying the functional operations of a given system must remain rigidly fixed if the system is to continue to perform its function, the *programmes* for the application of these codes must remain flexible if the system is to be able to evolve and to adapt to changes in its environment. A legal system can change its procedures, re-interpret laws, institute new decision-making instances, adopt an – almost – limitless variety of operations, but it cannot cease to distinguish between the lawful and the unlawful without ceasing, at the same time, to function as a legal system. Implicit therein is the assumption that the notions around which a code is constructed must be *sufficiently concrete* to allow for the development of programmes capable of assuring the ability of the system to perform its function.⁸¹ Without a rigid code capable of being expressed in concrete terms, there exists a constant *risk* that the *flexibility of the programmes* may jeopardise the integrity of the system by allowing not only its own operations to *cross the system’s boundaries*, but also by *opening those boundaries to trespass from without*.

As indicated in the first section of this chapter, there are various ways in which such trespasses can occur. The thesis presented here is that the narratives of the financial crisis that emerged in 2007 illustrate at least three of the possible scenarios that can lead to the *erosion of systemic boundaries*. In the following, the three narratives will be re-examined in the light of the theoretical observations concerning the systemic codes and programmes outlined above. In a final stage, we will then consider ways in which this system’s theoretical

⁷⁹ Luhmann, note 58 *supra*, pp. 142-43, & 750.

⁸⁰ See, for example, Baecker, note 75 *supra*, p. 184.

⁸¹ Luhmann, note 58 *supra*, p. 363.

perspective on the financial crisis can be of use in selecting those *regulatory measures* with the greatest chance of success in preventing the recurrence of such cataclysmic financial events in the future.

II.2. CRISIS FORM I: EMERGENCE OF TRINARY CODES

Upon the basis of the Millenium Bridge narrative, we posited the hypothesis that one form of crisis that can emerge results from the realisation of the “endogenous risk” inherent in any *single* given system – in this case, the financial system. It is characterised by a “heteronomisation” of systemic operations, that is, by the adoption of exogenous communicative references to guide its operations (*Hypothesis I*). What has happened, in other words, is that a *structural* coupling – through which information or mutual “perturbations” are exchanged – has developed into an *operative* coupling – in which the operations of one system become dependent upon those of another.⁸² From a systems-theoretical point of view, however, such operative couplings are *incompatible* with the proper functioning of any system – for which systemic closure is always required so that the system can conduct its own operations “autopoietically”, according to its own programme based upon its own code. The ability of the bridge’s suspension system to stabilise itself in the face of environmental influences is compromised by the fact that the environment, caught up with the bridge in a *communicative loop*, is feeding it with information (regular, rhythmic lateral shifts of constantly increasing intensity) that it was not programmed to deal with. Unable to classify this information in the terms of its own code, the bridge begins to sway “irrationally”, moving in ways for which it was not designed.

The addition of unprogrammed movements, as a result of the entanglement of information belonging to the system with information from the environment, is basically the consequence of the introduction of a *third value into the binary code* on which the system operates. While the theoretical possibility of multi-value systemic codes has been posited in the past, their practical functionality is, as Luhmann has argued, dubious:

⁸² On the question of “operative coupling”, see Marc Amstutz, “Métissage: Zur Rechtsform in der Weltgesellschaft”, in: Andreas Fischer-Lescano *et al.* (eds), *Europäische Gesellschaftsverfassung: Zur Konstitutionalisierung sozialer Demokratie in Europa*, (Baden-Baden: Nomos, 2009), p. 337.

“Each attempt to increase the list of code-values would immediately make decision-making so complicated that the system would not be able to operate in practice with sufficient security whatever supporters of the multiple-value logic might maintain.”⁸³

If one considers the behaviour of the financial markets when crises break out, it is this phenomenon that we often witness: the introduction of a new, exogenous value into the binary code of compensated risk/non-compensated risk on which investment operations are programmed. The extra-marital relations of an American President, a terrorist attack, or even the political pronouncements of a central banker create movements on the financial markets – up or down – that bear no relation to the actual risks of the investments or prices being attached to them. This is what is referred to in *Hypothesis I* as *realisation of the endogenous risk inherent in systems through the “heteronomisation” of operations* and the resultant erosion of their boundaries. The fact that markets are sensitive to external events with no logical bearing on the function that the financial system is called upon to perform within the overall economic and social systems is, of course, not new. Any attempt to render them less sensitive, however, requires, first, an analysis of the mechanisms by which that sensitivity arises and manifests itself. This, I would argue, is the usefulness of systems theory in this context. By identifying the code upon which the financial system is based, and the disturbance of that code as the source of certain systemic dysfunctions, it becomes possible to consider ways in which to insulate the code from such interference – just as it was possible to remedy the problem with the Millenium Bridge only after analysing the cause.

From a regulatory point of view, what this means is that some form of protective mechanism is required that can prevent the system from becoming caught in a disproportionate reaction to information provided to it from systems in its environment – with decisions as to whether a given risk is correctly priced then being made upon the bases of criteria other than those upon which the system was programmed. This is not to say that irrational behaviour on the part of investors can be eliminated, or that the financial system cannot calculate such factors as political uncertainty, threat of war, or positive or negative economic outlook into its risk calculations. What it means is that these factors should remain just that – contributing factors, and not overriding determinants that dominate the financial calculus: that a financial decision should be primarily a reflection of *financial*, and *not* political or other, considerations. Clearly, the most radical solution would be simply to

⁸³ Luhmann, note 20 *supra*, p. 180.

restrict financial trading where signs of either panic or “irrational exuberance” flash red – as is occasionally done in extreme situations. However, such solutions are, and can only be, temporary in nature, just as any other even milder attempt to protect the financial system from itself by preventing it from continuing its operations must necessarily be short-term. For regulation to succeed, be it in preventing or in resolving crises, it must strike a balance between the protection of the rigid code and the allowance of sufficient flexibility in the operational programme so as to permit systemic evolution. A number of suggestions exist as to how this could be achieved, some of which will be discussed below. Because financial regulation must also deal, simultaneously, with other forms of crisis, it will, however, be useful first to consider the underlying structures of these as well.

II.3. CRISIS FORM II: PROGRAMMATIC ABSTRACTION OF CODES

The narrative of the “boundary problem” - as described by Goodhart - led us earlier on to the hypothesis that the erosion of systemic boundaries can be caused by the *cyclical oscillation of specialised communications aggregates* from one system to another (*Hypothesis II*). This form of crisis is clearly different from that just sketched out as *Crisis Form I*, in which the problem originated in the inability of the code of a single system to process incoming information from its environment properly. In the second crisis form under discussion here, the problem lies in *programmatic dysfunctions in two systems simultaneously*, induced by interference from their common environment. The complexity of the mechanisms that come into play, as a result, rises exponentially. The starting-point for understanding the structure of this crisis form is the fact that the distinction between the two sub-systems within the overall financial system – the *narrow* and *broadier banking systems* – was the result of *financial market regulation*. It was thus artificially induced, in the sense that the functional differentiation of the two systems was a *reaction* to the introduction of statutory regulation norms. In other words, the respective social functions that the narrow and the broader banking systems are expected to perform did not evolve naturally, but were created indirectly by *fiat*, through the passage of a law. At the same time, the fact that society tolerates this differentiation between financial functions is an indication that a social need for it does, in fact, exist.

The manner in which the two systems separated off from each other is significant, in particular, because of its implications for the programmes that guide their operations. In contrast to functional systems that evolve “naturally” as new societal needs arise, and whose programmes – or differentiation criteria – are expressed in the terms of the environment out

of which they emerge, the programmes of *artificially-differentiated systems* depend on the *terminology* of that system to whose intervention they owe their existence. With regard to the creation of two parallel banking systems, one regulated, the other not, this suggests that their programmes are products of *legal* language games, and accordingly based upon a (regulatory) legal construction of reality and not upon the direct observation of the reality of the financial markets that form their primary environment.⁸⁴ Because of this, the closure of the two banking sub-systems – the form it takes on through the operations of its programme, and the code that underlies it – is *inherently unstable*, which, in turn, renders questionable the degree to which they are capable of *responding adequately* to their social environment. In principle, it is only even theoretically possible for the prevailing direct-interventionist methods of the existing regulatory regimes to function effectively to the extent that their (regulatory legal) diagnosis of the “social problem” to be remedied actually reflects, to a relatively high degree, the *social reality*. In other words, in order to perform its social function, the regulatory system must be based upon *a construction of reality that replicates the actual causes and effects that give rise to the successive operations of the regulated systems*.⁸⁵ Unfortunately, satisfying this pre-requisite is, in principle, a *systems-theoretical impossibility*. Social systems – and, in particular, legal systems – by their very nature, lack the requisite sensitivity for such finely-tuned perceptions of the events upon which they operate.

This failing is illustrated in almost paradigmatic form by the current financial regulation regimes. The respective codes of the narrow and broader banking systems are *not sufficiently well-defined*, and do *not reflect* with sufficient precision the *reality* of decision-making processes on the financial markets in order to allow either of them to arrive at systemic closure. In consequence, the boundaries of the respective systems are too porous to prevent the transfer of entire communications aggregates from the regulated to the unregulated sector and back again without regard for the social function that either system is ostensibly called upon to perform. *This lack of precision in the codes makes it impossible for their programmes to develop effective differentiation criteria for allocating economic communications to one or the other sector*. The abstractness of the codes and the resultant ambiguities in the programmes inevitably leads to recurrent errors in the systemic allocation

⁸⁴ *Ibid.*, p. 554.

⁸⁵ Galf-Peter Calliess, “Die Steuerungskrise– jetzt auch im Privatrecht?”, in: Galf-Peter Calliess *et al.* (eds), *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag am 30. April 2009*, (Berlin: Walter de Gruyter, 2009), pp. 441-42.

of environmental events and, thus, in the way that they are operated upon: high-risk transactions are treated as low-risk transactions and are, consequently, over-compensated; low-risk transactions are classed as high-risk and are under-compensated accordingly.

In considering ways to increase the effectiveness of regulatory schemes, the question that would – ideally - have to be addressed, therefore, is how the legal system can effect a more *precise* formulation of the codes that underlie the operations of the financial sub-systems whose emergence it induces through regulation. The notion that this can actually be done, however, is an illusion: in order to be functionally-effective, a systemic code must emerge out of the evolving social reality; it cannot be imposed *from the outside*. This being the case, the only promising alternative open to the legal system is to contribute to the development of *appropriate programmes* to guide the operations of both the regulated and the unregulated banking systems. In practical terms, what this means is that the overall structure of existing regulatory regimes – which rely primarily on direct intervention in the financial system – must be fundamentally revised. What is required is a mechanism for *overcoming the inherent inability of regulatory systems* – like all other legal sub-systems – *to grasp the underlying causalities of social events*. Possible approaches to the development of such a mechanism will be discussed further below within the context of an analysis of the emerging regulatory theory.

II.4. CRISIS FORM III: THE PARASITING OF CODES

The narrative concerning the DPA between *UBS* and the USA led us to the hypothesis that the parasitic exploitation of one system by another creates specialised communication loops that erode the boundaries of those systems (*Hypothesis III*). The result of the parasitic relationship between them is that both systems are compromised in their ability to perform the social function originally expected of them. Involved in this crisis form is the interaction between multiple systems in such a way that their boundaries are no longer clearly defined. Here, again, it can be argued that we are confronted with a *dysfunction* in social systems related to a *problem with their codes*.

The point of departure here is that the necessarily binary nature of the underlying codes of all social systems fundamentally excludes the possibility that the codes of two such systems “unite”. This theoretical impossibility of *inter-systemic code-bonding* serves to assure the autonomy of the principal social systems. In practice, this systems-theoretical “rule” is often confirmed in the breach. The literature contains studies of a number of social constellations in which mutually parasitic relationships between differentiated systems can

arise. A prominent example is provided by Luhmann, who describes the interweaving of law and politics in modern states governed by “the rule of law”:

“The political system benefits from the difference between legal and illegal being coded and administered elsewhere, namely, in the legal system. Conversely, the legal system benefits from having peace, a clear differentiation of authority, and, with it, the enforceability of decisions, secured elsewhere, namely, in the political system.”⁸⁶

What Luhmann is describing here is the way in which, by entering together into a relationship of reciprocal dependency, two systems can open for each other the possibility of “*growing out* of an external difference”.⁸⁷ In other words, the description which he offers of parasitic relationships between systems suggests that this phenomenon is to be considered, in principle, as *socially virtuous*. While this is certainly the case in many instances, the question, nevertheless, remains as to whether this is necessarily *always* the case. Given the Swiss saga of the DPA between the country’s largest financial institution and the U.S. government, it is difficult to avoid the suspicion that what we have here is a case of multiple systems making mutually-parasitic use of each other’s codes to *socially vicious effect*. It would appear that there exists a form of systemic parasitism through which the systems involved do not “*grow*” through their interaction with an “external difference”, but are actually *devoured* by it. This is a phenomenon that does not yet appear to have been noticed in system theory, so that it will be worthwhile examining it in somewhat further depth here. An interesting approach to the question is provided by Michel Serres in his groundbreaking study, “*Le Parasite*”, published in 1980, and still the most thorough treatment of the phenomenon of social parasitism to appear to date.⁸⁸

The fundamental issue addressed in the book is the *emergence of social order*. This occurs, according to Serres - and, in this, his theories are remarkably compatible with systems theory - gradually, through a series of “*interruptions*” which introduce *distinctions* into the primordial chaos.⁸⁹ These interruptions are of such a nature that they introduce changes into the natural order of things - as they would normally proceed in undifferentiated chaos. By this

⁸⁶ Luhmann, note 20 *supra*, p. 426.

⁸⁷ *Ibid.*, p. 426.

⁸⁸ Michel Serres, *Le parasite*, (Paris: Grasset, 1980).

⁸⁹ *Ibid.*, pp. 16-17.

means, they create order out of disorder. Serres explains this process with the aid of a subtly developed notion of the figure of the parasite.

A parable recounted by Serres offers a plausible illustration of the mechanism by which parasitism can serve as a basis for social order.⁹⁰ A hungry beggar passing by an inn quietens the rumbling in his stomach by breathing in the aromas emanating from the inn's kitchen. The cook emerges and demands payment for the aromas consumed. The beggar refuses. A passer-by overhears the argument between them and offers to mediate. He asks them to lend him a coin, with which he proceeds to strike the sole of his shoe, producing a slight ringing sound. "That sound," he declares, "is sufficient payment for the scents coming out of the kitchen." For Serres, the passer-by plays the role of a parasite. He is a third party who creates a relationship between two social orders that were previously unable to interact or to communicate with each other: the practice of exchanging food for money, on the one hand, and that of exchanging aromas for sounds, on the other. The parasite's action creates a kind of platform upon which a new form of exchange becomes possible: *coins are used to produce sounds, which can be exchanged for the aromas produced by food*. A new form of social communication has been created. The existing relationship between two orders – or *social systems* – is re-configured in such a way as to open suddenly a new channel of communication.

Interpreted in this way, Serres' parable provides a fairly precise image of the means by which parasitic interruptions of natural social-processes give rise to new social differentiations, and thus bring about order within society. The process has been succinctly articulated by Brown:

"In informational terms, the parasite provokes a new form of complexity, it engineers a kind of difference by intercepting relations."⁹¹

More specifically, this act of social engineering is accomplished by obliging the parties (the beggar and the cook) to react in one of two ways. They must either (1) incorporate the parasite (the passer-by) into their relationship and thus accept the new social order, or (2) exclude the parasite from their relationship and, by that very act of exclusion, create a new social order (by entering into an alliance with each other against the parasite,

⁹⁰ *Ibid.*, pp. 49-55.

⁹¹ Steven D. Brown, "Michel Serres: Science, Translation and the Logic of the Parasite", (2002) 19 *Theory, Culture & Society*, p. 15.

which would not have come about without the latter's "intrusion" into their existing relationship). The logic of parasitism can thus be described as a process by which the parasite is either *incorporated* or *eliminated*, whereby both alternatives represent differentiation processes that function as a source of social order.

From a systems-theoretical perspective, the effect of the parasite is to introduce a new code, or to alter existing codes, in the social systems upon which it "feeds".⁹² By allowing the parasite into their "system", the beggar and the cook *incorporate* the (economic) code offered to them by the passer-by: their notion of what is subject to trade or not, is fundamentally altered, as is their notion of what is fair or not. If they reject the parasitic passer-by's proposal, they thereby *re-constitute* themselves into a new, closed social system, with its own code regarding who belongs and who does not. The question now is: How does this apply to what we have termed in the present study *Crisis Form III*?

To begin, it should be recalled that the primary task of the code, as already discussed, lies in the preservation of *systemic autonomy*. By classifying certain communications as belonging to the system that it underlies, and rejecting others, the code guarantees the functional-differentiation of society. It assures the maintenance of a specific social order. The effect of a code is *socially virtuous* only if it leads to the *exclusion* (rejection) of communications that are foreign to the system, or - perhaps less obviously - if it is *adopted* by another system. While the benefit of the first of these possibilities is clear, the second requires some further explanation. The "incorporation" of one systemic code into another system represents a case of "*de-differentiation*".⁹³ This can be briefly illustrated on the example of the legal system, the coding of which is, historically-speaking, a fairly recent development. There exist cultures, particularly in the Asiatic regions of the world, which avoid such a coding, consider it dangerous even, and see an insistence on the law as something negative.⁹⁴ The preference, in such cultures, is for political settlements, with recourse to the law as a last resort, employed so seldom that an autonomous, functionally-operative legal system has *not* differentiated. A scenario, in which the code of the legal system is "adopted" by that of the political system, would, accordingly, entail the

⁹² The passer-by owes his existence in the parable to the beggar and the cook: while they could easily have gone on fighting without him, he would have no role at all in the story without them. It is in this sense that he can be said to "feed" on them, even if his presence is, in the end, beneficial (at least to the beggar).

⁹³ See Luhmann, note 20 *supra*, pp. 166-67.

⁹⁴ See the references cited in Luhmann, note 20 *supra*, p. 167 note 5.

disappearance of the functionally-differentiated system of “law” - creating, in this way, an “Asiatic” legal situation. The code of what was once the legal system – in so far as there exists a corresponding social need -- is assimilated into the *programme* of the political system, as one of the criteria upon which political decisions may be based, in keeping with the code of the political system, which remains intact.

Conversely, where one system latches on to another parasitically, in that it exploits the other system’s code to its own advantage, with *no benefit* to the “host system”, the added social value of the relationship, as posited by Serres, is absent. To the contrary, relationships which are not “mutually parasitic”, but which are only unilaterally parasitic – what is termed in biology an “*antibiosis*” – are actually *detrimental* to society. The detriment can also be defined: the uncompensated loss of autonomy, an inevitable by-product of such inter-systemic relationships, which leads to a *loss of specificity in the host system’s functional operations*. It no longer performs its own function, but exists only to support the operations of the parasitic system in the performance of its function. The result is that one of the functions required by the (functionally-differentiated) social system – of which both parasite and host are sub-systems – is no longer effectively performed. It is precisely this type of antibiosis, a unilateral parasitic exploitation of systemic codes, which we encounter in the follow-up to the DPA between *UBS* and the U.S. government, and which provides us with a case in point for studying the basic structure of our *Crisis Form III*.

The assumption that is possible for one system to exploit parasitically another system’s code clearly demands an explanation as to how, that is, by what mechanism, this can be achieved. The simple response is that the code of the parasitic system “infiltrates” that of the host system, so that the latter, while retaining its own terminology, begins to classify the events to which it extends its operations *not according to the terms of its own code*, but according to those of the parasitic code. Thus, for example, it may happen that the legal system classes as lawful only what the political system defines as being in the public interest and as unlawful only what the political system considers as not being in the public interest, whereby *inherently legal considerations* are left out of the calculus. The fact that this is possible derives from the paradox inherent in all systems, namely, that they are unable to apply their own code to their own operations - as mentioned earlier on: the legal system cannot decide that the difference between lawful and unlawful is, itself, unlawful. In order to continue operating in the face of this paradox, systems adopt an axiomatic tautology that renders the application of their own codes to their own operations superfluous. In the case of

the legal system, what is lawful cannot be unlawful, and *vice versa*: *tertium non datur*. Accordingly, any decision taken by the legal system with regard to the lawfulness of any given event must logically be lawful itself.⁹⁵ Similarly, the political system proceeds on the axiom that what is in the public interest cannot, at the same time, be contrary to that interest, and *vice versa*.

Unfortunately, however, the “*law of the excluded middle*” cannot stand up in the face of antibiotic parasitism. There is no way to eliminate fully the possibility of a third value insinuating itself into the system, masquerading as an element of the system’s own code, yet remaining undetectable due to the systems own axiomatic mechanism for resolving the paradox inherent in its operations. Coming seemingly from nowhere, a *third alternative*, the existence of which was thought impossible, like an uninvited guest who takes his place unnoticed at the table, is suddenly there to stay:

“Following the lead of Michel Serres, let us call the excluded middle a parasite. The two values of lawful and unlawful, the host and his guest, are so preoccupied with each other and the mutual attachment between them is so strong, that they do not even notice that there has been someone else sitting with them at the table for quite some time, ordering, and consuming altogether more than the host and his guests together. At first, we only had a suspicion as to who he was, but now we can also identify him: it is the political system.”⁹⁶

The manner in which politics invited itself in and established a permanent place for itself at the law’s table is a historical phenomenon in Western civilisation, which can be traced back over the centuries:

“At first, in the Middle Ages, its presence [*viz.* the political system as the uninvited guest of the legal system] was barely noticed, not least because it did not even really exist. Its own paradox of collectively binding decisions, that is, the question of how a decision-maker can bind himself and simultaneously reproduce freedom of decision, was kept in suspension by religion. Then, however, it snuck its way into the lower ranks of rule-making authority, latching itself onto the paradox of law using the notion of *reasons of state*, from which it derived certain privileges for itself (but still,

⁹⁵ See Niklas Luhmann, “Die Rückgabe des zwölften Kamels: Zum Sinn einer soziologischen Analyse des Rechts”, (2000) 21 *Zeitschrift für Rechtssoziologie*, pp. 3-60, at 45.

⁹⁶ *Ibid.*, p. 45 *et seq.*

only legal privileges), until, finally, for a good two hundred years now, as the power, or ruling authority, it has appointed itself to the head of the table.”⁹⁷

As Luhmann suggests in his historical model - and as is argued here in analysing the role of the political system as an intruder on the legal system - in order for one system to succeed in parasitically exploiting the code of a second system, it must employ *semantics* (“*reasons of state*”) that allow the parasite’s exploitative conduct to appear acceptable, or even necessary, to the host system. In applying the parasite theory to an concrete case, in order to understand better the developments that followed the *UBS* agreement with the U.S., it will be useful, therefore, to consider first the semantics that were employed in establishing what may be described as a parasitic chain: in its striving to *maximise profits*, the economic system exploited the code of the political system, which sought, in turn, to *enhance its legitimacy* by exploiting the code of the legal system, which, for its part, allowed itself to be exploited as a means of *asserting an authority* (regulatory powers) which it did not, in reality, possess.

With regard to the hijacking of the political system by the economic system, a wide range of terms were developed that proved highly useful in confounding private economic and public political interests with each other. For our present purposes, however, it will suffice to concentrate on a single paradigmatic example: “*too big to fail*” (TBTF). The argument that this catchphrase came to stand for may be summarised as follows:

“Government intervention for the rescue of systemically relevant undertakings [*i.e.*, financial institutions considered TBTF] is based upon an understanding that the consequences of insolvency can threaten the stability of the system and give rise to intolerable costs for the overall economy.”⁹⁸

It was precisely this argument which, as described earlier, moved the Swiss Federal Council to intervene in the civil matter of the agreement entered into by the *UBS*, as a private corporation, with the U.S. government. The central factor motivating this intervention, according to the official rhetoric, was concern that failure of the *UBS* could result in “*intolerable costs*” for the Swiss and global economies. However, the validity of this

⁹⁷ *Ibid.*, p. 46.


⁹⁸ See “Zwischenbericht der [schweizerischen] Expertenkommission zur Limitierung von volkswirtschaftlichen Risiken durch Grossunternehmen vom 22 April 2010”, available at: <http://www.finma.ch/d/finma/publikationen/Documents/zwischenbericht-expertenkommission-tbtf-d.pdf>, p. 6.

argument, to which we will return later in examining the parasitic behaviour of the political system, is not the focus of our attention here. At present, what concerns us is only the interest of the *economic* system in having the issue framed in its own terms. This interest is also quite transparent, as the advantages are many. In particular, by means of the TBTF semantics, the costs of the operations involved are metamorphosed from real economic costs (to the *UBS*) into potential *political* costs (the survival of the global economic system), which then translate back into economic benefits for the so-called “systemically relevant” financial institutions.⁹⁹ The new semantics thus provide the economy with a new reservoir for siphoning off further profits. The insinuation of private economic interests into the code of the political system (in the public interest/not in the public interest) makes it possible to categorise economic events as belonging to the political system, with the result that economic decisions are made upon the basis of political criteria.

The same basic pattern can be observed, *mutatis mutandis*, in the relationship of the political system towards the legal system. Here, it was “reasons of state” that provided the necessary semantic leeway to justify the FINMA’s decision as “legal” rather than “political”.¹⁰⁰ This parasitic use of the legal system by the Federal Council also has a further subtlety to it, due to a certain “affinity” of the financial authority with the political system, as will be touched upon immediately below. The decisive point to be noted here, however, is that the parasitic behaviour of the political system was conditioned by a desire to enhance *its own legitimacy*. Because the constitutionality of the Federal Council’s intervention was, and was also perceived to be, questionable, it saw no other means of avoiding the scandal and the subsequent loss of legitimacy that failure to act would inevitably have resulted in than by seeking refuge in a “legal” decision. It was to this end that it mobilised the FINMA.¹⁰¹

The particular subtlety of the Federal Council’s parasitic manoeuvre lay in its use of a government agency whose formal position places it at the very outskirts of the legal system. As a regulatory instance, it is charged by the executive branch with applying the financial law *independently* of the executive. In this sense, although its code - like that of a sub-system of the legal system - is a *legal* code (lawful/unlawful), it has a *natural affinity* with the political system, with which it is formally associated. This proximity provided the Federal Council

⁹⁹ *Ibid.*, p. 6.

¹⁰⁰ See *supra* .

¹⁰¹ Luhmann, note 20 *supra*, p. 424.


with easy access to the legal system, whose code it then attempted to exploit – with only limited success in the end, due to the better ability of the court system – specifically the Federal Administrative Tribunal – to resist tampering with its operations. Nevertheless, it cannot be denied that it did not entirely fail in its efforts, either – as witnessed by the reaction of the FINMA Chairman to the court’s ruling on the matter: a defiant declaration of his intent to continue trespassing on the principle of legality regardless of the opinion of the court.¹⁰² Even if it is questionable as to whether it will be possible to discover any convincing legal arguments to defend this standpoint, as evidence of the effectiveness with which the political system was able to undermine the code of the legal system parasitically *in casu*, it is, nonetheless, quite telling.

Having analysed the mechanisms by which parasitic chain relationships between the major functionally-differentiated social systems can arise, eroding the boundaries of those systems and leaving them open to crisis, we can now return to the question of *how* this understanding can be put to practical regulatory use. In such cases, as we have seen, primary importance would have to be attached to preventing the parasitic exploitation of systemic codes by *breaking* the parasitic system’s “*semantic spearhead*”, as it were. The most obvious way of accomplishing this would clearly be to eliminate the need for such ambivalent terms in regulatory legal argument. In other words, regulatory law should be based upon a *self-organisational* model, rather than upon the present model of legally-justified direct intervention. The question is, of course, how to design such a self-organisational regulatory model for actual practice. A new approach to regulation that offers such a possibility will be considered in the final section of this chapter. First, however, it will be useful to consider certain fundamental principles to be observed in the avoidance and regulation of crises.

III. CRISIS REGULATION

III.1. REGULATORY DESIGN

The foregoing analysis of different crisis forms allows us to articulate at least one general rule concerning financial regulation: regulatory strategies must be *evolutive* in nature. In other words, an effective regulatory model cannot be constructed upon the basis of a *linear* conception of the way in which financial markets develop. It must be conceived in such a way as to be able to *react to highly variegated, unpredictable changes* in the structure of potential crisis fields, to interruptions and discontinuities in the evolution of the market. More

¹⁰² See *supra* .

specifically, as was seen in the most recent global financial crisis, regulatory rules cannot work if they take into account only the *momentary* financial condition of the *individual* financial institutions at fixed intervals (for example, rules such as those which require large banks to maintain certain types of liabilities amounting to 10% or 20% of their total assets, which in crisis situations mutate into equity). As the discussion of the three crisis forms treated above has shown, there is a *systemic-evolutive* dimension to crises, with important regulatory implications. One such implication is that quantitative measurements of *institutional health* are not sufficient. If crises are to be prevented, or, at least, contained, other methods are required. Equally clear is that the underlying principles upon which such methods must rely can logically only be derived from an understanding of the inherent structure of systemic crises, as has been attempted here.

III.2. RULES OF REGULATORY CRISIS PREVENTION

Regulatory Crisis Prevention Rule 1: Organisational Pre-requisites

Our analysis of *Crisis Form I* revealed a first area in which regulatory intervention was called for: the codes of the systems located within the financial sector must be protected from assimilating *extraneous* values. At issue here is the relationship between the system's own design and the environment in which it operates. More specifically, the question to be answered is: *How can the ability of the system to recognise the events that pose a threat to the binarity of its code, as it selects information from its environment, be enhanced?* Given the systems-theoretical fact that systemic codes are not open to direct intervention, what is called for are *indirect* methods that guide the operations of the financial system *as such*. This suggests that the operational selection-mechanisms built into the structure of financial institutions must be strengthened in such a way as to maintain their *focus* on the principle distinction that constitutes the code of financial operations (compensated risk/uncompensated risk). To do this, we would propose that the regulatory regime should avail itself of the possibilities offered by further *structural diversification in financial institutions*.

What is meant by further structural diversification is that the *division of tasks* within the organisation is to be further refined, *increasing* the number of highly specialised independent units. By this means, the level of "*self-created uncertainty*"¹⁰³ within the organisation can be raised. By reducing the possibilities for consultation between the units of the organisation, they are compelled to rely more heavily on each other properly performing

¹⁰³ Niklas Luhmann, *Organisation und Entscheidung*, (Opladen-Wiesbaden: Westdeutscher Verlag, 2000), p. 317.

their pre-established tasks. Under these conditions, each unit has little alternative but to orient its operations strictly on the code that underlies the entire organisation's activities: *the code of financial operations*. The focus of individual institutions on that code ensures collectively that the requisite rigidity of the overall financial system's binary code is maintained. At the same time, the higher degree of specialisation achieved through the greater diversification of tasks enables the system to draw *finer distinctions* between the events that it encounters in its environment and thus to *filter* them *better* - as being appropriate, or as a latent threat - to its own functional operations. In this way, the system maintains its ability both to evolve and to maintain its own boundaries while still performing its fundamental social function. By filtering out those events from the system that are recognisable only on closer analysis as a threat, such a highly-diversified system has a correspondingly-improved ability to protect its boundaries and thus to prevent crises from arising.

Regulatory Crisis Prevention Rule 2: Programme Interpretation Guidance

Crisis Form II suggests a further sphere in which regulation can play a decisive role. In this case, the aim of regulation would be to mitigate the consequences of system codes articulated in such abstract terms that they do not permit the formation of *sufficiently precise* programmes. Programmes may be said to be not sufficiently precise where they do not allow the system's operations to categorise correctly the communications that it encounters in its environment.¹⁰⁴ As we saw above, in the analysis of Goodhart's Boundary Problem (*Crisis Form II*), under such conditions, it is possible that entire aggregates of communications may come to oscillate from one system to another, upon a cyclical basis, for no system-intrinsic reason and thus effectively obliterate the boundaries of the systems involved. The consequence, here, too, is that the systems thus become unable to perform their social functions adequately. As regulatory law cannot directly influence the level of abstraction at which system codes are articulated, it must intervene in a more subtle manner, once again by providing guidance for the system's programmes.¹⁰⁵ The difficulty, this time, however, lies in the limitations of the legal system itself, and of regulatory law in particular, in grasping the reality of the environment in which the regulated systems operate. Here, as well, the legal system must follow an indirect path in order to achieve the desired regulatory effect. It must

¹⁰⁴ See *supra* ■.

¹⁰⁵ See *supra* ■.

adapt its own programme in order to provide itself with the means of formatively-influencing the programmes of the regulated systems.

In order to explain how such a sophisticated regulatory scheme could be constructed, it is necessary first to recall the traditional division of legal systems into those whose programmes are conditional and those with teleological programmes. Conditional programmes are characterised by the defining of future circumstances that must be present at the moment of a court or other official decision, in order for the matter at issue to be qualified as lawful or unlawful.¹⁰⁶ Teleological programmes do without such definitions and define only “present intents”, that is, states of affairs, the attainment of which is considered desirable as seen from the perspective of the present.¹⁰⁷ The setting of such intents serves as a “guideline for ascertaining the conditions that can contribute to a decision between the lawful and the unlawful”.¹⁰⁸ The two systemic programme types in question here differ from each other, in principle, by the fact that (put in traditional terms) in one the constituent elements required for a legal determination are *fixed by statute in advance* (= conditional programmes), while the other delineates the *scope of the determining the powers of the authority (judge or regulatory agency) to define* the determinant grounds (= teleological programmes).

On close examination, it can be seen that neither conditional nor teleological programmes are adequate to the purpose of exerting evolutive influence on the programmes of regulated systems. Common to both programmes is that they are based upon an interventionist model. They exert social influence (the influence on the programmes of social sub-systems) by artificially imposing new structures on the systems that they regulate. The original structures of the regulated systems are replaced either by the conditional programmes designed by law-makers or the teleological programmes determined by courts or regulatory agencies.¹⁰⁹ The disadvantage of these methods is that they suffer from *normative stasis*: potential future developments play no role in the application of either conditional or teleological legal programmes. This renders them inherently unsuitable for use in the development of an evolutive regulatory regime as proposed here.¹¹⁰ As any financial

¹⁰⁶ Luhmann, note 20 *supra*, p. 198.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*, p. 202.

¹⁰⁹ On the entire question see, *inter alia*, Calliess, note 85 *supra*, p. 441.


¹¹⁰ See *infra* ■.

regulatory scheme capable of preventing crisis must be able to evolve synchronously with the financial environment, as is argued here, the only conclusion possible is that such a scheme must represent a *tertium* in legal programming, in other words, it must move beyond the models of existing conditional and teleological programmes. The question now is: What would such a *tertium* look like?

A way out of the dilemma posed by conditional and teleological programmes *in casu* can only be sought in a regulatory regime that waives direct intervention into the regulated systems and replaces it with *indirect* - one could also say, *reflexive* - intervention.¹¹¹ The regulated system is construed by the law as remaining responsible for the design of its own programme. Notwithstanding this, it has an influence on the programme design process, in that it formulates programme interpretation default rules for the regulated system: it defines - without officially imposing - the data or factors that the regulated system should take into account in designing its programmes in such a way as to satisfy the expectations of socially-adequate behaviour.¹¹² In this way, the law functions not normatively, but *cognitively*.¹¹³ It places at the disposal of the regulated system the “reality recognition resources” required for it to develop socially-compatible programmes. The pre-requisite to the assimilation of the interpretative default rules - in keeping with the cognitive nature of the entire process - is that they be intrinsically-plausible and objectively-convincing. In this way, the law allows the regulated system to evolve autopoietically. It enhances the system’s ability to adapt continuously to its environment, thus avoiding the social stasis created by the linear development model underlying both conditional and teleological legal systems.

As with *Regulatory Crisis Prevention Rule 1*, concrete proposals for the implementation of the Rule 2 will be covered in the final section of the chapter.

¹¹¹ On the notion of *reflexive* intervention (with a critical comment) see, for example, Erhard Blankenburg, “The Poverty of Evolutionism: A Critique of Teubner’s Case for ‘Reflexive Law’”, (1984) 18 *Law & Society Review*, pp. 273-294.

¹¹² Such interpretational guidelines are thus distinguishable from conditional and teleological programs in that they do not define constituent elements of a situation, upon the presence of which regulatory intervention is contingent. Interpretational guidelines – as a form of cognitive law – may be used, or not. Whether they are, in fact, used is a question of the *credibility* of the interpretational schemes that the law places at the disposal of the economy. See, also, *infra* .

¹¹³ For a more detailed treatment of the concept of *cognitive law*, see Marc Amstutz & Vaios Karavas, “Rechtsmutation: Zu Genese und Evolution des Rechts im transnationalen Raum”, (2006) 8 *Rechtsgeschichte*, pp. 14-32.

Regulatory Crisis Prevention Rule 3: Preventing Semantic Instrumentalisation

A third sphere, in which regulatory law can intervene to prevent or to resolve crises, can be deduced from the analysis of *Crisis Form III*. The aim is to hinder the parasitic exploitation of the major functionally-differentiated social systems - in particular, the political and legal systems - by rendering the use of semantic borrowings from the host system by the parasite-system *difficult*, if not *impossible*. In order to prevent the political system from exploiting the legal system, for example, the former must be hindered in the use of such terms as “reasons of state” as a device for delegating political problems to the legal system. The difficulty in realising this regulatory objective lies, of course, in the fact that a strict prohibition on language games is legally unrealistic. It follows that regulatory measures for the prevention of crises due to parasitic system-exploitation must also use *indirect* means to accomplish their purpose. The most promising path to the suppression of the danger represented by the parasitic instrumentalisation of semantics lies in a *sharpening of the self-organisational capacities of financial institutions*. The central idea is to reduce drastically the number of possibilities available to the functional systems involved (the economy, politics, law) for putting ambiguously-defined terms to parasitic use. One means of achieving this could be to replace traditional, compulsory regulatory methods with *self-regulatory techniques*. In recent years, we have witnessed a veritable renaissance in self-regulation through the creation of compliance divisions in nearly all major corporations.¹¹⁴ Where the task of assuring legal compliance is assigned to the regulated systems themselves, the occasions calling for direct intervention by the political or legal systems into the economic system can be significantly limited. This automatically lightens the burden on regulatory authorities and, concurrently, reduces the number of situations in which the economic, political or legal systems can plausibly employ parasitic semantic tools.

III.3. EVOLUTIVE CRISIS RESOLUTION: INSTITUTION-BASED FINANCIAL REGULATION AS A CASE IN POINT

The analysis of *Crisis Forms I, II* and *III* led to the identification of rules for evolutive regulatory crisis-prevention through the formulation of guidelines in three spheres: organisational structure, programme interpretation, and a reduction of the parasitic instrumentalisation of semantics. It is noteworthy that recent developments in financial

¹¹⁴ See Marc Amstutz & Vaïos Karavas, “Weltrecht: Ein Derridasches Monster”, in: Galf-Peter Calliess *et al.*, (eds), *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag am 19. Juni 2009*, (Berlin: Walter de Gruyter, 2009, pp. 645-672.

regulation show evidence of a certain breakthrough in these areas at the purely *practical* level. This suggests that regulatory practice is already moving along the lines for which the present study has attempted to supply a possible theoretical foundation. These practical developments will be the focus of the final remarks that follow. The purpose here is to demonstrate ways in which the crisis-prevention rules identified above can be given substantive form.

It is, above all, in the work of Walsh that the “subliminal” efforts of financial law practice to discover a new paradigm for modern financial regulation has been investigated and brought to light.¹¹⁵ Walsh has diagnosed a new trend in transatlantic financial market regulation, which he terms “*institution-based*”. The underlying strategy behind this new regulatory model is summarised as follows by Walsh:

“In this strategy the regulators, to date the Securities and Exchange Commission and the Financial Industry Regulatory Authority, require firms to establish certain institutions. In the U.S. regulatory context these typically include: a Chief Compliance Officer, compliance policies and procedures, an annual self-assessment, access for the Chief Compliance Officer to the firm’s senior-level executives, and internal codes of ethics. The establishment of these institutions is required by rule, but the functioning of these institutions within each firm is generally left to the firms themselves, with the regulators providing interpretation, guidance, and personal statements. ... [It is argued] that institution-based regulation combines a mandatory institutional architecture with a customizable firm-specific functionality.”¹¹⁶

The regulatory trend identified by Walsh is composed of *two* elements. The first is compulsory (“*mandatory institutional architecture*”), and requires financial firms to set up certain internal “institutions”. As an example, Walsh mentions the demand by the United States Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA) for a *structural diversification* to be effected in the organisation of banks. This is intended to lead to the appointment of a *Chief Compliance Officer* (“CCO”), a delineation of “*compliance policies*”, a setting of “*compliance procedures*” and the

¹¹⁵ John H. Walsh, “Institution-Based Financial Regulation: A Third Paradigm”, (2008) 49 *Harvard International Law Journal*, pp. 381-412; a criticism of this approach can be found in Anita I. Anand, “Rules v. Principles as Approaches to Financial Market Regulation: Responding to John H. Walsh, *Institution-Based Financial Regulation: A Third Paradigm*”, (2008) 49 *Harvard International Law Journal*. 381 (2008), (2009) 49 *Harvard International Law Journal*, pp. 111-115.

¹¹⁶ Walsh, note 115 *supra*, p. 381.

preparation of an “*annual self-assessment*” report.¹¹⁷ At first glance, this approach could appear to be merely a variant of a conditional programme – commonly referred to the Anglo-Saxon world as “rule-based regulation”. However, as Walsh himself notes:¹¹⁸

“If one were to consider only the rules-based elements of this type of regulation, these requirements would be its sum and substance. However, requiring the establishment of these institutions is only the start.”

It is for this reason that the second element of the regulatory strategy behind the “institution-based approach” is essential to an understanding of its mechanics. This second element - *customisable firm-specific functionality* - addresses the question of how the internal organisational “institutions” of financial firms must be constituted and how they are expected to function. The SEC and the FINRA have issued various statements in this regard (interpretations, guidance, personal statements), which explain their conception of the internal institutions to be established by the financial firms, and their expectations as to how these institutions should function. As an example of this technique, one may cite the declared interest of the SEC and the FINRA in ensuring that the CCO be granted access to a firm’s highest ranking executives.¹¹⁹ This regulatory method can, in no way, be considered as representing binding legislative or official government action. Walsh explains the complex nature of the explanatory statements as follows:

“The SEC has argued that the statements in its releases are not ‘legislative rules’ that establish new legal obligations. Rather, they are interpretative rules that inform the public about the standards that the agency intends to apply when exercising its discretion. In other words, the statements are in the nature of ‘advice’ from the agency, not rules with ‘the force of law’. Of course, persons subjected to agency regulation ignore its advice ‘at their peril’. Similarly, when FINRA’s Interpretative Materials have been approved by the SEC, they are ‘generally considered part of the rules they interpret, while the publications that provide ‘guidance’ are labeled as such. Finally, regulatory officials’ personal statements about their hopes for compliance institutions are useful in understanding the regulator’s vision for the new institutions, but as a matter of law they are merely hortatory. Taking all of these

¹¹⁷ *Ibid.*, pp. 388-389.

¹¹⁸ *Ibid.*, p. 389.

¹¹⁹ *Ibid.*, p. 399.

materials together, it is possible to describe in some detail ... the regulatory expectations for how these institutions would operate.”¹²⁰

Walsh sees the primary advantage of this interplay between *mandatory architecture* and *customisable functionality* in the fact that, in the context of the *globalisation of financial markets*, it is conducive to an increase in the compatibility of national regulatory approaches. Among others, he stresses three main points:

1) First, the institution-based approach is *neutral* in terms of content, so that it can easily be tailored to the local needs of each country, according to the circumstances, without sacrificing consistency at global level.¹²¹

2) Second, the new regulatory trend makes *knowledge acquired locally* available for use by the entire financial system, thus offering a plausible solution to the inherent difficulty of regulatory law in re-constructing the reality of financial markets, as described above. It is no longer incumbent upon the regulatory agencies to disentangle the *causative links* between events on the capital markets and simultaneously to devise apposite and immediate regulatory measures to keep in step with evolutive interruptions in expected market behaviour. Instead, it is the actors on the financial markets themselves – the formal organisations of which the system in crisis is made up – that are required both to gather information and to apply it to themselves autologically in order to resolve the systemic problems of the financial system at the highest level. The systemic dimension of preventing and managing crises thus forms a factor in the calculus of financial regulation and is thus an integral part of all regulatory measures. In Walsh’s words:

“As a global paradigm, this dynamic process of self-improvement could help address a pressing need. In some cases, members of the international regulatory community are not just creating new markets; they are also creating new compliance communities. Thy dynamic growth in certified professionalism and expertise could prove a valuable resource in this effort.”¹²²

3) Finally, in Walsh’s view, the institution-based approach is *self-sustaining*, so that it is capable of uniting the core elements of regulatory crisis-prevention under a single regulatory regime:

¹²⁰ *Ibid.*, pp. 389-390.

¹²¹ *Ibid.*, p. 410.

¹²² *Ibid.*, pp. 411-412.

“A global paradigm, this type of continuous improvement could help firms and regulators stay current, especially in the fastest-growing securities markets. Change is coming quickly to many securities markets, but in some of the youngest and most rapidly growing markets the rate of transformation is staggering. Institutionalized self-improvement, by the regulated firms themselves, could help compliance keep pace.”¹²³

There can be no doubt that these factors constitute significant “globalisation” benefits for financial regulation. More important in the present context, however, is the fact these developments in regulatory efforts at crisis management also provide a “ready-made” means of implementing the regulatory rules derived from the foregoing theoretical analysis. The correspondence between these rules and the approach outlined by Walsh is easily recognisable:

1) The official imposition of an “*institutional architecture*” on financial market participants, as described by Walsh largely implements *Regulatory Crisis Prevention Rule 1*. The principal question here concerns the manner in which the structural diversification of financial firms through the introduction of a CCO, compliance policies, compliance procedures, annual self-assessments and the like give substance to this rule. Of particular interest is the way in which these organisational measures compel the financial actors to focus on the code of the financial system and hinder the interference of extraneous values in the system code. In this connection, Walsh stresses the pressure created to respect the logic of the overall system by the presence of a CCO:

“The SEC indicated that it expects the CCO to have a strong role in the firm, with ‘sufficient seniority and authority within the organization to compel others to adhere to compliance policies and procedures’. The SEC has also said that the CCO ‘should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures for the firm’.”¹²⁴

The development and enforcement of “appropriate policies and procedures” is merely another way of saying the subjugation of the financial institute in question to the function of the financial system as such. Or, to put it in different terms, the CCO places internal limits on the bandwidth of the firm’s operations, so that possibility of orienting the organisations

¹²³ *Ibid.*, p. 410.

¹²⁴ *Ibid.*, p. 391.

operations on *values other than those of the binary code of financial systems* is excluded. This is achieved primarily through the articulation of appropriate policies and procedures, whose task it is to narrow the range of a given organisation's activity to a point that any deviation towards actions which are foreign to the system's own logic becomes increasingly unlikely. The "self-created uncertainty" which comes about as a consequence of the organisational measures in question, contributes to this restriction on non-systemic behaviour in that it naturally impedes oversight of the CCO's performance of his or her tasks by other members of the staff or management. It is to this very end that the SEC provides a list of the tasks to be performed by the CCO:

"They [*i.e.*, the listed duties] include advising senior management on the fundamental importance of compliance, conferring with senior management on significant compliance issues, serving as a compliance 'consultant' to businesspeople throughout the firm, analyzing and resolving significant compliance issues as they arise, ensuring that the firm's compliance processes are appropriate and timely carried out by responsible staff, ensuring that employees are appropriately trained in compliance-related matters, serving as the firm's point of contact during regulatory oversight, and being active in industry efforts to develop good compliance practices."¹²⁵

2) It is equally clear that the statements released by the SEC and the FINRA, in which they make known their expectations with regard to the functioning of the organisations' internal institutions, effectively implement what was here described as *Crisis Prevention Rule 2*. What is significant in this context is that, above all, the SEC specified in its statements that firms subject to the institution-based approach were to begin formulating their "policies and procedure" by first determining the concrete risks to which they were exposed. The substantive effect of these instructions has been quite remarkable in actual practice:

"The months after the rule was adopted, a shorthand language grew up around this statement. Firms said they were conducting 'risk assessments' by creating 'inventories of risks'."¹²⁶

Such "*inventories of risks*" fulfil the role of programmes for the operations of the financial firms, in that they are capable, to a certain extent, of neutralising the effects of any excessive abstractness in the coding of the financial markets or their sub-systems. These

¹²⁵ *Ibid.*, pp. 391-392.

¹²⁶ *Ibid.*, pp. 393.

programmes should - in theory - have the capacity at least to mitigate the phenomenon of cyclically-oscillating communications aggregates at the centre of the boundary problem described by Goodhart, in that they facilitate the allocation of specific banking activities to either the *narrow* or the *broadier banking system*. It should be noted, however, that although these initiatives provide some indication as to how our *Crisis Prevention Rule 2* could be implemented in practice, there is still not sufficient empirical evidence available to allow any reliable estimate as to their actual effectiveness.

(3) With regard to *Regulatory Crisis Regulation Rule 3*, here, too, the institution-based approach offers a possible means of practical implementation. The inclusion of interpretative guidelines, such as those released by the U.S. financial market regulation authorities, as a second, essential element of this new regulative strategy represents an implicit reversal of the policy of *direct* intervention. In *lieu* thereof, the new guidelines help to place a quantitative limit on the opportunities available for the parasitic instrumentalisation of semantics by the major functional systems of society.

CHAPTER 10

THE FAILURE OF REGULATORY INSTITUTIONS A CONCEPTUAL FRAMEWORK

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I. INTRODUCTORY REMARKS

The functional connection between legal and social regulation has radically changed its focus in the sociological literature of the last decades. As a matter of fact, the traditional role of the state and its theoretical representations as the ultimate level of co-ordination of social actions has dramatically reduced their concrete relevance.¹ This process was clearly determined by several, widely-discussed factors, such as the emergence of supranational institutions which were able to impose their authority on national states, the increasing differentiation of regional institutions which absorb much of the state regulative power, and, last, but not least, the substantial weakening of many of the coercive tools which, through positive or negative sanctions, were exclusively used by the state in the past.²

The traditional pillars of the legal, political and social dimension of the state are, therefore, gradually transforming themselves into a series of paradoxical relicts: that of divided sovereignty, of democracy without a territorially- and culturally-defined *demos*, and of constitution without overarching authority.³ Now that the legal systems seem no longer complementary to the political system in providing a sort of regulated regulation of society, both systems appear more and more exposed to the increasing pressure of other mechanisms of social regulation, especially those of a moral and economic nature. It is thus not surprising

¹ G. Teubner (ed), *Global Law without a State*, (Aldershot: Ashgate-Dartmouth Publishing, 1997).

² A. Febbrajo, "Pene e ricompense come problemi di politica legislativa", in: *Diritto premiale e sistema penale*, (Milan: Giuffrè, 1983), pp. 97-119.

³ J. Priban, "Constituting the Heterarchy of European Constitutionalism in the EU's new Member States", in: A. Febbrajo & W. Sadurski (eds), *Central and Eastern Europe after Transition. Towards a new Socio-legal Semantics*, (Farnham: Ashgate Publishing, 2010).

that the eclipse of some of the essential regulative functions traditionally-ascribed to the state is now conceding wider room to external regulations which could produce a sort of autonomously-organised extra- or even anti-state.

All these internal and external, normative and structural changes are connected with the fading out of the former state hegemony within a certain society, and are accelerating the emergence of other forms of social regulation. In the noisy environment of our contemporary societies, the voice of state institutions is thus not only losing its traditional authority and its imperative tone, but it is also often unable to be deciphered by social actors because of the presence of many other increasingly loud and commanding voices.

To explore the complexity of these transformations, it is necessary to analyse, from both macro-sociological and micro-sociological perspectives, some of the basic concepts normally associated with the regulative functions of legal institutions. In particular, starting from a typology of traditional models of institutional regulation, we will try to underline their correspondence to different kinds of legal culture, based upon different representations of the relationships between law and society (Section II), and their possible combination into a more comprehensive model of systemic regulation (Section III). From this perspective, we will try to re-define traditional strategies for the critical evaluation of legal regulation (Section IV), according specific attention to the main instruments of structural coupling which, in normal circumstances, may support a successful legal regulation (Section V). Finally, we will discuss some of the most visible failures of institutional regulation, determined by the increased exposure of the legal system to evolutionary crises which stem from its own risky environment (Section VI).

II. CLASSICAL MODELS OF INSTITUTIONAL REGULATION

The most important models of “institutional regulation” proposed in the history of socio-legal studies were influenced, not only by different conceptions of the state, but also by different forms of “legal culture”. In order to orient ourselves within this extremely wide field of possible meanings, the concept of “legal culture” could be here intended as concerning the intellectual background which influences the decisions produced by legal professionals (internal legal culture), as well as the images of positive law elaborated by social actors (external legal culture).

This basic distinction reflects the largely accepted opposition between the “formal” attitudes of “law operators”, and the “informal” attitudes of “law consumers”. According to

this dichotomy, the former is based upon the insider's view, endowed with a direct knowledge of legal contents and methodology, while the latter is based upon the perceptions of laypersons considered as potential or occasional players in the law game, and characterised by more flexible approaches towards legal values and their possible internalisation.⁴

Yet, the distinction is, on closer inspection, ambiguous in relation to its ideological character. The internal legal culture of legal professionals can be presented as ideological if we consider the legal order as a sort of ivory tower excessively closed to society,⁵ but, if we prefer to defend the purity of the legal order against the hidden pollution coming from society, it is the external legal culture which appears as ideological. As a matter of fact, every internal legal culture, typically influenced by the perspective through which legal operators are observing law, is far from being neutral. The judge, the lawyer or the notary, even if oriented to an internal point of view, could, at the same time, be influenced by the interests of their own professional association or by particular interests connected with other social contexts.

The same distinction also seems too rigid in that there is no necessary homogeneity within internal or external legal cultures. Within the "internal" culture of legal professionals relevant differences (for instance, among attorneys and judges) could be ascertained, while external legal cultures could refer to profoundly inhomogeneous views (for instance, connected with several culturally-relevant categories, such as education, income, age, *etc.*).

In order to obtain a more articulated frame of reference, we prefer to take into consideration three possible elements: besides the internal or external roles, we also consider both the criteria and the situations which are relevant in a certain regulation. These three elements could independently assume internal or external perspectives which, in this way, enrich the grey zone of mixed hypothesis between the extreme poles of totally-internal and totally-external legal cultures.⁶

As far as the roles are concerned, it is possible to consider the legal culture of an actor who, in spite of his or her role internal to the legal system, applies external criteria to internal

⁴ D. Nelken & J. Feest (eds), *Adapting Legal Cultures*, (Oxford: Hart Publishing, 2001); D. Nelken, "Using the Concept of Legal Culture", (2004) *Australian Journal of Legal Philosophy*, pp. 1-28.

⁵ R. Cotterrell, "The Concept of Legal Culture", in: D. Nelken (ed), *Comparing Legal Cultures*, (Aldershot: Ashgate-Dartmouth Publishing, 1997).

⁶ A. Febbrajo, "Cultura giuridica. Contenuti e funzioni di un concetto", in: A. Febbrajo, A. La Spina & M. Raiteri (eds), *Cultura giuridica e politiche pubbliche in Italia*, (Milan: Giuffrè, 2006), pp. xi-lxiii.

matters (this is the case of the so-called political justice of a non-neutral judge), or of an external actor who is applying internal criteria to internal matters (this is the case of the “informal justice” of non-professional lay-judges appointed to solve legally-relevant conflicts).

Also from the point of view of the criteria of regulations, the flexibility of the criteria applied by social actors could independently change from their roles (internal or external). As is clearly shown by the comparison of social and legal attitudes towards the death penalty in different countries, populations embedded in certain external legal cultures could tend to apply much more severe criteria in relation to particularly horrific crimes than the legal professionals who are influenced by their own internal legal culture.⁷

From the point of view of the situation to which a given legal regulation refers, it is finally possible to identify circumstances explicitly regulated by legal norms, which are more or less indifferent for the legal system independently both from the roles involved and from the criteria actually applied in situations which are clearly relevant for the legal order.

This cultural trilemma could contribute to the definition of a typology of different models of legal regulations. A legal regulation appears characterised by a combination of roles (R), criteria (C) and situations (S) which, in different contexts, is possible to consider separately as internal (i) or external (e) to the legal order.

In a model of regulation characterised by totally internal perspectives (R_i, C_i, S_i), it is easy to recognise the imperativistic approach of Kelsen. It reflects the internal legal culture of legal professionals convinced to apply legal norms according to formally pre-determined criteria and situations.⁸ This technocratic image of institutional regulation, which mainly corresponds to the continental self-representation of the judges, was used to defend the organisational independence of legal professionals who were represented as not being accountable for the consequences of their decisions. Legal professionals inserted into a hierarchical structure based upon a centralistic vision of law are culturally-oriented to a clear cut separation of the domain of what *is*, from that of what *ought to be*.

⁷ D. Melossi, “Translating Social Control, Reflections on the Comparison of Italian and North American Cultures”, in: S. Karstedt & K. Bussmann (eds), *Social Dynamics of Crimes and Control. New Theories for a World in Transition*, (Oxford: Hart Publishing, 2000).

⁸ H. Kelsen, *General Theory of Law and State*, (New York: Russell & Russell, 1961).

A totally opposite model of regulation, results from the complete externalisation of all the elements which may characterise a given legal culture. This model, which typically deals with non-professional roles, pre-supposes criteria of decision and situations that are external to the legal order because they are not explicitly qualified by legal norms (its typical scheme could thus be: Re, Ce, Se). Such a model of regulation was basically adopted by a movement, that of legal realism, which represents the ideal counterpart to legalism.⁹ Being engaged in the empirical revision of an exclusively norm-oriented legal science, this movement was particularly successful in underlining the possibility of an exclusively fact-oriented legal science and in increasing the empirical sensitivity of legal professionals.

Less radical models of regulation are softening the rigid opposition of norms and facts from a perspective in which it is possible to combine social and legal cultures. In particular, one model could be connected with a legal culture characterised by internal roles, external criteria and internal or external situations (Ri, Ce, Si/e). The basic theoretical idea of this scheme is the traditional formula *ex facto oritur ius*, which pre-supposes an incremental process of stratification of single decisions based upon customary sources of regulation, and stabilised through their gradual reception into a *Juristenrecht*. In this model, we can recognise a sort of “Bukowina regulation”, similar to the pluralistic model described by Eugen Ehrlich. This kind of regulation underlines the pre-eminent influence of the spontaneous forms of the organisation of social interests and ideals, and the interstitial role played by the judges, who, as mediators between norms and facts, contribute to the stabilisation of a state legal order, which is considered to be just one among the many regulators of the concrete lives of individuals.¹⁰

Starting from the pre-supposition that society is able to produce autonomous organisations with specific legal regulations, Ehrlich differentiated two aspects of a “living law”, more widespread and powerful than the legal propositions produced by the state and closer to social situations: on the one hand, a living law mainly produced upon the basis of the utilitarian criteria of rationality developed by single associations (living law generated by society), on the other, a living law mainly produced by legal professionals and constantly

⁹ K. Olivecrona, *Law as Fact*, (Oxford: Oxford University Press, 1939); T. Geiger, *On Social Order and Mass Society*, (Chicago IL: University of Chicago Press, 1969).

¹⁰ E. Ehrlich, *Fundamental Principles of the Sociology of Law*, (New York: Russell & Russell, 1962).

revised through their adaptive work (living law generated by the judges).¹¹ In this second case, the influence of the sociological jurisprudence is particularly evident.¹²

An even more flexible model of regulation is characterised by a relativistic approach which admits the possibility of assuming, at the different levels of roles, criteria and situations, internal and external points of view, as required by the functional orientations that are prevalent within the different social contexts (Re/i, Ce/i, Se/i). In this relativistic model, we can recognise the Weberian approach to the issue of social regulation. This approach was able to combine, into a highly articulated typology of different kinds of legitimation and social action, the formal aspects of a normative regulation *à la* Kelsen as well as the purposive and traditional aspects of a spontaneous regulation *à la* Ehrlich.

According to the types of rationality and the decision-criteria included in his complex architecture, Weber considered, with analytical attention, the different regulations functionally-connected to the constitutive rules of the various social games which characterise the different types of social institutions. The decision-criteria in these realms are basically complementary, and are mainly articulated within an abstract definition of the identity of certain types of civilisation.¹³

Upon the basis of these significant examples, we can distinguish, within the “classical” sociology of law, four models of legal cultures which correspond to the above-mentioned aspects of the possible combinations of normative/cognitive orientations:

- an “imperativistic” model which, following a top-down, hierarchical direction, mainly assumes the cultural point of view of legal operators in a dimension which is doubly normative-oriented, that is, in relation to the object and in relation to the pre-supposed source of regulation;

¹¹ Ehrlich was clearly influenced by a pluralistic ideology, which opposed the official ideology of centralism, at that time predominant in Vienna, where Kelsen was the undisputed benchmark. However, we must concede that, if compared to current standards, the level of tolerance and peaceful co-existence, both towards and among minorities, provided by the vast Austrian Empire was admirably capable of combining both nomogenetic models: Kelsen’s centralistic, state-based approach, which clearly prevailed in Vienna, and the pluralistic model, which prevailed in the peripheral, multi-cultural region of Bukovina, where Ehrlich lived [H. Kelsen, “Eine Grundlegung der Rechtssoziologie”, 1915 39 *Archiv für Sozialwissenschaft und Sozialpolitik*, pp. 839-879; Ehrlich, note 10 *supra*; M. Rehbinder, *Die Begründung der Rechtssoziologie durch Eugen Ehrlich*, (Berlin: Duncker & Humblot, 1967)].

¹² A. Febbrajo, *Sociologia del diritto*, (Bologna: Il Mulino, 2009).

¹³ M. Weber, *On Law in Economy and Society*, (Cambridge MA: Harvard University Press, 1966).

- a “realistic” regulation which, being concentrated on the external culture of social actors, is empirically-oriented to a mainly statistic perspective, and is, therefore, doubly cognitive, both in relation to the object and to the source of regulation;
- a “historic” regulation which, assuming a pluralistic perspective, is connected with the customary regulation of different associations in a dimension which is cognitive in relation to the object, and normative in relation to the perspective adopted; and
- a “functional” regulation which, taking into consideration a relativistic context, comparatively analyses the typical decision-criteria of different social institutions, based upon the normative/cognitive dimension of the constitutive *rules* of the *empirical* social games.

Table 1. Four classical models of regulation

<i>model of regulation</i>	<i>source of regulation</i>	<i>perspective</i>	<i>main points of reference</i>	<i>aspects of legal cultures</i>	<i>basic orientations</i>
imperativistic	formal	hierarchical	norms	professional roles	normative/normative
realistic	empirical	statistic	facts	social situations	cognitive/cognitive
historic	customary	incremental	associations	social roles	cognitive/normative
functional	constitutive	institutional	social games	decision criteria	normative/cognitive

III. A SYSTEMIC MODEL OF REGULATION

At this point, a question arises: Do the classical models of legal regulation which have been briefly presented describe concrete alternatives, or do they, instead, emphasise particular aspects of a more complex reality? A possible point of convergence for the above-described models of regulation seems to be offered by the social system approach. The innovative character of this approach derives from its more or less explicit re-definition of the concept of social differentiation, which appears articulated, not only from a *horizontal* perspective, that

is, through a functional delimitation of the “borders” of the social sub-systems within a certain society, but also from a *vertical* perspective, according to which each social system elaborates different levels of “self-observation” in order to produce the structural and functional adjustments required by its own environment. In this way, social systems are able to introduce, into a reflexive process of self-regulation, a multilevel combination of normative and cognitive moments provided by constant observation, and observation of observation, of the regulations adopted.

In the last decades, the author who has developed the most influential set of conceptual instruments within this theoretical approach is Niklas Luhmann. His lexicon and his way of thinking reveal a profound debt towards philosophical, sociological, and even anthropological and biological legacies. Law is presented by Luhmann as an essential part of a social system, opened to constant alternation of the normative moment of regulation and the cognitive moment of the correction of regulations. The possibility of observing and being observed is necessarily inserted into a circular process, according to which the facts recognise the norms, and the norms learn from the facts.¹⁴ The legal system becomes self-regulated in order to regulate better, and it regulates its own regulation upon the basis of a selected exchange of information from other systems and a reflexive treatment of the different legal cultures. We can thus speak of a “reflexive” regulation which is, at least implicitly, open to continuous interaction between the different legal cultures of both the producers of norms and their addressees.¹⁵

This model is the result of an internal development, which increasingly depersonalised and covered with systemic terminology its original anthropological roots. In Luhmann’s first important socio-legal work, legal regulation is defined as an instrument of “generalisation of expectations”, which connects actor and system. Legal regulation is perceived by the single actor upon the basis of his or her individual experiences and, at the same time, it is inscribed by the observer into the legal system’s frame of reference. The basic need of the system is, from an evolutionary perspective, to react adequately to the changes of the environment, recurring to the selectivity of the regulative structures considered essential

¹⁴ A. Febbrajo, “From Hierarchical to Circular Models in the Sociology of Law. Some Introductory Remarks”, in: *European Yearbook in the Sociology of Law*, (Milan: Giuffrè, 1988), pp. 3-21.

¹⁵ G. Teubner, “Substantive and Reflexive Elements in Modern Law”, (1983) 16 *Law & Society Review*, p. 239 *et seq*; *idem* & H. Willke, “Kontext und Autonomie. Gesellschaftliche Selbststeuerung durch reflexives Recht”, (1984) 1 *Zeitschrift für Rechtssoziologie*, pp.4-35.

for its protection. In other words, legal regulations both reduce the excess of the possibilities of action (complexity) offered by the environment to the different social systems, and provide a common basis for the social expectations of individual actors.¹⁶ In this context, individual and systemic perspectives can converge towards the production of a “positive law” which depends both on decisions and on their constant adaptation by other decisions. Thus, the result is that the legal system reflects, in its normative structures, the fundamental need of certainty, which is essential for the system and is typically diffused among social actors.¹⁷

Furthermore, Luhmann forcefully underlines the importance of the “procedures”. They are mechanisms employed by social, and, in particular, by legal, systems in order to maintain the cohesion and the legitimation of their regulation. Procedures could thus be seen as sub-systems which comprehend a series of acts structured by a complex set of convergent operations of self-determination in order to produce uncertain outcomes in pre-regulated ways.¹⁸ The borders of procedures are filtered through typical codes based upon rigid internal/external distinctions in order to select the signals coming from the outside according to a relevant-irrelevant dichotomy. Luhmann shows that the sum of the various steps of a certain trial is a truth “constituted” within a given normative structure by the parties who, having played their “cards”, are de-legitimised if they, in the end, try to de-legitimise the outcome of the trials. The traditional strategies of legitimation through legality are, in this way, supported by legal decisions endowed with self-legitimising procedures in which the loser is, for social reasons, denied the right to protest.

In a subsequent phase, Luhmann’s theory, starting from the impossibility of a total closure of the legal system, focuses attention on its internally-regulated connections with other social systems. Thus, legal semantics must firstly take into consideration that the “operative closure” of every system is a self-referential way of defining “what belongs to the system and what belongs to the environment”. In this context, the bridge is no longer between system and actor, but between different systems. They could produce a complex set of convergent operations inserted into a process of intersystemic exchange of *stimuli* and irritations. The legally-most-relevant sectors could be selectively “irritated” through the mediation of their operators, the “legal professionals”, who could then react by relying “on

¹⁶ N. Luhmann, *A Sociological Theory of Law*, (London: Routledge, 1985).

¹⁷ N. Luhmann, *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie*, (Frankfurt aM: Suhrkamp Verlag, 1981).

¹⁸ N. Luhmann, *Legitimation durch Verfahren*, (Frankfurt aM: Suhrkamp Verlag, 1983).

their own network of operations”.¹⁹ In this phase, the function of “communication” becomes crucial. It allows us to define the different levels of the legal system’s self-observation, and, at the same time, the possibility of overcoming the limits of the system’s specific rationalities. Thus, legal regulation has to structure a certain area of possibilities of communication through reflexive mechanisms organised in a series of networks which are able to assure, in a circular way, their mutual de-codification.²⁰

Table 2. A systemic model of regulation

<i>model regulation</i>	<i>of source regulation</i>	<i>of perspective</i>	<i>main points of reference</i>	<i>aspects of legal cultures</i>	<i>basic orientation</i>
reflexive	communicative	self- referential	social network	cumulative	circular

The comprehensive character of the “reflexive” model of regulation now becomes more evident. In the different phases of Luhmann’s construction, it is possible to recognise the main socio-legal models of legal regulation which have been previously discussed. In particular:

- a) the normativistic regulation emerges in the process of autonomisation (*Ausdifferenzierung*) of the legal order from other regulative systems;
- b) the realistic regulation appears in the process of the generalisation of inter-dependent expectations, and expectations of expectations;
- c) the historic and pluralistic regulation is reflected in the different legal orders produced within different specific sectors of society upon the basis of self-regulated procedures; and
- d) the functional regulation is represented in the exclusion of the possibilities, of action considered inappropriate or incompatible with the functioning of the different systems.

¹⁹ N. Luhmann, *Risk: A Sociological Theory*, (Berlin-New York: Walter de Gruyter, New York, 1993).

²⁰ N. Luhmann, *Social Systems*, (Stanford CA: Stanford University Press, 1995; *idem*, *Law as a Social System*, (Oxford: Oxford University Press, 2004), pp. 79-80.

All these aspects tend to bring into special prominence a general connection between legal regulations and social risks. Law could be considered as a response to the risk of possible delusions, which has to balance the first-level (material) uncertainty of eventually deviant forms of behaviour with the second-level (formal) certainty of institutionalised sanctions. Yet, in a highly inter-dependent society, law appears as a generalised way not only of pre-determining legal reactions to deviant patterns of social behaviour, but also of taking into consideration, in a reflexive way, the risks produced by human actions, including legal regulations. Law is trying to reduce the external complexity of the world and to regulate risk through decisions when other decisions are not possible and when non-decisions become even more risky. Therefore, reduction of risk is an issue that law has to deal with upon an everyday basis, by considering not only the risks engendered by the future, but also the risks coming from decisions already taken.

For Luhmann, a general definition of risk is based upon the following pre-suppositions:²¹

- a) Socially-relevant risks cannot be confined to the conscience of individuals because risk is not a mere psychological variable, but is a negative projection of the future to which it is culturally accorded consensus and recognition in an ordered society;
- b) Risk, as a culturally-relevant factor, is essentially connected to the broad conviction of its existence, and is at the very centre of our attention in the operative moment of decision, regardless of the existence of empirical reasons worth worrying about; and
- c) Risk, being perceived as a possible consequence of our decisions or of the decisions of other human beings, plays a crucial role for every choice which aims to be accepted as rational; it pre-supposes the awareness of possible negative consequences and is based upon more or less accurate calculations.²²

²¹ Luhmann, note 19 *supra*; *idem*, *Law as a Social System*, note 20 *supra*.

²² This enables the concept of risk to be distinguished from other concepts, such as that of danger [Luhmann, note 19 *supra*, and A. Marinelli, *La costruzione del rischio. Modelli e paradigmi interpretativi nelle scienze sociali*, (Milan: Angeli, 1993)]. Danger is independent from social perceptions; it is real, but it is not necessarily perceived in advance, while risk is generally perceived as a cultural product, even though it may not be real. In other words, danger is a matter of fact, while risk is a matter of cultural perception. The world of risk and the world of danger are two different worlds. We are embedded in the world of danger from the

A risk-oriented definition of law suggests some questions: What strategies enable positive law to perform risk regulation? How can a legal system absorb the risk of failing in the fundamental task of producing social stability in spite of its own constantly modifiable nature? And, even more importantly, can the prevailing interpretation of risk that law is required to tackle influence the very understanding of law and *vice-versa*?

There are various ways to answer these questions. In general, the chance that someone is not behaving according to the content of the norm could be absorbed through the most concrete form of the exercise of power: the power of translating risks. Regulation can thus be defined as a means of transferring risk to others, regardless of whether they accept it or not. The sweeping changes currently occurring in the social environment are, however, affecting legal culture at different levels simultaneously,²³ so that the ability of law effectively to fulfil its regulatory function by means of the above-mentioned strategies could be called into question.

Many possible solutions correspond to the different models of legal regulation. From a normative point of view, we can say that, if someone is not obeying a certain norm, the risk of the act of disobedience is transferred to its author, exposing him or her to a secondary norm which introduces a certain sanction. In this case, the task of reacting to the risk of deviant forms of behaviour is concentrated in the hands of the judge. However, at this level, a norm may be exposed to the risk of non-application.

From a realistic point of view, and assuming the perspective of social actors, legal regulations are generally oriented to predictable behaviour patterns. Law is presented as the most complex answer to the question of reducing the uncertainty of social life, and creating the conditions for a tolerable level of delusions in human relations. But the plurality of norms which regulate different behaviour patterns could create such a circularity of responsibilities that it would ultimately become impossible to define who is responsible for what in the event of the production of negative consequences.

If the risks that legal regulations have to face are considered from the historic point of view of a cultural analysis of the different spontaneous associations, law is presented as a sort

very beginning of our life, while we only enter the world of risk if and when we try to realise certain models of rationality. We are always in danger of dying, but only under certain circumstances do we consciously take risky decisions that may produce pernicious effects for our lives.

²³ D. Nelken, *Comparing Legal Cultures*, (Aldershot: Ashgate-Dartmouth Publishing, 1997), *idem* & Feest, note 4 *supra*; and Febbrajo, note 6 *supra*.

of self-produced and self-legitimated set of norms. The resulting “living law” is capable of functioning without the support of state institutions, and is based upon a bottom-up approach to the problem of “how and where norms are created”. It assures a constant correspondence between local interests and pluralistic regulations. When, in a pluralistic society, the prevalent cultural orientations can change, the judges, according to Ehrlich, have to interpret the newly-accepted values that inform the social sources of law.

From the functional point of view based upon an analysis of the decision-criteria typically adopted in the various sectors of society, the concept of risk appears essentially connected to the awareness that the different kinds of rationality do not exclude, but actually *imply*, the uncertainty of every legal regulation. The concept of risk is so closely connected to the Weberian concept of social action that it seems to be the other side of the same coin, and both are accepted, through the crucial concept of “chance”, as necessary variables from a non-deterministic perspective.²⁴ While the concept of social action depends on a more optimistic and cohesive vision of society and on the assumption that the chance of fulfilling expectations normally exists, the concept of risk is based upon a more pessimistic and conflictual vision of society, which emphasises the possibility that this chance does not exist in a significant number of cases.

From a reflexive point of view, the focus is set on the possible risks produced by the interaction between the different levels of self-regulation of the legal system and the different sectors of society. Assuming a more abstract approach, Luhmann distinguishes two ideal typical programmes which can be applied to concrete cases in order to absorb the inevitable risks that they could produce. The first corresponds to a totally deductivistic- and normative-oriented “conditional” programme (reproducing a logical syllogism based upon a simple “if x, then you have to decide y” scheme), and the second to a cognitive- and experience-oriented “purpose-specific” programme.²⁵ At a reflexive level, the problem is how to define meta-criteria in a conditional or in a purposive way.

²⁴ In one of his earlier works, Max Weber underlines that the need to externalise risks through formally constituted figures, such as the “legal person”, has influenced in a decisive way the consolidation of capitalism and the development of the legal basis adequate to its consolidation [M. Weber, *Zur Geschichte der Handelsgesellschaften im Mittelalter*, (Tübingen: Mohr, 1924)]. Especially when risks are particularly high, the binary code “liable v. non-liable” could reduce the uncertainty about the consequences of legally-relevant decisions in the sphere of economic activity and could arrange the attribution of responsibilities in a sustainable way.

²⁵ N. Luhmann, “The Coding of the Legal System”, in: A. Febbrajo & G. Teubner (eds) *State, Law, Economy*

In the systemic perspective, the basic attitude of law is to defend social, and in particular legal, structures from excessive sectorialisation. The emphasis put by Luhmann on this orientation of positive law results as just one of the possible theoretical treatments of the classical models of regulation. It is, for instance, totally different from the approach of Jürgen Habermas, who, starting from the legacy of the *Frankfurter Schule*, considers the role of the state and of formally legal regulations in a radically negative light.²⁶ In general, it is possible to affirm that the contrast between Luhmann and Habermas, which has contributed to the visibility of their constructions, can be summarised as the normal opposition of ideological and utopian approaches which are trying to face a common problem: the search of the ideal social order.

Luhmann is describing a world in which individual social systems are under the continuous need to establish their borders towards a risky environment. For him, the system is the sociological and anthropological mirror of a certain model of a routine-oriented actor obsessed by the ideology of certainty and by the search to obtain only the expected reactions from the other actors. In contrast, the substantially utopian image of society designed by Habermas pre-supposes a never-ending tension, on the one side, against the not-always-legitimated decisions imposed by powerful and alienating structures, and, on the other, towards a better use of the potentialities of a rational discourse which is able to de-colonise from systemic influences the lifeworld. The different perspectives of both alternatives lead, in the case of Luhmann, to a positive evaluation of the normative structures, and, in the case of Habermas (who is clearly closer to a spontaneous model of regulation), to their perception as obstacles to authentic expressions of individual freedom.

In summary, the social order is, for Luhmann, the projection of a pervasive “anthropology of the limits” signalled by the positive functions of the different regulating structures, and the social systems are presented as self-observing entities characterised by a correspondent anthropomorphic need to reduce the fear of delusion. Instead, Habermas’ approach can be characterised by an “anthropology of the possibilities”, *i.e.*, by the idea that the restrictions of possible actions imposed by regulative structures must be considered as alienating instruments which it is rational to try to overcome.

as *Autopoietic Systems*, (Milan: Giuffrè, 1992).

²⁶ J. Habermas, *The Theory of Communicative Action Volume 2 System and Lifeworld. A Critique of Functionalist Reason*, (Boston MA: Beacon Press, 1987); *idem*, *Between Facts and Norms*, (Cambridge MA: The MIT Press, 1996).

IV. OLD AND NEW CRITIQUES OF REGULATIVE MODELS: FROM THE CONCEPT OF EFFECTIVITY TO THE CONCEPT OF JUSTICE

The “classical” models of regulation, and the systemic model in which they converge, could also provide the incongruent perspectives which are the necessary pre-conditions for a critique of the imperativistic model of regulation. As a matter of fact, this model, strictly oriented to the application of norms, is the ideal point of departure for a sociological revision of the normative contents of legal regulations which concentrates on their factual reception.

Starting from a realistic critique of legal regulations, typically oriented to the conceptual opposition legality/effectivity, it is possible to underline that many situations which *in abstracto* are pre-determined by legal norms, are *de facto* not correspondent to real behaviour.²⁷ The concept of effectivity, central from this perspective, does not obviously imply a complete correspondence of normative contents to factual events. It merely suggests, from a socio-legal point of view, a sort of ideal type which, although it may appear both statistically and culturally impossible to realise, is, nevertheless, useful as an abstract point of reference for measuring any concrete deviations of reality.²⁸

The inevitable presence of a certain degree of deviance, and the possibility of interpreting the same norm in a more or less extensive way, have transformed the problem of effectivity into the far more realistic question of which degree of ineffectivity is acceptable in order to assure an effective social regulation through legal norms.²⁹

The second conceptual dichotomy from which it is possible to develop a socio-legal criticism of the normativistic concept of regulation, is represented by the legality/efficiency juxtaposition. It is possible, here, to recognise the selective criteria of “living law” that Eugen Ehrlich pre-supposed when he underlined the selective role exercised by social associations in relation to their own interests.³⁰ As producers of regulations well-adapted to the requirements and the needs of their individual members, associations are autonomously able

²⁷ On the concept of effectivity, see Geiger, note 9 *supra*.

²⁸ Clearly, the target of a complete 100% effectiveness is not only impossible to reach, but could also produce negative effects. A good example is offered by the so called “white strike”, *i.e.*, a strike which, by introducing a high level of rigour in the concrete application of all legal norms, produces the equivalent effect of a normal strike: the complete paralysis of a certain activity.

²⁹ Febbrajo, “Legal Cultures in Transition. A Systems-theory Approach”, in: A. Febbrajo & W. Sadurski (eds), *Central and Eastern Europe after Transition. Towards a new Socio-legal Semantics*, (Farnham: Ashgate Publishing, 2010).

³⁰ Ehrlich, note 10 *supra*.

to correct or even to substitute state norms which appear to be inefficient from their typical points of view.

The search for efficiency is a difficult effort, which is largely present in several social sectors, and can contribute to the definition of different levels of acceptable ineffectivity in concrete situations. Nevertheless, the imprecision of the possible decision-criteria as well as the organisational limits of public institutions could foster cultural resistance. An example is offered by one of the most visible fields of intervention in a mature welfare state,³¹ the educational system, which is now preparing future generations for increasingly uncertain jobs, and is absorbing in the process more than one third of the student's entire lifetime. Only a diffused cultural attitude in favour of the symbolic value of higher education could make such a huge disproportion between costs and benefit of human resources acceptable.

The third conceptual opposition from which it is possible to develop a criticism of the normativistic concept of regulation is represented by the legality/adequacy dichotomy. Upon this basis, Weber articulated a series of typologies concerning characteristic decisions-criteria in the different areas of social action. In this context, the same normativistic approach could be justified not because of its methodological purity, nor because of its correspondence to reality or to basic needs, but because of its adequacy to certain cultural conditions. A legal science inspired by a normativistic perspective thus seems to be functional to the development of a capitalistic-oriented economy and/or to the consolidation of self-conscious groups of legal professionals aiming at defending their basic interests.³²

The more comprehensive conceptual dichotomy from which the legal system's structure and its different regulation models could be critically analysed is the juxtaposition of legality/justice.

Justice is, without any doubt, one of the most difficult topics in philosophical reflection. Its theoretical complexity and substantial ambiguity, far from having exhausted a multi-millenary debate, are still able to motivate partisan argumentations, which are periodically interpreted and updated. This endless debate is, at least partially, relevant outside the traditional realm of legal philosophy, and could be considered as a point of reference from

³¹ A. Febbrajo, "The Rules of the Game in the Welfare State", in: G. Teubner (ed), *Dilemmas of Law in the Welfare State*, (Berlin: Walter de Gruyter, 1986).

³² M. Weber, *On Law in Economy and Society*, (Cambridge MA: Harvard University Press, 1966).

a socio-legal perspective which, as such, is more interested in a comparative, than in a hierarchical, vision of legal regulations.

The concept of justice must be considered not as an authoritative source of regulations acceptable for the whole society, but rather as the final result of a series of selection criteria produced in different ways within different social sectors. Justice, in other words, provides a sort of meta-normative perspective, which is able not only to criticise strictly normativistic legal reasonings, but also to absorb the main arguments of other critical approaches.

The old principle according to which *summum ius* could be *summa iniuria*, as well as the principle *dura lex sed lex*, contain a message which is still actual to this day: that legality alone does not provide sufficiently rational decision-criteria. Moreover, for a legal science, the distinction between justice and injustice is, in technical terms, not less, but rather more, demanding.³³ This confers to justice the ideal typical role of a north star, in the sense that it is essential for defining, with a certain approximation, the course of the legal system.

We have thus to distinguish between a sense of justice which is typical for legal professionals and administrative institutions (internal legal culture), and a sense of justice typical of the public (external legal culture). In both cases, what is more visible is the general attempt to avoid the production of unjust consequences.³⁴ Indeed, from a cultural point of view, the most important element is not justice, *but* injustice.

An Italian film of the so-called neo-realist period, shot in the years immediately after World War II, proposes the possible opposition of legality and injustice in terms oriented to social and external, instead of technical and internal, legal cultures. The title of the film, “*Bicycle thieves*”, (original title: *Ladri di biciclette*, directed by Vittorio de Sica, 1948) lets us

³³ This is the fundamental meaning of the well-known passage by Ulpian, which is still impressed in gold letters on the walls of the University of Macerata: *Juris merito quis nos sacerdotes appellet: justitiam namque colimus et boni et aequi notitiam profiteamur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simultatam affectantes* (Ulp. 1 inst.). Particularly important is the use of *separantes* in relation to the distinction *aequum ob iniquo*, and of *discernentes* in relation to the distinction *licitum ab illicito*. In this way, the first distinction appears more cultural and less technical than the second.

³⁴ For instance, from a legal point of view, not paying taxes is perceived as being incompatible with a concept of justice that is concentrated on the necessity of assuring the normal functioning of state structures, but, from the point of view of the economy of each single family, the total payment of the prescribed amount of taxes could be perceived as unjust if not balanced by an adequate amount of public services; from the point of view of the medical system, abortions may be accepted as part of normal routine while, from a religious or moral point of view, these medical interventions could be totally excluded from the realm of true medical activities.

understand that the core of the story is the substantial difference of two forms of behaviour, which are analogous from a strictly legalistic point of view, but which remain totally different in the light of social evaluation. The story tries to make this comparison plausible by insisting on the different effects of two different episodes of theft. The victim of the first theft is a poor man who, accompanied by his son, is just beginning to work using an old bicycle as an essential aid for his job. Once the bicycle, which represents the only economic support for his family, has been taken away from him, the poor man feels compelled to steal another bicycle, but, lacking the necessary ability, he is quickly arrested. The theft of the first bicycle is presented as both illegal and unjust, while, in the second part of the film, the same behaviour is presented as illegal but just. The worldwide success of the film was a clear testimony of the possibility that the concept of justice (or, rather, the concept of injustice) was universally recognised.

Following this argument, if we accept the point of view of social systems theory, justice appears as a criterion according to which certain legal decisions are positively or negatively evaluated according to the consequences in other systemic contexts. Justice is an abstract idea that may be interpreted differently in the various social sub-systems, as it is the cumulative result of the gradual exclusion from these different social contexts of what appears incompatible with their physiological functioning. Justice is thus an issue which combines the abstract level of a value-oriented meta-rule with the empirical level of the individual circumstances to which it is applied.

Even if justice does not correspond to legality, within the cold machinery of legality there is, traditionally, a sort of internal nostalgia towards justice. Recently, the issue has been re-examined, by attributing a sort of “subversive” role to the concept of justice in the legal system.³⁵

The incongruent perspectives assumed for a critical approach to the normativistic concept of legality (effectivity, efficiency, adequacy, justice) appear to be basically connected to the different strategies of self-observation (self-generalisation, self-organisation, self-correction, self-evaluation) which pre-suppose the different centres of the aggregation of the corresponding cultural perspectives (types of behaviour, utility, functionality, compatibility).

³⁵ G. Teubner, “Selbstsubversive Gerechtigkeit: Kontingenz- oder Transzendenzformel des Rechts?”, in: (2008) 1 *Zeitschrift für Rechtssoziologie*; *idem*, *Autopoietic Law: A New Approach to Law and Society*, (Berlin: Walter de Gruyter, 1988).

Table 3. Critiques of legal regulations

<i>Incongruent perspectives</i>	<i>Aspects of self-referentiality</i>	<i>Centres of aggregation</i>
Effectivity	Self-generalisation	Types of behaviour
Efficiency	Self-organisation	Utility
Adequacy	Self-adaptation	Functionality
Justice	Self-evaluation	Compatibility

Under these pre-suppositions, and in full awareness of the faltering “certainty” of law,³⁶ “internal” legal culture could be inclined, more explicitly than in the past, to recognise the nuances and the mixed solutions that social reality inevitably offers. The legal professionals have thus to take into consideration, in addition to the clear-cut yes/no, lawful/unlawful alternatives, the articulated communications between social systems, which allow a sustainable balance between the opposite poles of effectivity and ineffectivity, efficiency and inefficiency, flexibility and rigidity, justice and injustice.

V. TOWARDS A TRANS-SYSTEMIC DEFINITION OF LAW

The different levels of critical self-reflection discussed above could enrich a reflexive model of law. The intersection of normative and cognitive orientations, the plurality of internal and external cultural influences, their inter-systemic contacts and corresponding filters, are the fundamental means for submitting the strategies of institutional regulation performed by the legal system to a constant and “reflexive” revision.

This multilateral process could be firstly based upon a sort of internal differentiation of the legal order and a process of re-entry connected to the development of a higher level of self-reflection.

The different parts of the legal order, which some comparative legal scholars call “formants”,³⁷ are basically oriented to the dimensions of the autopoietic process (variation, selection, stabilisation). In general, legislation mainly assumes the dimension of variation, the

³⁶ V. Gessner & A. Cembudak (eds), *Emerging Legal Certainty. Empirical Studies on the Globalisation of Law*, (Aldershot: Ashgate-Dartmouth Publishing, 1998).

³⁷ R. Sacco, “Legal Formants: A Dynamic Approach to Comparative Law”, (1991) *The American Journal of Comparative Law*, pp. 1-34, & 343-402.

administrative branch the dimension of selection, the judicature the dimension of stabilisation. The doctrine is, instead, able to reach the level of abstraction required for the comprehensive task of a synthetic co-ordination of the former dimensions.

Moreover, the complementarity of these dimensions generates further autopoietic interactions between the different critical perspectives which are incongruent with a mere legalistic approach. All these inter-actions are important elements for triggering a legal evolution which is dependent from an “internal” hypercycle, because, in this way, normative regulations are forced to assume, more explicitly, self-referential orientations in order to correct their norms.

Table 4. Internal hypercycle

<i>Incongruent perspectives</i>	<i>Formants</i>	<i>Dimensions</i>
Effectivity	Judicature	Stabilisation
Flexibility	Legislation	Variation
Efficiency	Administration	Selection
Justice	Doctrine	Autopoietic synthesis

The forms of interaction which are characteristic of this internal hypercycle could be re-inforced by the use of additional strategies of regulation, which are based on the co-existence within the legal system of different non-legal criteria of rationality. In order to ensure adequate inter-systemic communications, legal systems are explicitly or implicitly provided with a certain range of “redundancies”,³⁸ which offer the possibility of filtering the forms of behaviour according to the typical area of relevance of the system. This does not necessarily imply a loss of importance of the typical characteristics of the legal system, but requires a sort of mutual acknowledgement between legal and non-legal systems. The resulting image is that of an “ecological” law which communicates both with its environment and with other social systems, trying to respect their logic and to avoid any kind of hegemony.

³⁸ N. Luhmann, note 19 *supra*.

The legal system can be represented as a meta-regulator, which defines the communications that are compatible at an inter-systemic level, and combines possible answers not only upon the basis of communication, but also upon the perception of risks (including those produced by law itself). It is in this broader range of relevance that the possibility of the legal system being able to cope with risks is re-inforced, and assumes an increasing openness to inter-systemic strategies of risk treatment.

Moreover, these circular contacts of the legal regulations with other sub-systems build up a sort of “external” hypercycle, which is supported by the corresponding instruments of the structural coupling in order to provide a sort of inter-systemic balance between the external expectations and the internal autopoietic combination of stabilisation, selection and variation. Among these instruments, we can focus attention on the constitution, the market, and democracy. They attribute a crucial inter-systemic role to the borders of the legal, the economic and the political system respectively. In this position, they are building an inter-systemic hypercycle, which, in advanced societies, basically consists of the regulation that the constitution exercises on the market and democracy, and which democracy exercises on the constitution and the market.

Constitution is an instrument of structural coupling which assures, in terms of reciprocal stabilisation, a constant connection of the legal system with the internal cultures of legal operators, on the one hand, and with the political system, on the other. It is the most legal part of the political system and the most political part of the legal system, and has the inter-systemic function of defining both the legal borders of politics and the political borders of law. In this sense, it represents, at the highest possible level, the ability of law to reflect on law. It is an “evolutionary invention”, an “autological text”, a part of an autopoietic, self-referential law that is able to provide a political legitimization of law and a legal legitimization of politics.³⁹

At the same time, the constitution could be represented as the most important indicator of a certain legal system’s identity and the cultural point of reference at which the value of the system could be evaluated in consideration of the demand of stabilisation coming from the legal system and the societal environment in which it is embedded.

³⁹ Luhmann, *Law as a Social System*, note 20 *supra*.

In addition to the written constitutions, we have to consider, at a mere informal level, a plurality of emerging factors of stabilisation, which can gradually change the internal, formally-oriented, legal culture. As a matter of fact, the “unwritten” constitutional norms,⁴⁰ which are disseminated in various legal traditions, influence both the public and the legal professionals. Moreover, in an open process of “structural coupling”, the particular connections between constitutions and political systems do not exclude further connections with the economy, religion and other social systems.⁴¹ We should also not forget that the sometimes decisive acceleration of the process of constitutionalisation is provoked by individual personalities, who, in important constitutional roles, are able to re-define the dominant legal cultures and give different tones to established constitutional texts, thus representing additional sources of change in a period of transition.

The market, considered as an instrument of structural coupling, appears as an institutionalised bridge between the legal and the economic system. As a legally-regulated mechanism, the market tries to exclude the legal decisions that are incompatible with the functioning of a certain model of the economic systems and, *vice versa*, the economic decisions that are incompatible with the functioning of the given legal system. The market is, in particular, the door through which legal norms can be connected with the criteria of rationality that are adopted by private economic actors and public administrations. In this context, the concept of efficiency is the main point of reference for an economic evaluation of legal regulations, and the concept of utility is the possible bridge for this trans-systemic communication. Only if economic logic is recognised by legal logic will a channel of selective communication among these social systems not remain a pure utopia or a sort of normative invasion.

The market constantly selects forms of behaviour and decisions through the autonomously-changeable determination of prices, and, thanks to its “recursive closure”, it does not destroy for the future the choices that it has excluded. Given the growing importance of the economic aspects of social life and the decreasing importance of the state, the market

⁴⁰ C. Mortati, *La costituzione in senso materiale*, (Milan: Giuffrè, 1940).

⁴¹ A constitution, in order to handle the risks coming from the constant mutability of norms, appears equipped with a nucleus of fundamental rights which are abstract, and, at least potentially, contradictory. From a social system perspective, they are clearly functionally-connected not so much with the interests of the individuals, but with the requirements of the legal system and of the wider social context in which it is involved [N. Luhmann, *Grundrechte als Institution: Ein Beitrag zur Politischen Soziologie*, (Berlin: Duncker & Humblot, 1965)].

appears as a pervasive instrument of structural coupling. This means that the legal system undergoes an increasing economisation through the growing ability of legal decision-makers to translate the criteria of rationality adopted by economic actors into their own code.

Democracy represents an instrument of structural coupling which assures the functional relationship between the legal system and the external legal cultures within a determined political context. It is the political answer to the risks produced by a legal system, and, at the same time, a point of access to the highly-differentiated reservoir of the external legal cultures. In so doing, it not only produces a legitimation, but also keeps open a variety pool for the periodical innovative changes of both legal and political systems.

It is important to underline that, by virtue of this “revolving-door” effect of the democratic process, the legal system pre-supposes new decisions, and maintains the possibility of changing criteria and contents in order to recover the previously discarded alternatives. For the legal system, a democratic political system is, therefore, an essential learning opportunity.

In particular, the democratic process can intervene to support the legal possibility of innovation and the political legitimisation of the legal system, through its essential features, that is distributing citizen access to the democratic processes upon the widest possible basis; organising the selection of members elected to the political organs; and submitting the elected members to a periodical evaluation of their activities.⁴²

In this inter-systemic and hyper-cyclical model of regulation,⁴³ both constitution and democracy have - at least formally - an active role of stabilisation and variation, while a subordinate role of selection is reserved to the market. Besides the autopoietic production of selection, variation and stabilisation, the circulation of self-regulating media such as value for the definition of the coherence in the legal system, money for the definition of prices in the economic system, and consensus for the definition of the majority in the political system, assure the external legitimation of internally-legitimated decision-criteria, as well as the consolidation of an intersystemic equilibrium.

⁴² Luhmann, *Law as a Social System*, note 20 *supra*.

⁴³ G. Teubner, *Law as an Autopoietic System*, (Oxford: Blackwell Publishing, 1993).

Table 5. Inter-systemic connections of law, economy and politics

<i>Instruments structural coupling</i>	<i>of Main connections</i>	<i>cultural Media</i>	<i>Indicators</i>	<i>Dimensions</i>
Constitution	Professional legal cultures	Values	Coherence	Stabilisation
Market	Economic cultures	Money	Price	Selection
Democracy	External legal cultures	Consensus	Majority	Variation
External hypercycle	Law/Economy/ Politics	Legitimation of Legitimation	Equilibrium	Autopoietic process

These interconnections suggest - with particular evidence - one fundamental question: What if the control exercised by law and politics on economics through the instruments of structural coupling becomes unsustainable or impossible because of the reduced role of the state and the absence of credible alternatives?

VI. FAILURES OF LEGAL REGULATIONS

The risks that society is currently facing are mainly considered “man-made risks”.⁴⁴ Human regulations have thus to be included among these risks. They do not necessarily provide adequate responses to present and future risks, but could, with their possible negative consequences, be even more negative for the entire system than the risks which they try to reduce.

Some of the problems, directly or indirectly related to legal regulations, which are currently exposing law to new risks, are connected with the reduced role of the state, and of several social structures which were, in the past, able to support the regulatory function of the state.⁴⁵ As the ultimate structure for limiting the area of the culturally-relevant risks, law

⁴⁴ U. Beck, *Risk Society. Towards a New Modernity*, (London: Sage, 1992); *idem*, *World Risk Society*, (Cambridge: Polity Press, 1999).

⁴⁵ The family, for instance, as a primal group, carried out a similar task regulating life's basic risks and

assumes, therefore, a more difficult task: to regulate, in a legitimate, generally-applicable and non-conflictual way, those risks which the other structures are unable to regulate.

Further risks could be identified according to the classical models of regulation. From an empirical point of view, the growing awareness of the manifest and latent effects of technological progress is no longer seen as a means for adapting nature to man's needs,⁴⁶ but rather, in a substantial dimension, a risky instrument aimed, sometimes unknowingly, at generating invisible effects without the control of technologically-oriented regulations.⁴⁷ One significant example is represented by the widely-debated environmental issues, which seem to have escaped, for their ambiguous effects, the regulative control of the sorcerer's apprentice, in spite of huge regulative efforts at different concrete levels.

From a pluralistic and historical point of view, attention could concentrate on the growing inability of the traditional state to impose an efficient leadership on a society conceived as a cluster of different cultures. The state, given its loss of credibility as a central institution for the whole of society, encounters problems, especially where, in a social dimension, established regulations are widely perceived as being risky because of the basic tension between the centre and the periphery.

From a functional point of view, the rapid transformations, normally included under the somewhat vague heading of "globalisation", have dramatically enlarged the level of risk perception in the economic area. Globalisation processes are gaining momentum, in a temporal dimension, as a result of faster trade operations in the framework of a new, still extremely problematical, commercial law which has to meet different inter-systemic requirements.⁴⁸

Finally, from a reflexive point of view, the heterarchical structure in which states are inserted becomes a sort of network of different supranational regulative entities, which further reduce the regulative power of the state, and, in the same way, necessarily augment

assuring, in a predominantly solidarity-orientated manner, prompt help to those in need.

⁴⁶ K.-H. Ladeur, *Abwägung. Ein Neues Paradigma des Verwaltungsrechts*, (Frankfurt aM: Campus, 1984).

⁴⁷ The administrative strategies for treating these risks are various. The not univocally interpreted technological development, whose adverse effects, frequently hyped up by the media, cannot be ignored by the general public, are sometimes met in the EU by resorting to somewhat rudimentary instruments, such as the "precautionary principle", which seem to protect not only the citizens, who are potentially exposed to the risk in question, but also the bureaucratic apparatus.

⁴⁸ See, from an "internal" perspective, F. Galgano, *La globalizzazione nello specchio del diritto*, (Bologna: Il Mulino, 2005).

the contingency of the concrete outcomes. The gradual fading away of the traditional role of the state⁴⁹ and the increasing articulation of different levels of reduced sovereignty are connected, in a spatial dimension, with the growing emergence of transnationally-oriented organisations, which are no longer limited to a measurable territorial basis.

To face these situations, the legal system cannot simply concentrate on already empirically-tested strategies of regulation. For a realistic approach, one possible strategy could, for instance, be the production of more norms, in order to fill the gap between legal regulations and uncertain scientific forecasts which are no longer adequate. For a utilitarian approach, a possible strategy could, instead, be connected with a higher level of efficiency of the legal regulation through a reduced production of norms and spontaneous mechanisms of adjustment based upon legally- and socially-relevant orientations.⁵⁰ A functional strategy would avoid this traditional alternative between “more or less norms” recurring to a plurality of flexible criteria of interpretation based upon articulated types of rationality in the different social contexts. Finally, for a reflexive approach, an even more complex strategy could consist of transferring responsibilities to a higher meta-regulation from which it could be possible to overview the social impact of the different strategies of regulation.

Each of these strategies has a specific justification: the univocal correspondence between facts and norms, the exclusion of the undesired facts, the mutual adjustment of facts and norms, and the combinations of normative and cognitive orientations. But the mere re-iteration of these traditional risk-management strategies seems not to solve the current problems adequately. It would merely imply, because of the high demand of regulations, an excess of norms, sanctions and procedures, which could easily surpass the limits of the attention of the legal system as well as that of the legal actors involved.

⁴⁹ Paradoxically enough, the supra-national governance that is linked to EU membership leaves, in the long run, more possibilities to new Member States from Central and Eastern Europe to differentiate their governance according to local pre-communist traditions. In each country, this requires not only increasing co-ordination through an adequate “regulation of regulations”, but also a different relationship between centre and periphery [M. Krygier & A. Czarnota, “After Postcommunism: The Next Phase”, (2006) 2 *Annual Review of Law and Social Science*, pp. 299-336].

⁵⁰ A good example of two extreme cases of flexibility and rigidity could be represented by the label of a *Cinzano* vermouth bottle, which indicated, in German, to be served at a temperature between x and y degrees and, in Italian, to be served neither warm nor cold. Regardless of the practical effectiveness of these indications, which probably was the same in both countries, it is interesting to note that, in the first case, the cultural pre-supposition was that a rule must be as precise as possible, while, in the second case, the cultural pre-supposition was that a rule must leave as much room as possible to its interpreters.

Besides, the question is not only quantitative, but also qualitative. A Machiavelli of the Twenty-first century would probably affirm that, in order to develop an adequate regulative power, it should be necessary to cut off a larger portion of sovereignty from the individual states and to deliver it to a supranational entity governed by a sort of institutionalised super-prince. Yet the multiplication of regulatory levels may represent, in most cases, a new kind of risk, instead of one acceptable answer. As recent experiences show, the imposed collaboration of several middle-sized local democracies does not produce a larger democracy, but it, instead, creates huge organisational and bureaucratic entities based upon more or less hidden oligarchies; several local constitutions do not merge into wider constitutions with a more general, or even universal, character, but are constantly encountering political obstacles and complex interpretational problems; several local markets do not enlarge themselves into a global market without producing a series of distortions and relevant limitations on competition.

In all these cases, a world society seems unable to regulate political and economic processes directly. This inevitably produces a pathological isolation of the legal system, which has to face more and more challenges outside its formal area of control. In our terminology, the present crisis of legal regulations could thus be seen as the result of a weakening, not only of the state and of its role in society, but also of the circular malfunctioning of its three main instruments of structural coupling: constitution, market and democracy. These instruments, no longer supported by a credible state semantics, and by a positive hypercycle, could re-inforce, instead of reducing, the reasons for their own failures.

The difficulty of maintaining the unity of the constitution is, historically, a recurrent problem. Every constitution, as the most durable normative act in a legal order, inevitably has to pay for its endurance in terms of threats to effective legitimation.⁵¹ At present, there are increasing difficulties in combining its potentially incompatible orientations: the defence of what belongs to the realm of the personal and private dispositions of individuals, and the defence of what belongs to the realm of public and political communities. We are thus witnessing the emergence of a sort of “liquid” constitution, destined to be easily re-shaped by the current cultural factors, and explicitly based upon a sort of “multilateral compromise”,

⁵¹ L. Alexander, *Constitutionalism. Philosophical Foundations*, (Cambridge: Cambridge University Press, 1998).

which is not able to define higher level of values in order to stabilise the variations of the lower values.

A constitution which has to be considered not only as a product, but also as a producer of internal and external legal cultures,⁵² tends to appear as a sort of religious text, normally accepted even if not generally known,⁵³ and, as such, it seems connected with a “thin” legitimization, based upon two negations: the *a priori* de-legitimation of possible de-legitimizations concerning the entire constitution or parts of it. In this context, the legitimization of the constitution as a whole seems to be influenced and absorbed by the more concrete loyalties produced within the different constitutional institutions.⁵⁴

In the EU, this process seems even more complex because of the presence of a double process of constitutionalisation which, on the one hand, tends to reduce the sovereignty of the individual Member States while, on the other, is still unable to produce a formally- and socially-legitimated supranational level. It is therefore necessary to bet on a new kind of “constitutional pluralism”,⁵⁵ or on the principle of “subsidiarity”, possibly inspired by a multilevel self-government, in conformity with the complex structure of a commonwealth⁵⁶ in order to confer a minimum of constitutional stability to a confused and contradictory reality.

Democracy, too, has its own risks. The basic problem which democracy tries to solve, namely, how to transform, through legal regulations, a political system into a system in which more power - in particular, the power to change decisions - is given to more actors, is no longer able to rely on a strong mediation of political parties. Without wide-ranging ideologies, political parties have substantially reduced their ability to transform social demands into political supply, and their difficulties in remaining in tune with a sometimes

⁵² P. Haeberle, *Verfassungslehre als Kulturwissenschaft*, (Berlin: Duncker & Humblot, 1982).

⁵³ This frequent lack of knowledge sometimes tends to transform constitutions into a sort of taboo, which cannot be discussed even at the level of internal legal culture.

⁵⁴ Ch. Joerges, I.-J. Sand & G. Teubner, *Transnational Governance and Constitutionalism*, (Oxford: Hart Publishing, 2004).

⁵⁵ N. Walker, “The Idea of Constitutional Pluralism”, (2002) 65 *The Modern Law Review*, pp. 317-359, at 339.

⁵⁶ N. MacCormick, “Democracy, Subsidiarity, and Citizenship in the ‘European Commonwealth’”, (1997) 16 *Law and Philosophy*, pp. 331-356.

volatile public-opinion dramatically increase the obstacles to an acceptable solution to the problem of representation.⁵⁷

Consequently, the distinction between the majority and the opposition may not be stimulating, but, instead, paralysing if the rules of their mutual co-operation are not fairly interpreted; majority rule, which enables us to accept today what was rejected yesterday, is capable of producing not only innovation, but also indecision and endless compromises; even the widest possible access to the democratic process may not be sufficient if a relatively low number of people participate and public opinion is not sufficiently informed.⁵⁸

Analogous problems concern the legally-regulated institution of the market, where the action of an utilitarian culture could produce self-destructive, instead of self-correcting, processes. While, in normal situations of information, an increase in prices can be balanced by a reduction of demand, in a financial market dominated by media, the opposite could happen; because of a chain of mimetic reactions and the consequent alternation of tides of euphoria and panic, higher prices could generate higher demand, and lower prices lower demand.⁵⁹ The result is that the self-restraining supply/demand model is substituted by a self-reinforcing process which is almost impossible to stop if occurs on a global basis.

After the recent economic crisis, what appears clear is that generally negative results are the outcome of a series of rational decisions taken by individual actors. The operators are oriented to the normal goal of staying in the economic game as long as it is profitable, and then leaving it as soon as possible in order to reduce prospective losses before it is too late. Nevertheless, in a market which is too large to control, this creates an overproduction of risks, which, in a circular way, are self-reproducing and which reduce the possibility of alternative strategies from the point of view of the individual actor. Given the dependence of public opinion on unmanageable factors, trust towards the system is not only the effect, but also the cause of the system's stability. If trust produces trust, the lack of trust could produce crisis. Moreover, the multiplication - on a massive scale - of certain forms of otherwise

⁵⁷ This is particularly evident when it is necessary to differentiate the normal political supply. For instance, during European elections political parties appear often unable to adjust local slogans and themes to a wider European scenario.

⁵⁸ Participation, one of the basic principle of every democracy, requires so much time that, even if formally extended almost to everybody, it is, in practice, substantially restricted. Even at the lowest level of the administrative committee of a city quarter or borough, where it is possible to decide on the number of trees which have to be planted along the alley where everybody walks daily, democracy tends therefore to become indirect.

⁵⁹ A. Orlean, *De l'euphorie à la panique: penser la crise financière*, (Paris: Edition de la Rue d'Ulm, 2009).

statistically unlikely behaviour (for instance, multiple withdrawals of money at the same time) could destroy even the most stable bank system.

One alternative solution to a centralised management of financial crises could be the insertion of a meta-level of self-reflection into the traditional economic mechanisms in order to regulate the differentiation and to increase the segmentation of the markets. Without this pre-supposition, the role of selecting the possibilities of the decisions, traditionally exercised by the market, could be exposed to the risk of failing to produce a stabilising function.

In the absence of a global authority which could establish a correct distribution of political, economic, and legal responsibility the codes of the traditional instruments of structural coupling are losing their specificity and their dichotomous character. For the constitution of a state provided with only limited sovereignty, *particular* and *universal* are no longer necessarily alternatives in terms of values, because of the weakening of a central and unique point of reference; for a market increasingly exposed to speculative influences, *less* and *more* could, in the long run, converge in terms of money, because it is likely that what seems less today could become more tomorrow; for a democracy in which the political parties play a reduced role, the *strength* of certain political trends could be accompanied by their *weakness* in terms of organised consensus. Therefore, the general problem of combining innovation, stabilisation and selection could remain unsolved. This suggests the possible emergence of counter-tendencies: the regionalisation of constitutions, the segmentation of the markets, and the virtualisation of a cyber-democracy which is independent from traditional political parties.

Table 6. The limits of structural couplings

<i>Instruments of structural coupling</i>	<i>of Limits</i>	<i>Paradoxical convergences</i>	<i>Possible outcomes</i>
Constitution	Stabilisation without innovation	particular/universal	Regionalisation
Market	Selection without stabilisation	less/more	Segmentation
Democracy	Innovation without selection	strong/weak	Virtualisation

These diffuse mal-functions become evident at different levels, in conformity with the wideness of their range (intra-systemic or inter-systemic, pluri-systemic or global), their origin, their pathological symptoms and their therapy.

We could distinguish four main hypotheses which are strictly inter-related, in the sense that, if the therapy is not adequate, they could create the pre-suppositions of further negative consequences:

- the normal change of a single system produced by the increasing external complexity and the overflow of the possibilities offered by the environment require constant structural adjustments and, in particular in the case of the legal system, additional levels of cognitive self-reflection within the different models of normative regulation;
- if this becomes impossible, the crisis produced by local dysfunctions could generate an inter-systemic dis-equilibrium of complexity which requires an operative adjustment of the tools of legal regulation and the fading out of the mutual borders among a plurality of systems;
- the transition connected with the emergence of this new context and requires the re-definition of the specific goals of the systems involved and the correspondent functional adjustment of the strategies of legal regulation; and
- the extreme hypothesis of a catastrophe produced by a negative hypercycle in which different systems and the correspondent instruments of structural couplings simultaneously re-inforces no longer their function, but their disfunction, implies the concrete menace of a definitive collapse of their borders. In the worst case, the consequent regulation crisis could be connected with a situation which is dominated not by a positive interaction between cognitive and normative elements, but by self-destructive feedback processes.

Table 7. Pathologies of legal regulations

<i>Levels of crises</i>	<i>Origin</i>	<i>Pathological symptoms</i>	<i>Therapy</i>
Change	increase of external complexity	overflow of possibilities	of structural adjustments

Crisis (<i>sensu stricto</i>)	structural rigidity	local dysfunctions	substitution of the tools
Transition	general transformation of the context	loss of identity	Re-definition of the goals
Catastrophe	negative hypercycle	collapse of the inter-systemic borders	functional block

VII. CONCLUDING REMARKS

The way in which crises are treated is itself a factor which may produce further risks. In many areas of social life, legal regulations are no longer able to absorb the risks that they produce. The business person turning to the market, the client turning to a lawyer or the citizen turning to the political system are currently aware, probably more than in the past, that they are running significant risks generated both by the regulations that they have to apply and by the increasing complexity of the inter-relations among social sub-systems.

Moreover, it is widely acknowledged that the cultural lenses through which crises, in particular the crises of legal regulations, are observed, are not always reliable. Everybody knows that there are theories that indicate only imagined realities, and that there are crises which are, theoretically, not even perceived. A wrong perception of the objective dimension of risk has increased in many areas the difficulties of adequate regulations.⁶⁰

In general, it is necessary to remember that, from a theoretical point of view, the legitimization of a self-regulated economy through political and legal systems, respectively interested in a limited control of legislation and in a legalistic control of its interpretation, was historically challenged by a much more interventionist approach, based upon a programmed economy, on government-controlled politics and on a legal system mainly interested in reducing social inequalities. Now, this confrontation is clearly not so radical, and the opposition is no longer between two different types of economic regulation; instead, the self-portraits of the social systems are more nuanced, admitting apparently contradictory combinations such as, for instance, that of *dirigiste* politics and a liberal economy, or of a solidary legal system and a liberal economy. It is clear that these different combinations of

⁶⁰ Luhmann, note 19 *supra*.

political, economic and legal strategies of regulation are connected with corresponding distributions of risks among both social actors and the social systems in which they are operating.

Consequently, it is necessary, from a methodological point of view, to raise the question of whether the failures of regulation are independent, as systemic issues, from individual awareness, or whether they require the perception of legal operators and simple legal actors. In the first case, crises appear as the impersonal product of systemic factors which depend on a gradual but not completely controllable reproduction in law; in the second, they appear as the product of a sense of disorder which is widely-diffused among social actors. Both perspectives have been taken into account here. The pre-supposition is that the management of a more or less profound crisis of legal regulations requires the adequate cultural orientation of individuals as well as the ability of the legal system to re-define, when necessary, the structural and functional borders of law, which are menaced by the absence, or by the reduced presence, of an essential social factor of inter-systemic integration, such as the state.

In spite of all the present, or incoming, failures, traditional state-centred regulations of social life have not yet been replaced by adequate alternatives. General formulations, as “material” constitution, “immaterial” market and “invisible” democracy, are generally used to label the present “critical” situation, involving “fictitious” constitutions, markets and democracies. Moreover, a mimicry of the traditional theory of the state based upon constitution-like, parliament-like, sanction-like, population-like entities, is a preliminary attempt to substitute an adequate and still absent theory of post-state regulations.

Nevertheless, crises of legal regulations are now perceived with particular intensity. In our terms, the question is the following: Is it possible – without the intervention of a credible state - to imagine a sort of meta-autopoiesis upon which the chance of overcoming the different cases of crisis, or of stopping negative hypercycles as in the extreme case of a catastrophe, actually depends?

The metaphor of the ship which tries to repair its damage while cruising in a tempest or in an otherwise risky environment is well known. Probably, in the case of legal regulation, the problem could be even more complex: how to introduce, in the absence of a captain, who is a central point of reference, substantial changes not only to the structure of the boat, but also in the mentality of the crew and in the attitudes of the passengers. In this sense, the

regulation of crises directly concerns, not only the structure of the legal game, but also the professional knowledge of legal experts, possibly provided with a trans-systemic vision.⁶¹ The pre-supposition that law has to be interpreted in a strictly deductivist way, and that legal operators, educated in a normativistic way, have to ignore even the most disturbing consequences of a legal decision, is, in general, unacceptable.

The incoming model of the western legal operator has thus to be profoundly re-interpreted. The pre-supposition that law has to be interpreted in a strictly deductivist way, and that legal operators, educated in a normativistic environment, have to ignore even the most disturbing consequences of legal decisions, is, in general, unacceptable. As an essential component of a network without central authorities, the upsurge of a sort of *Juristenrecht*, tries, through an intense dialogue particularly at constitutional level, to balance cultural specificities, to legitimise emerging material constitutions, especially at the level of fundamental rights, and to support implicit references towards a still unclear vision of a pluralistic “society of societies”.⁶²

If legal professionals could contribute with a number of specific competences in treating the pathologies which affect legal regulations, because of the complexity of these dysfunctions, an important role must be recognised not only for jurists, but also for economists or political scientists. Moreover, the emphasis placed on the cultural aspects of crisis could imply a decisive role for sociologists. In a highly competitive scientific world, what is a socio-legal scholar expected to do?

It was once proposed that socio-legal scholars should assume the role of social engineers, under the supervision of the state, because of their presumed ability to apply the knowledge of social sciences to the search for the best operative decisions. Now, thanks to their internally- and externally-oriented roles, they are, instead, expected to re-inforce a strategy of re-entry, which could guarantee the integration of the legal cultures with forms of pluralism. In other words, they could take on the task of identifying and interpreting signals coming from different social systems, thereby contributing to a new equilibrium of legal and social regulations through the intermediation of internal and external hypercycles.

⁶¹ V. Olgiati (ed), *Higher Legal Culture and Postgraduate Legal Education in Europe*, (Naples: Edizioni Scientifiche Italiane, 2007). On the concept of “legal game”, see M. Weber, “R. Stammlers ‘Überwindung’ der materialistischen Geschichtsauffassung”, in: *Archiv für Sozialwissenschaft und Sozialpolitik*, XXIV, 1907, pp. 94-151.

⁶² N. Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1997).

In such a context, a situation of crisis could be represented, despite all the difficulties which it creates, not only as a negative, but also as a positive, event. The central role of legal cultures could have positive consequences which would improve the variety of normative regulations and elaborate new stabilisation and selection strategies. The pressures for profound changes generated by local crises and transitions could facilitate a wider participation of individuals in the definition of a new self-representation both of the social systems and of their environment.

The case of catastrophes needs to be considered separately.⁶³ Because of their exceptional character, they require a sort of natural self-regulation based upon the cognitive acknowledgement of common risks. A catastrophe could represent, at the same time, both the problem and its univocal solution. It would enable all the relevant operations in the system to be stopped without attending responses from theories or experts. This interruption of the chain of inter-systemic consequences could be imposed under the force of the timeless concept of necessity (*ananke*) and without formal regulation.

The differences between internal and external legal cultures and their articulations are no longer relevant because of the factual evidence, which leaves no room for different interpretations, of the connections between present forms of behaviour and future risks. The approach of Habermas, based upon a powerless communicative rationality, and the approach of Luhmann, based upon the requirements of the social system, could, in these extreme cases, *de facto* converge. It is probably the paradox of our over-civilised age that the major risks which we now have to face are so culturally dependent, that the salvation from catastrophe could be found in a sort of last minute self-regulation at global level, generated by the suspension of the institutional and cultural sources of highly sophisticated, and therefore slow and uncertain, regulations.

⁶³ M. Woodcock & A. Davis, *Catastrophe Theory*, (London: Penguin Books, 1991).

Section III.2

Individual and Collective Reactions

CHAPTER 11

STRUGGLES FOR LAW: GLOBAL SOCIAL RIGHTS AS AN ALTERNATIVE TO FINANCIAL MARKET CAPITALISM

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“Reflexively applied programmes always have to re-construct developments that have led to a crisis and always have to ponder the future conditions able to overcome it.”¹

The reactions of the G20 to the global economic and financial crisis have so far been characterised by the fact that they have left untouched the fundamental structures of the financial market-driven accumulation regime.² Instead, gathered under the umbrella of world economic governance, the G20 still “support competition, dynamism and innovation in the marketplace”.³ It is the explicit aim of the G20 that potential crises are forecast in advance through heightened “regulatory oversight”⁴ and improved risk assessment; however, a fundamental turn away from financial market capitalism is not envisaged. National bail-out plans do, in the short term, indeed violate the principle of a lean state beyond “big government” by their anti-cyclical monetary policies, investment and nationalisation programmes; this should not, however, obscure the fact that governments present such measures aggressively as emergency measures which are necessary to maintain the structure

¹ R. Wiethölter, “Sozialwissenschaftliche Modelle im Wirtschaftsrecht”, (1985) 18 *Kritische Justiz*, pp. 126-139, at 128.

² M. Aglietta, *Ein neues Akkumulationsregime. Die Regulationstheorie auf dem Prüfstand*, (Hamburg: VSA-Verlag, 2000); F. Chesnais, “Das finanzdominierte Akkumulationsregime: theoretische Begründung und Reichweite”, in: C. Zeller (ed), *Die globale Enteignungsökonomie*, (Münster: Westfälisches Dampfboot, 2004), pp. 217-254; P. Windolf (ed), *Finanzmarkt-Kapitalismus: Analysen zum Wandel von Produktionsregimen*, (Wiesbaden: Verlag für Sozialwissenschaften, 2005).

³ G20, Declaration – Summit on Financial Markets and the world economy, 15 November 2008, para 8.

⁴ G20, Communiqué – Meeting of Finance Ministers and Central Bank Governors, 14 March 2009, para 7.

of the existing accumulation regime or to correct it slightly.⁵ However, there are good reasons to assume that the crisis of the world economy is not merely a financial crisis. On the one hand, the reasons for the crisis are deeply-rooted in the neo-liberal regulation of the world economy, which has systematically favoured the liberalisation of markets (including the financial markets) since the 1980s.⁶ On the other hand, qualitatively, new sources of danger *beyond* the crisis of the financial market have attracted attention; in particular, they include both the environmental and the climate crisis. If the next years see no progress in replacing the fossil-based fuel basis of the world economy, then more realistic risk assessments will have to place the so-called financial market products on the scrap heap due to drought and floods.

The task, therefore, is to link the different dimensions of the crisis, which all transcend the events on Wall Street or on the Frankfurt Stock Exchange by far, to each other. The current phenomena amount to an organic crisis of globalised capitalism, which also affects connected social and environmental relations. An appropriate grasp of the worldwide crisis has to look beyond the “unleashed” financial markets and the “greed mentality” of the managerial class. In particular, (global) law and institutionalised politics are not innocent social systems which have simply been overpowered by an unrestrained speculation bubble. On the contrary, political and legal decisions are responsible for the fact that the financial market-driven accumulation regime could rely on a beneficial juridico-political embeddedness: from the Basel II Accord and its “softened” equity capital requirements,⁷ the Financial Market Development Act of the German government,⁸ to the jurisdiction of the civil Court of Appeal at the Federal Court of Justice, which is responsible for banking law⁹ – the course was set for financial market capitalism. Last, but not least, this development has

⁵ See, for instance, the analysis of reactions to the economic crisis in Europe, in: J. Becker & J. Jäger, “Die EU und die große Krise”, (2009) 157 *Prokla – Zeitschrift für kritische Sozialwissenschaft*, pp. 541-558.

⁶ S. Gill, “Constitutionalizing inequality and the clash of globalizations”, (2002) 4 *International Studies Review*, pp. 47-65; for the integration of the EU single market, see *idem*, “European governance and new constitutionalism: Economic and monetary union and alternatives to disciplinary neoliberalism in Europe”, (1998) 3 *New Political Economy*, pp. 5-22.

⁷ See the Financial Times columnist for Germany, L. Zeise, *Ende der Party. Die Explosion im Finanzsektor und die Krise der Weltwirtschaft*, 2nd ed. (Cologne: Pappy Rossa Verlag, 2009), p. 187.

⁸ Dating back to 2002. A survey of measures taken by the German government with instructive analyses of the crisis can be found in A. Demirovic, “Kehrt der Staat zurück?, Wirtschaftskrise und Demokratie”, (2009) 157 *Prokla – Zeitschrift für kritische Sozialwissenschaft*, pp. 589-605, at 601.

⁹ P. Derleder, “Subprime Judikatur. Die Bewältigung der Finanzkrise und die Anforderungen an eine risikoadäquate Zivilrechtssprechung”, (2009) 1 *Kritische Justiz*, pp. 3-24.

also become manifest culturally in the fact that the “entrepreneurial self”¹⁰ amounted to the general principle of a market civilisation in recent years. An appropriate account of the capitalist crisis should not attempt to refer solely to the expansion of economic rationality. It has to draw on the social relations of forces that are articulated within capitalist formations.

However, it is clearly irritating that, in the current situation, the common rallying cry of the G20 anti-crisis policies is: “Capitalism is dead. Long live capitalism!” There are only minor indications for clearly-outlined alternatives to the global introduction of a somewhat more strongly framed financial market capitalism. Some think tanks and green parties advocate a ecological re-construction of the capitalist mode of production, in order to replace, albeit gradually, the fossil foundation of the world economy.¹¹ After all, the debate about “economic democracy” shows signs of a re-vitalisation; it aims to counter the dominance of the shareholder value in corporate policies and to start making economic life more receptive to social and ecological concerns.¹² However, such a commendable alternative seems helpless in the face of a differentiated and transnationally-networked world economy; even more so as – and this applies to the European context in particular – the socio-political forces which could carry out such an alternative development are in a problematical state. As the no-global collective “turbulence” recently pointed out:

“We are trapped in a state of limbo, neither one thing nor the other. For more than two years, the world has been wracked by a series of interrelated crises, and they show no sign of being resolved anytime soon. The unshakable certainties of neoliberalism, which held us fast for so long, have collapsed. Yet we seem unable to move on. Anger and protest have erupted around different aspects of the crises, but no common or consistent reaction has seemed able to cohere.”¹³

In the following, an approach will be introduced which can react successfully to the economic and financial crisis. Social movements, which have highlighted the crisis tendencies of world capitalism for years, increasingly warm to the demand for “global social

¹⁰ U. Bröckling, *Das unternehmerische Selbst. Soziologie einer Subjektivierungsform*, (Frankfurt aM: Suhrkamp Verlag, 2007).

¹¹ See, for example, the website of the Green New Deal Group: at: <http://www.greennewdealgroup.org>.

¹² A. Demirovic, *Demokratie in der Wirtschaft. Positionen – Probleme – Perspektiven*, (Münster: Westfälisches Dampfboot, 2007); see, seminally, F. Naphtali (ed), *Wirtschaftsdemokratie. Ihr Wesen, Weg und Ziel*, (Berlin: Verlagsgesellschaft des Allgemeinen Deutschen Gewerkschaftsbundes, 1928) and O. Šik, *Humane Wirtschaftsdemokratie. Ein dritter Weg*, (Hamburg: Knaus-Verlag, 1979).

¹³ See their text “Life In Limbo”, available at: <http://turbulence.org.uk/turbulence-5/life-in-limbo>.

rights”.¹⁴ The movements from Belém to San Francisco take this notion as a way to counter the social and ecological fault lines of the global economy by demanding legal rights to food, participation and social security. They refer, for instance, to the UN International Covenants on Civil and Social Rights not only in order to address their concerns, but also to claim them legally. It cannot be denied that civil societal protests, which aimed at generating global rights from below, were successful in the field of legal policy.¹⁵ In this perspective, social rights serve as an expression which aggregates liberal, social and civil, as well as “third-generational” (for example, the right to peace and participation) rights, and create a counter-hegemonic project out of it.¹⁶ However, the challenge now would be to re-contextualise the agenda of global social rights under the conditions of the global economic and financial crisis – as an alternative to the liberal-market order of the world economy. In this context, it might be an advantage that the demand for global social rights starts below the level of grand regulatory projects, since this allows it to make the best use of the given counter-hegemonic potential and to take the changed transnational constellation into account, in which regulatory macro alternatives unfortunately still tend to be sidelined. Although global social rights do not depict a meticulous way of re-organising the global economy, they can serve as a starting-point for raising claims concerning a more democratic economic order and an egalitarian (re-) distribution of wealth. Such a starting-point is of the utmost importance because possible alternatives to financial market capitalism will not emanate from thoughtful expertise alone. As has always been the case, the necessary antitoxin can only be injected by social and political struggles.¹⁷

In a first step, it will be shown that the G20’s reaction to the crisis still holds to the principles of economic liberalism (Section I). Michel Foucault’s analysis of the liberal government works, in this context, as a backdrop in order to demonstrate that an analysis of the global crisis management would have to transcend the simple dichotomy of “more

¹⁴ T. Seibert, “Globale soziale Rechte”, (2008) 3 *Kritische Justiz*, p. 333 *et seq.*

¹⁵ See, for instance, the following studies: S. Buckel, “Feministische Erfolge im transnationalen Recht: Die juridische Aufarbeitung des japanischen Systems sexueller Sklaverei”, (2008) 1 *Leviathan*, pp. 54-75; B. Rajagopal, *International Law from Below. Development, Social Movements and Third World Resistance*, (Cambridge: Cambridge University Press, 2003); A. Fischer-Lescano, *Globalverfassung – Die Geltungsbegründung der Menschenrechte*, (Weilerwist: Velbrück Wissenschaft, 2005).

¹⁶ For such an aggregating approach, see E. Riedel, “Menschenrechte der dritten Dimension”, (1989) 16 *Europäische Grundrechte-Zeitschrift (EuGRZ)*, pp. 9-21.

¹⁷ See, for example, B. Silber, *Forces of Labor: Workers’ Movements and Globalization since 1870*, (Cambridge: Cambridge University Press, 2003).

market” *versus* “more regulation”. It was, after all, Foucault who comprehensibly explicated that the deep structures of liberalism encompass far more than the mere interplay of economic liberalisation and state regulation. Liberalism entails a far more fundamental power-knowledge complex, which rests on its own epistemic and cultural relations of dominance.¹⁸ There seems to be no alternative to the “natural” market and its just distribution anymore: There is no Alternative (TINA). In this way, economic liberalism ousts any possibility of being-different and disguises the societally-contested roots of the market. In return, any form of critique should, in the first place, be concerned with making visible this contingent moment in the formation of social order since this is the pre-requisite for any alternatives to be conceived as “viable” at all.

This project of revealing contingency is an important *topos* in the contemporary theory debate. Under the *leitmotiv* of the “return of the political”, recent years have seen significant efforts to give the notion of political change more plausibility in societal conditions that seem to leave no room for alternatives.¹⁹ For such different theorist as Jacques Rancière, Chantal Mouffe, Ernesto Laclau, Alain Badiou and Slavoj Žižek, the political does not become manifest in institutionalised official politics; the political is, instead, linked to more fundamental forms of action, which point to the conflictive nature of the social and are even not confined to the political system. Especially in times of the TINA principle, so the tenor of this strand of debate goes, the re-discovery of the political offers ample potential for making neo-liberalism’s assumptions of naturalness the subject of social debate (Section II): Politics is dead. Long live the political! At the same time, this provides the opportunity for making conceivable a genuine legal policy that does not rely on the central control of political institutions.²⁰ In the face of increased differentiation and fragmentation,²¹ it is

¹⁸ For the power-knowledge complex, see M. Foucault, *Überwachen und Strafen. Die Geburt des Gefängnisses*, (Frankfurt aM: Suhrkamp Verlag, 1977), p. 39 *et seq.*

¹⁹ See, for instance, C. Mouffe, *The return of the Political*, (London-New York: Verso, 1993); *idem*, *On the Political*, (New York: Routledge 2005); J. Rancière, *Disagreement: Politics and Philosophy*, (Minneapolis MN: University of Minnesota Press, 1999); U. Bröckling & R. Feustel (eds), *Das Politische denken. Zeitgenössische Positionen*, (Bielefeld: Transcript-Verlag, 2010); Frankfurter Arbeitskreis für politische Philosophie (eds), *Autonomie und Heteronomie der Politik. Politisches Denken zwischen Post-Marxismus und Poststrukturalismus*, (Bielefeld: Transcript-Verlag, 2004); A. Badiou, *Metapolitics*, (London-New York: Verso, 2005); S. Crichtley, *Infinitely Demanding. Ethics of Commitment, Politics of Resistance*, (London-New York: Verso, 2007).

²⁰ In a similar vein, A. Fischer-Lescano & R. Christensen, “Auctoritatis interpositio. How Systems Theory deconstructs Decisionism”, in: P. Zumbansen & O. Perez (eds), *Law after Luhmann*, (Oxford: Hart Publishing, 2010 forthcoming), and L. Israël, *L'arme du droit*, (Paris: Les Presses de Sciences Po, 2009).

²¹ A. Fischer-Lescano & G. Teubner, *Regime-Kollisionen*, (Frankfurt aM: Suhrkamp Verlag, 2006).

decisive to push political forms of action to become more differentiated themselves. Then, the demand for global social rights appears as the paradigmatic case to re-gain the political. It allows leeway for the politicisation and democratisation of the world economy, taking its starting-point in the *arcanum* of law (Section III). The spectres raised in the Universal Declaration of Human Rights cannot be easily shrugged off in times of economic and financial crisis.

I. G20: STICKING TO THE TRUTH OF THE MARKET

In the wake of the worldwide crisis management policy, the institution of the G20 has been strengthened. The group, which encompasses the relevant industrial and transition countries, has set itself the goal of initiating common strategies for problem-solving. This includes, among others, the reform of the International Monetary Fund (IMF) and the re-organisation of the Financial Stability Forum, which are meant to contain future crisis tendencies or, at least, to forecast them more swiftly.²² However, the previous agreements of the G20 do not question the central foundations of liberal-market economic policy. As can be seen from the results of the Pittsburgh summit and from the “Global Plan for Recovery and Reform”,²³ at the centre of the agreements stands the clearly-stated belief in a strong role of financial markets, in economic liberalisation and market-opening as well as in a soft global regulative policy:

“Our work is guided by a shared belief that market principles, open trade and investment regimes and effectively regulated financial markets foster dynamism, innovation and entrepreneurship that are essential for growth, employment and poverty reduction.”²⁴

This concerns, therefore, not the re-construction (*Abkehr*), a turning away from the financial market-driven accumulation regime, but its continuation with different means. Consequently, the economic and financial market crisis does not appear as a systemic phenomenon of financial market capitalism. To the contrary, it is attributed to erroneous risk calculations, insufficient risk forecasts and incorrectly-calibrated stabilisation policies.²⁵

²² G20, The Global Plan for Recovery and Reform, 2 April 2009, para 15 *et seq.*

²³ *Ibid.*

²⁴ G20, Declaration – Summit on Financial Markets and the world economy, 15 November 2008, para 2.

²⁵ “Major underlying factors to the current situation were, among others, inconsistent and insufficiently coordinated macroeconomic policies, inadequate structural reforms, which led to unsustainable global macroeconomic outcomes”, (G20, Declaration- Summit on Financial Markets and the World Economy, 15

Interestingly enough, with these epistemic reasons stretching from incomplete knowledge of the risks of financial market products to “un-informed” economic measures, the factors that supposedly caused the economic crisis seem to have been determined. This explanatory approach leads logically to the G20’s political demand for more “regulatory oversight” and a more realistic risk assessment, which forms the starting-point for the requested corrections of the world economic order.²⁶

In this sense, the policies with which the G20 reacted to the crisis have to be characterised as “structurally conservative”.²⁷ They sustain the financial market-driven accumulation regime with slightly different means and remain within a neo-liberal matrix. Michel Foucault’s analysis of liberal government seems to be an appropriate theoretical tool in order to examine the deep structures of this neo-liberal matrix. In his studies of liberal government and its rationality (governmentality), Michel Foucault pointed out that the enormous success of economic liberalism decisively depends upon the (preceding) interplay of knowledge formation and power relations.²⁸ The emergence of economic liberalism in the Eighteenth century is here not only ascribed to the economic development of productive forces, but also, Foucault deciphers, to the fact that liberalism is based upon truth regimes and techniques of domination.

He assumes that economic liberalism is based upon a specific overlap of knowledge formation and the exertion of power. Preceding problematisations and forms of knowledge become the driving force in implementing the market society. Hence, political economy not only constitutes an economic doctrine, but is also, as it were, “a sort of general reflection on the organization, distribution, and limitation of powers in a society”.²⁹ It establishes the notion of a “natural”, non-crisis-prone market process, which is meant to lead to the *Wealth of Nations* (Adam Smith). Consequently, for Foucault, the market is far more than merely the

November 2008, para 4).

²⁶ G20, Communiqué – Meeting of Finance Ministers and Central Bank Governors, 14 March 2009, para 7; see, also, the report of the G20-Working Group 1, “Enhancing Sound Regulation and strengthening Transparency”, (esp. para IV), 25 March 2009.

²⁷ J. Becker & J. Jäger, note 5 *supra*, pp. 541-558, at 554.

²⁸ M. Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-1978*, (Houndmills: Palgrave Macmillan 2007), and *The Birth of Biopolitics: Lectures at the Collège de France, 1978-79*, (Basingstoke: Palgrave Macmillan, 2008); for European governmentality, see K. Möller, “Gouvernementales Wahrheitsregime oder dezentrales Netzwerk-Regieren. Die europäische Beschäftigungsstrategie als Machtökonomie”, (2009) 4 *Leviathan*, pp. 575-601.

²⁹ M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-79*, note 28 *supra*, p. 13.

place for economic transactions; within the market, power relations with significant societal impact exist, which are especially effective in an epistemic respect. If the natural market has become the lodestar, which works in a “natural” and “fair” manner, then a “truth” of its own constitutes itself at the market:

“And it is not economic theory but this place itself that from the eighteenth century became a site and a mechanism of the formation of truth. And [instead of] continuing to saturate this site of the formation of truth with an unlimited regulatory governmentality, it is recognized - and this is where the shift takes place - that it must be left to function with the least possible interventions precisely so that it can both formulate its truth and propose it to governmental practice as rule and norm.”³⁰

Prices tell the truth about products; monetary stability tells the truth about whether political regulation understands the natural-harmonious processes of the market appropriately; the preservation of a job depends on whether the subjects have internalised the rules of competition and entrepreneurship. The market - according to Foucault’s conceptual bundle - turns into a site of “veridiction” (as used in Foucault’s lectures):³¹ a site of truth-telling emerges, which frames, as it were, the political and societal life with its *règles de véridiction*.³²

The art of government is now to stand up to the “permanent economic tribunal” which erects the market, and to take into account the full consequence of market truth and power relations, which arrange themselves around this procedure of truth.³³

This is the reason why the market as the site of “veridiction” is closely-linked to the political and societal relations of domination and patterns of regulation. They need, in fact, to know in detail the natural, just, course of market conditions; they have to stir them, invoke them, or, at least, to hope that the verdict of the market lends some legitimacy to the respective approach of political regulation. Basically, the government is not, or is only to a limited extent, allowed to intervene in the truth procedure of the market, as, otherwise, distortions in the truth-telling of the market occur, which run counter to the formation of

³⁰ *Ibid.*, p. 30.

³¹ *Ibid.*, p. 61. See, also, p. 30: “This site of truth is not in the heads of economists, of course, but is the market.”

³² M. Foucault, *Le gouvernement de soi et des autres. Cours au Collège de France 1982-1983*, (Paris: Gallimard, 2008), p. 6.

³³ *Idem*, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-79*, note 28 *supra* p. 253.

truth. Consequently, the government has to function according to the market and the relations of dominance installed there.³⁴ In this way, government assumes the function of a “management of freedom”.³⁵ On the other hand, the market provides the decisive standards for evaluating state-political patterns of response. This especially includes an as-complete-as-possible knowledge of decision-makers with regard to the market and its mechanisms, which is why Foucault sees the main problem of any modern government not in the fact that it is a “bad” government, but in the fact that it is an “ignorant” government.³⁶

It is precisely this interplay between market and truth that the G20 tries to overcome, since the crisis-torn development of the world economy passed a devastating judgement. It is striking that the central role that the market and free trade plays is not questioned at a single point. Instead, what is at stake is the question of *how*, under the current difficult circumstances, market principles, financial markets, free trade and monetary stability can be maintained. Concerning the reasons for the economic and financial crisis, the G20 selectively brings into play the epistemic problem of erroneous or insufficient risk assessment. It is precisely the G20 that has been the “ignorant” government in recent years. The economic and financial crisis are said to be the “result of excessive risk taking and faulty risk management practices in financial markets, inconsistent macroeconomic policies”³⁷ and also the result of a “lack of oversight of systemic risks”.³⁸ It is therefore hardly surprising that the demanded measures towards a global “*ordo*” of the economy include, as a significant element, an improved acquisition of information and risk assessment. One hopes for improvements through new supervisory regimes, more transparency and accountability. However, the very core of the financial market-driven accumulation regime remains untouched; basically, the market retains its function as a just distributive instrument. The new global regulative policy is meant to guarantee the epistemic grasp of the market in order to identify crisis quickly and to mitigate them, if possible. Even the restriction of capital flows is explicitly opposed.³⁹ In

³⁴ *Ibid.*, p. 32.

³⁵ *Ibid.*, p. 63.

³⁶ *Ibid.*, p. 17.

³⁷ G20, Communiqué Meeting of Ministers and Governors, São Paulo, 8-9 November 2008, para 3.

³⁸ G20-Working Group 1 “Enhancing Sound Regulation and strengthening Transparency”, 25 March 2009, para ii.

³⁹ “We will not retreat into financial protectionism, particularly measures that constrain worldwide capital flows, especially to developing countries.” (G20: The Global Plan for Recovery and Reform; London, 2 April 2009, para 22.).

this respect, these events allow us to consider Foucault's analysis of liberal government by way of example.⁴⁰ Since the market "tells" the truth about politics, the economic crisis represents a regulative problem that can be overcome by freeing the truth-telling of the market from its corrupting factors (managers and incorrect risk assessment).

A further consequence of this epistemic power of the market is that the market itself does not appear as a changeable (contingent) social relation, anymore. In the end, Michel Foucault develops his analysis of government with an explicitly critical intention. Although he insists that the liberal matrix must not be under-estimated in its subjectivations and relations of domination, his analyses aim at providing a "critique of power"⁴¹ and leeway for "not being ruled to such an extent".⁴² The whole point of his argument is this double approach: a critique of modern society is unthinkable without an analysis that examines economic liberalism with regard to its power relations, and takes its scope, which transcends the economy to a great extent, seriously. In return, Foucault strives to understand economic liberalism in its societal emergence, in its contingency with the help of his analysis of liberal government.⁴³ He shows which societal developments have led to the permanent generalisation of economic liberalism together with its governmental rationality, and stresses the permanent contestation of power relations.⁴⁴ With the help of an analysis of government, one could then see "the respect in which and why they [the relations of power] are unstable" and increase their "accessibility to struggles or attacks".⁴⁵ In this way, a "field of possibilities" emerges and "[...] in this battle around the history of capitalism around the history of the role of the institution of law, of the rule in capitalism, we are actually dealing

⁴⁰ Here, I assume that Foucault examines the different variants of European post-war ordo- and neo-liberalism in order to place them into a genealogy of liberalism and not to contrast the more moderate "ordo-liberalism" with American "neo-liberalism"; see M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-79*, note 28 *supra*, p. 75 *et seq.*, & p. 215 *et seq.*

⁴¹ In a similar vein, Axel Honneth's reasoning on Foucault: *idem*, *The Critique of Power: Reflective Stages in Critical Social Theory*, (Cambridge MA: The MIT Press, 1991), p. 105 *et seq.*

⁴² M. Foucault, *Was ist Kritik?*, (Berlin: Merve-Verlag, 1992), p. 12.

⁴³ This is a project that ultimately follows Karl Marx's *Critique of Political Economy*, since it radically questions the taken-for-granted "naturalness" of the market. See, seminally, K. Marx & F. Engels, *Das Kapital*, (Werke, Band 23), (Berlin DDR: Dietz Verlag, 1962).

⁴⁴ C. Gordon, "Governmental Rationality: An Introduction", in: G. Burchell C. Gordon & P. Miller (eds), *The Foucault Effect: Studies in Governmentality*, (Chicago IL: University of Chicago Press, 1991), pp. 1-52, at 48.

⁴⁵ M. Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-1978*, (Houndmills: Palgrave Macmillan 2007), p. 119-20.

with a whole political stake”.⁴⁶ And it is precisely this *political* stake that becomes only possible and conceivable once the analysis of government has revealed the contingency of existing orders.⁴⁷ In contrast, those who are concerned about legitimising rule, such as the G20, always endeavour to restrict or hide the contingency of the formation of the social order. This “invisibilisation”, of contingency can be re-constructed with the help of the previous announcements of the G20: there seems to be no relevant alternatives to open financial markets. Combined with a foresighted regulation of risk, they guarantee welfare and jobs. The world economy is only threatened by an archaic protectionism;⁴⁸ however, it remains open as to whether this is a kind of economic nationalism of industrial states or the turn away from the ruthless market opening so urgently needed from the perspective of development policy.⁴⁹ The analysis of government also raises the question of what opportunities emerge to reveal and practically to attack this obfuscation of contingency.

“If there is a sense of reality, there must also be a sense of possibility.”⁵⁰

Although the quest for far-reaching alternatives to the global ordo-liberalism is fruitful in many respects, one undeniable problem remains: on the one hand, there currently seem to be no forces that could carry economic-democratic developments in the countries of the North. On the other hand, the fragmentation of the world economy poses a great challenge to such considerations. How could a democratisation of the world economy be possible under the current conditions of global inter-connectedness? Here, it already becomes clear that a number of intellectual and practical efforts are still necessary in order to update such approaches for world society. A promising approach would be to inquire into the actions of the G20, which conceal the contingency that could be countered with the help of contingency “visibilisation”. The concept of contingency describes “something given (something experienced, expected, remembered, fantasized) in the light of its possibly being

⁴⁶ M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-79*, note 28 *supra*, p. 165.

⁴⁷ See, also, with regard to the power analytical project of Michel Foucault, M. Saar, *Genealogie als Kritik. Geschichte und Theorie des Subjekts nach Nietzsche und Foucault*, (Frankfurt aMain: Campus, 2007), p. 289.

⁴⁸ G20, *The Global Plan for Recovery and Reform*; London, 2 April 2009, para 22.

⁴⁹ See, for instance, C. Wichterich, “Woman peasants, food security and biodiversity in the crisis of neoliberalism”, (2009) 51 *Development Dialogue*, pp. 133-141; A. Fischer-Lescano & G. Teubner, “Cannibalizing Epistemes: Will Modern Law Protect Traditional Cultural Expressions?”, in: C. Graber (ed), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, (Cheltenham: Edward Elgar Publishing, 2008), pp. 17-45.

⁵⁰ R. Musil, *Der Mann ohne Eigenschaften*, (Hamburg: Rowolth, 1957), p. 16.

otherwise [...]”.⁵¹ This interplay of the “possibility-of-being-different and at the same time of-being-dependent-on-something-else” has always to be made visible against the tendency of modern social systems to conceal their own contingency.⁵² This leads to the question of how the project of revealing contingency can be *imagined* at all, and how it can finally be *turned* into practice. This point will be the underlying theme in the following section. At first, these considerations that have dealt, in recent years, with making visible the contingency of social order formation have to be examined, in order to qualify - with the demand for global social rights - a course of action that makes the recovery of the political practical. In this way, a weakness of the contemporary debate about the revitalisation of the political can be addressed: namely, the fact that it remains at the level of making contingency visible, while it only insufficiently suggests substantial points or forms of action. The main concern here is explicitly to fill the emerging leeway with progressive intent.

II. THE DOUBLING OF POLITICS

A strand of contemporary political and legal theory distinguishes two dimensions of politics. While one dimension addresses the already constituted relations of power in official politics, the other greatly transcends the political system and the state.⁵³ Here, politics and the political describe forms of action that reveal the contingent and conflictual character of the social order and remind us of the fact of its alterability. These forms of action are not confined to the political system; they can also be localised beyond the state in civil society or other social systems. The political can, for instance, be found in the legal system, the arts or in the academic world.⁵⁴ The intensity with which the doubling of the concept of the political

⁵¹ N. Luhmann, *Social systems*, (Stanford CA: Stanford University Press, 1995), p. 106; for the differences (and common features) of concepts of contingency in systems theory and post-Marxism, see U. Stäheli, *Sinnzusammenbrüche – eine dekonstruktive Lektüre Niklas Luhmanns*, (Weilerwist: Velbrück, 2000), p. 266 *et seq.*

⁵² G. Teubner, “Selbstsubversive Gerechtigkeit: Kontingenz- oder Transzendenzformel des Rechts?”, in: G. Teubner (ed), *Nach Jacques Derrida und Niklas Luhmann: Zur (Un-)Möglichkeit einer Gesellschaftstheorie der Gerechtigkeit*, (Stuttgart: Lucius & Lucius, 2008), pp. 9-36, at 17; [*idem*, “Self-subversive Justice: Contingency or Transcendence Formula of Law?”, (2009) 72 *Modern Law Review*, pp. 1-23].

⁵³ With this, I refer, among others, to the theories of Claude Lefort: “Thus the political reveals itself not in what is commonly called political action but in the double movement of the appearing and concealing of the way in which society institutes itself.” (C. Lefort, “Die Frage der Demokratie”, in: U. Rödel (ed), *Autonome Gesellschaft und libertäre Demokratie*, (Frankfurt aM: Suhrkamp Verlag, 1990), pp. 281-297, at 284); for politics as a system, see N. Luhmann, *Die Politik der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 2000); concerning the doubling of politics; see, also, U. Stäheli, note 51 *supra*, p. 227 *et seq.*

⁵⁴ For law, see A. Fischer-Lescano & R. Christensen, “Auctoritatis interpositio. How Systems Theory deconstructs Decisionism”, in: P. Zumbansen & O. Perez, note 20 *supra*; for the arts, see J. Rancière, *The Politics of Aesthetics*, (London-New York: Continuum Inter. Publishing, 2004); for the society as a whole

has been presented in recent years is closely linked to diagnoses of the present (*Gegenwartsdiagnosen*). It can be seen as a way of reacting to the return of a market society blinded by assumptions of naturalness which no longer offer any space for the political struggle between the left and the right.⁵⁵ Against the proclaimed end of history, the debates about the political mobilise the conditions for the possibility of societal change. Moreover, the doubling of the concept of politics could also be understood as a quest for the re-conceptualisation of an emancipatory project after the failure of centralised political regulation. Only a permanent examination which keeps the political moment of the formation of societal order negotiable is able to challenge processes of “invisibilisation” and de-politicisation. The latter are cultivated by the political system, the law and the economy, in order to hide their own paradoxes and thus to render them immune to the influences of their societal environment.

At the same time, the impression arises that the reflection of the doubling of politics suffers from a malady that stems from beyond the formal distinction of forms of action. For their projection, the reflections on the doubling of politics propose theoretical architectures, all of which provide few suggestions of how to fill the leeway gained substantially. Authors repeatedly stress the significance of political contestation or, in a more radicalised variant, of a politics of rebellion.⁵⁶ But what such forms of action could consist of is, however, not accounted for. This is certainly understandable, since, with the contingency of the formation of the social order, every political form of action becomes contingent, *i.e.*, not without an alternative, itself, and is, therefore, in danger of concealing its own contingency. As a result, an enormous formalism problem arises: a merely formal elucidation that the world is contingent can only be a first step, since it remains open how the emerging field of possibilities could be used in a theoretically-informed manner, or what concrete measures should be taken. Such a merely formal approach neglects the motivational conditions of political involvement, which a programme for the recovery of political contestation has to take up. Concrete causes for political contestation arise from the experience of degradation or

(the political as the “anatomy of the social world”), see E. Laclau, *On populist reason*, (London-New York: Verso, 2005), p. 154.

⁵⁵ C. Mouffe, *On the Political*, (New York: Routledge, 2005), p. 2.

⁵⁶ See, for instance, J. Rancière, “Demokratie und Postdemokratie”, in: *idem* & A. Badiou, *Politik der Wahrheit*, (Vienna: Turia + Kant, 1996), pp. 119-188, at 128 *et seq.*

oppression, the feeling of injustice, convictions or theoretical insight,⁵⁷ but rarely from the willingness of the actors involved to expose themselves to the infinite regression of contingent contingency. A further problem of the controversy about the political is the fact that the consequences of differentiated social systems – the systemic conditions for recovering the political – are not sufficiently understood. This is the reason why the contemporary theory debate seems, albeit only to a limited extent, able to address the respective conditions for the progressive politicisation of the law, the economy, and so forth. In the following section, this point is illustrated with reference to the, perhaps, most radical juxtaposition of the two dimensions of politics — to be found in the work of the French philosopher Jacques Rancière. Upon this basis, a concept of global social rights that could initiate an apposite politicisation of world society is suggested. This “filling” programme is called contingency re-visibilisation through global social rights.

II.1. POLITICS AND “POLICE”

In contrast to other protagonists of contemporary political philosophy, for the French philosopher Jacques Rancière, there is no “doubling” of the concept of politics (politics/the political; politics as system/politics as irritation; politics as constituted/as constituent, *etc.*). Traditional patterns of politico-institutional and statal orders that claim validity are, for Rancière, expressions of the “police”:

“What generally goes by the name of politics is the set of procedures whereby the aggregation and consent of collectivities is achieved, the organization of powers, the distribution of places and roles, and the systems for legitimizing this distribution. I propose to give this system of distribution and legitimization another name. I propose to call it the police.”⁵⁸

The term “police” is particularly attractive for Rancière, because it addresses, like no other term, the “distribution of bodies” and the part a community plays in regulating the sensible “distribution”.⁵⁹ “Police” represents:

⁵⁷ See, for instance, Axel Honneth’s study, *The Struggle for Recognition. The Moral Grammar of Social Conflicts*, (Cambridge: Polity Press, 1995), or the study by Robin Celikates, *Kritik als soziale Praxis, Gesellschaftliche Selbstverständigung und kritische Theorie*, (Frankfurt aM: Campus, 2009), which focuses on critical starting-points within ever-day practice.

⁵⁸ J. Rancière, note 19 *supra*, p. 28.

⁵⁹ For the roots of “police” and the science of “police” (*Polizeiwissenschaft*) as political science (*Staatswissenschaft*), see, also, M. Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-1978*, note 28 *supra*, p. 311 *et seq*; Jacques Derrida draws on the concept of the “police” in his

“the way speaking bodies are distributed in an articulation between the order of saying, the order of doing, and the order of being. The *demonstration* of right or *manifestation* of what is just is a reconfiguring of the partition of the perceptible [...]”⁶⁰

In this sense, “police” is not only a repressively-operating, disciplining machinery, it also determines the distribution and symbolic representation within the community. For Rancière, from this logic of the “police”, it follows that a large part of the phenomena often assigned to the state, official politics or law, are finally “police” phenomena, in which there is *sui generis* no space for “politics”. Rancière’s criteria leads to the point that “police” logic encompasses the entire societal order. But beyond these “police” rules of distribution, Rancière discovers obstinate forms of action, for which he reserves the term “politics”. Political, in a strong sense, are those “forms of action” that “question the police distribution and refer to its contingency [...]”.⁶¹ In Rancière’s account, political hope is pinned to those few actions that disrupt the existing system of rule by upsetting the sensible distribution.⁶² These actions follow a kind of counter-logic which rejects all established symbolic distributions. For Rancière, this counter-logic is triggered when societal groups that are not yet represented in the distribution of the police order emerge. The “scandal” of politics starts where a “share of the shareless (*la part de sans-parts*)”⁶³ enters the stage and demands to be counted and treated “equally”. A political action is an action that disrupts the police logic and starts from those invisibly present who have no part in the police order. With this pointed concept of politics, Rancière attributes, to these political forms of action, a central role in “visibilising” the police distribution: on the one hand, the existence of politics is the foundation for the contingency of societal order and the fact that it is not “based on nature, no divine law” regulates it.⁶⁴ On the other hand, this existence is significantly dependent upon those forms of action that reveal the contingency of the “police” distribution. It is therefore hardly surprising that, for Rancière, politics enters the stage of history at the moment in

reconstruction of Walter Benjamin’s “Zur Kritik der Gewalt”: J. Derrida, “Force of Law: ‘The Mystical Foundation of Authority’”, in: C. Drucilla, M. Rosenfeld & D. Carlson (eds), *Deconstruction and the possibility of justice*, (New York: Routledge, 1992), pp. 3-67, at 45.

⁶⁰ J. Rancière, note 19 *supra*, p. 55.

⁶¹ J. Rancière, “Gibt es eine politische Philosophie?”, in: *idem* & B. Badiou, note 56 *supra*, pp. 64-93, at 83.

⁶² J. Rancière, note 19 *supra*, p. 18.

⁶³ In the official English version, “a part of those who have no part”; *ibid.*, note 19 *supra*, p. 14.

⁶⁴ *Ibid.*, p. 16.

which the poor of the Greek *polis* constitute themselves as the *demos* (as “that horde who have nothing”⁶⁵) and, in this way, question aristocratic rule.

The merit of Rancière’s juxtaposition of “politics” and “police” is certainly not just that it deciphers the contingency of the social world and the leeway for its politicisation in theory; its notion of political forms of action also offers criteria that can be fruitfully applied to the use of this leeway. But he even goes a step further: only those political forms of action which address the share of the shareless are at all able to make contingencies visible. Without a, as Rancière calls it, “true” quality⁶⁶ of the form of action, social contingency cannot be “re-visibilised”.⁶⁷ However, this point highlights that Rancière’s juxtaposition of a maximal difference between subversive politics and affirmative “police” is prone to argumentative trouble.⁶⁸ If sensible distribution no longer shapes the access to society, and if differentiated patterns of order which are characterised by their own paradoxes can be diagnosed, the juxtaposition of “politics” and “police” needs further qualification. Beyond the classical *polis* (and even there) the situation becomes far more complex. The drawback of Rancière’s connection of contingency “visibilisation” and forms of action rests in an all-too-simple binary scheme, which makes it difficult to imagine political forms of action under conditions of the plural patterns of order in world society. Before a suggestion is made to remedy this problem in order to recover the political, the objections against Rancière are briefly outlined.

Rancière assumes a sharp distinction between “politics” and “police”: either a form of action follows as much as possible Rancière’s paradigm of the “‘spontaneous’ rebellion”⁶⁹ making it political, or it remains in the framework of the existing sensible distribution of the world. However, Rancière misses that the paradoxes of modern society affect both sides of the juxtaposition and call a strict *either-or* into question. The “police” order itself includes political moments, in which - in Rancière’s parlance - existing orders are distributed anew or

⁶⁵ *Ibid.*, p. 9.

⁶⁶ Here, I refer to the German translation where the expression “reiner Anspruch” is used (J. Rancière, *Das Unvernehmen. Politik und Philosophie*, (Frankfurt aM: Suhrkamp Verlag, 2002), p. 31) while the English translation uses the expression “sheer name” (*idem*, note 19 *supra*, p. 18).

⁶⁷ For Rancière, politics, equality and democracy coincide consequently in one form of action; J. Rancière, note 56 *supra*, pp. 119-156, at 129.

⁶⁸ In a similar vein, Michael Hirsch, “Libertäre Demokratie im neoliberalen Staat. Die Begriffe Staat, Politik, Demokratie und Recht im Poststrukturalismus und Postmarxismus der Gegenwart”, in: *idem* & R. Voigt, *Der Staat in der Postdemokratie. Staat, Politik, Demokratie und Recht im neueren französischen Denken*, (Stuttgart: Franz Steiner Verlag, 2009), pp. 191-226, at 214.

⁶⁹ With a similar reference to Rancière’s paradigm, see, also, S. Žižek, *The Ticklish Subject: The Absent Centre of Political Ontology*, (London: Verso, 2000), p. 173.

differently. Does the dispute about competences between two ministries fall into the “police” or the “political” category? Or what about the recent juridical conflicts between the Federal Constitutional Court and the ECJ? This is certainly not about turning the “iron cage” (Weber) of modern society into a flexible one. However, the fact should not be obscured that adaptation, compromise or reform were not visible as political moments. In turn, the viewpoint of a “true” quality of the spontaneous rebellion turns out to be problematical. Even political and social movements have to handle this problem again and again, since they have to rely on a minimum of “police” distribution if they want to work permanently. At the latest, when they affect the “police” order through reform policies, the question arises as to when they turn from shareless bearers of politics into shareholders.⁷⁰ At which point does “politics” turn into “police”? Is insisting on politics already the (again only formal) criterion for the critique of the “police”? Who decides about and describes the political and “police” aspect of an action? It is a characteristic feature of Rancière’s political philosophy that it does not precede “dialectically”, but in a binary mode. By taking a consistent, purely political claim as the starting-point for the recovery of politics, it is unable to take account of the contradiction-prone basic structure of every social action in its respective social context. In this respect, the value of the juxtaposition of politics and “police” already decreases, to some extent, once the conditions for political forms of action become the focus of attention.⁷¹

II.2. LEGAL POLICY AND “POLICE”

Interestingly, it is Rancière himself who has made concessions in this direction. As soon as he turns to law, he cannot maintain the simple binary juxtaposition of “politics” and “police”. This is the level at which it becomes clear that a dialectical perspective would be beneficial, when it comes to the relation of radical critique and existing order. Rancière attributes an important role to law in the “police” distribution. The law represented “a system” that produced “primarily guarantees of state power”.⁷² It serves a specific structure of domination by attempting to implement a unity of legal implementation and application:

⁷⁰ U. Brand, A. Demirovic & C. Görg, *Nichtregierungsorganisationen in der Transformation des Staates*, (Münster: Westfälisches Dampfboot, 2001); with a more optimistic attitude, M. Hardt & A. Negri, *Empire*, (Cambridge MA-London: Harvard University Press, 2001), p. 312.

⁷¹ See, also, the “deconstruction” of Walter Benjamins concept of the general strike, in: J. Derrida, “Force of Law: ‘The Mystical Foundation of Authority’”, in: Drucilla, Rosenfeld & Carlson, note 59 *supra*, pp. 3-67, at 63 *et seq.*

⁷² J. Rancière, note 19 *supra*, p. 112.

“But the rule of *the* law is always the rule of *a* law, that is, of a regime of unity among all different senses of the law posited as a regime of identity of the community.”⁷³

However, such a categorisation of law has functionalist overtones. As in many other critical legal theories, law turns into the servant of the “police” order. It is not taken seriously as a legal system, as separate site for the handling of contingency and social conflict. But Rancière’s perspective becomes more sophisticated, once he turns to concrete judicial disputes. Here, he discovers the opportunity for those who have no part to “inscribe” themselves in the legal order with the help of their claims. The struggle of subalterns, to use a Gramscian expression, for legal recognition leads, according to Rancière, to “new inscriptions of equality within liberty and a fresh sphere of visibility,”⁷⁴ by scandalising existing exclusion as un-lawful and by demanding their share. With these “inscriptions of equality” Rancière renders comprehensible the dialectic of modern law:⁷⁵ on the one hand, it is the expression of “the predominance of circumstances over human beings, who well nigh are the former’s disempowered products”;⁷⁶ on the other hand, the universal claim of law also enables the subalterns to demand their share and to implant themselves in the “police” logic of the legal apparatus.⁷⁷ It is, therefore, only logical that Rancière takes human rights, in particular, as a powerful inscription of equality, which can be used again and again by the shareless to claim their share.⁷⁸ At the same time, Rancière takes human rights less as the subjective rights of individuals; as inscriptions of equality, they, instead, enable the excluded to take action in order to claim their legal right and to demand their part. Accordingly, human rights have “a potential for the inscription of equality that is actualised in the moment in which they [the human rights] are contested”.⁷⁹ They offer a starting-point for Rancière’s politics, which upsets the existing “police” distributions and patterns of exclusion. However, with this fairly convincing argument, Rancière contradicts his own binary juxtaposition of

⁷³ *Ibid.*, p. 108.

⁷⁴ *Ibid.*, p. 42.

⁷⁵ *Ibid.*, p. 125.

⁷⁶ T.W. Adorno, “Gesellschaft”, in: *idem, Gesammelte Schriften Band 8. Soziologische Schriften I*, (Frankfurt aM: Suhrkamp Verlag, 1997), p. 9-19, at 9.

⁷⁷ For a similar argument from a neo-Marxist perspective, see S. Buckel, *Subjektivierung und Kohäsion. Zur Rekonstruktion einer materialistischen Theorie des Rechts*, (Weilerwist: Velbrück, 2007), p. 312 *et seq.*

⁷⁸ J. Rancière, “Who is the subject of the rights of man?”, (2004) 103 *South Atlantic Quarterly*, pp. 297-310.

⁷⁹ S. Krasmann, “Jacques Rancière: Politik und Polizei im Unvernehmen”, in: U. Bröckling & R. Feustel (eds), *Das Politische denken. Zeitgenössische Positionen*, (Bielefeld: Transcript-Verlag, 2010), pp. 77-98, at 90.

politics and “police”, since the “police” distribution of law entails, through human rights, at least a starting-point for politics. In turn, every form of politics turns from a certain point on into an inscription of equality, which is *also* entangled in “police” logic.

Although Rancière makes some convincing concessions, his thought remains still tied to the true quality of political action. With the help of Jacques Derrida’s considerations about the indeterminacy of law, the notion of the inscription of equality could, to an even larger degree, be re-formulated within the law.⁸⁰ For Derrida, it is not only the subalterns who achieve inscriptions of equality; instead, the law itself provides, in its deep structures, a universal horizon of justice, which can, again and again, be used to question the repressive use of force by the existing law. The law is a paradox social form:⁸¹ it is repression and emancipation at the same time. With its promise to be not only legal but also just, law opens the possibility of confronting the existing repressive law with its own standard of justice:

“It is this deconstructable structure of law (*droit*), or if you prefer of justice as *droit*, that also insures the possibility of deconstruction. [...] Deconstruction is justice.”⁸²

For Derrida, it is the structure of law that establishes the pre-conditions for de-constructing and politicising law. Put in Rancière’s parlance, politics *and* “police” overlap so much in law that a binary juxtaposition of politics and “police” no longer makes sense; instead, the passages from politics to “police” - from the always coming justice to the repressive mythical authority of law - along a “*différance*” initiate an “oppositional logic”; a “de-stabilizing, complicating and bringing out”;⁸³ a never-ending questioning of “police” distributions in law. What can be achieved, however, are mainly “shifts”, since justice is never entirely complete but always in the process of becoming (*à venir*). In contrast to Rancière, who grounds his politics of the “re-visibilisation” of contingency in a maximal difference between politics and “police”, in Derrida’s case minimal differences and shifts are meant to bring about a intra-legal “re-visibilisation” of contingency. Even “minimal

⁸⁰ J. Derrida, “Force of Law: ‘The Mystical Foundation of Authority’”, in: Drucilla, Rosenfeld & Carlson, note 59 *supra*, pp. 3-67.

⁸¹ For the concept of the legal form, see S. Buckel, *Subjektivierung und Kohäsion. Zur Rekonstruktion einer materialistischen Theorie des Rechts*, (Weilerwist: Velbrück 2007), p. 226 *et seq.*

⁸² J. Derrida, “Force of Law: ‘The Mystical Foundation of Authority’”, in: Drucilla, Rosenfeld & Carlson, note 59 *supra*, pp. 3-67, at 14-15.

⁸³ *Ibid.*, pp 3-67, at 8.

resistance”⁸⁴ triggers a movement of de-construction, which is, from the very start, embedded in a “police”-political *continuum*. Rancière’s juxtaposition of politics and “police” could be used in a de-constructive vein: politics and “police” can be conceived as a *continuum* in which somewhat more “police” and somewhat more “political” forms of action struggle with one another. On the one hand, the law safeguards the “police” distributions; with the inscription of equality entailed in this social form, it generates, on the other, the pre-conditions for a politicisation, *i.e.*, a questioning, of the existing “police” distribution against the standard of an egalitarian distribution of the sensible world.⁸⁵

II.3. THE RE-BIRTH OF THE POLITICAL

What are the implications of this discussion of the different offers made by political philosophy for the recovery of the political. Whoever wants to come to terms with the political beyond politico-institutional distributions, whoever wants to examine the political in law, the economy or politics refers to such forms of action that make visible the “possibility-of-being-different” inherent in every exercise of rule: another world is possible. However, at this point, it is necessary to inquire into the conditions for the possibility of making contingency visible once again: first, a binary juxtaposition is only partly plausible; the relation of politics and “police” could be conceived of as a continuum.⁸⁶ Upon this basis, one should distinguish between those acts of communication that tend to irritate and upset, and those that tend to maintain and stabilise. In turn, political acts of communication in modern social systems are, at least to a minimal extent, of an inherent “police” nature (in the sense of their own distribution rules), or refer to inscriptions of equality, which are themselves part of the “police” order (for example, human rights). These criteria offer the possibility of distinguishing slightly more political from slightly more “police” forms of action. This is a distinction that aims less at the watering down of the politics of politics than at the permanent examination of the respective forms of action for their political and/or “police” part. Emancipatory movements should also not be relieved of minding their own minimal “police” share in order to keep the problem of the mechanisms of “invisibilisation” and exclusion at

⁸⁴ Albeit in a different context, see S. Žižek, *The Parallax View*, (Cambridge MA: The MIT Press, 2006), p. 82.

⁸⁵ The tensions and overlaps between Derrida’s concept of “justice” and Rancière’s concept of “equality” are not addressed at this point.

⁸⁶ See, in a similar vein, R. Celikates & R. Jaeggi, “Verflüssigung der Demokratie. Zwischen Institution und Revolution”, (2006) 1 *Polar. Halbjahresmagazin für Theorie, Kultur und Alltag*, pp. 85-89.

least present. After all, it cannot be excluded that “politics” turns into “police”.⁸⁷ *Vice versa*, it also holds that something with a “police” nature can be successfully politicised, if it can be moved away from more of a “police” logic and made the subject of political forms of action.⁸⁸

Second, the talk of the (one) “police” remains tied to an orderly structure of society, which does not make itself aware of plural orders and the differentiation of social systems, value spheres or discourses. A recovery of the political had to take the plurality of the patterns of order as its starting-point and had to be prepared to foster such forms of action that are, in a specific area, able to react to the phenomena of legal, political, economic and scientific domination. Accordingly, the political forms of action have to be pressured to adapt, because they are not confronted with a “police” distribution but different “polices”. It is precisely at this point that the possibility of a genuine legal policy lies, because only the equality inscriptions of the legal form generate the possibility for a genuine politics of law, which counters the “police”-repressive application of law with the help of intra-legal inscriptions of equality.

Third, the construction of maximal differences between politics and “police” is insufficient because, in the “strange loops”⁸⁹ of the modern social structure, irritations stem not necessarily from the biggest possible distance to the “police” distribution. Instead, political forms of action always have to question themselves with regard to how they can produce irritations that can be processed within particular sub-systems (the problem of connectivity)⁹⁰ and turn the inscriptions of equality in the existing “police” order expressly against the latter. What is of concern here is the attitude of immanent critique:

“For such a project of critique, there is no fixed point outside of society, rather critique has to start with a transcendent reference surplus in its immanence.”⁹¹

⁸⁷ See, also, Krisch’s point that law can become an “instrument of hegemony” under conditions of power asymmetries; N. Krisch, “The case for pluralism in postnational law”, (2009) 12 LSE, Society and Economy Working Papers, p. 40.

⁸⁸ Those who, for instance, insist that social minimum standards, such as those outlined in the European Social Charter, are observed in times of economic and financial crisis, are expressly not complicit in a “police” logic.

⁸⁹ N. Luhmann, note 53 *supra*, p. 264.

⁹⁰ In order to be litigable, such forms of action had to be able to connect to the existing communicative codes of the respective social system.

⁹¹ A. Fischer-Lescano, “Kritische Systemtheorie Frankfurter Schule”, in: G.-P. Calliess, A. Fischer-Lescano,

With this approach of immanent critique, one cannot help but characterise especially those forms of action as “political” that attack the “police” arranging rules by paying particular attention to minimal differences. Luhmann was already aware that revolutions are typically triggered by “the smallest of events”.⁹² What is decisive is whether an action or an act of communication is, at any given time, able to shift the *continuum* towards politics and renewed visibility of contingency or towards “police” and the obfuscation of contingency.

Fourth, the recovery of the political depends, to a large extent, on some form of response emerging from political and social movements, since the question arises as to whether the mere awareness of the contingency of the social world, the contingency of legal decision-making or the market, is sufficient to push ahead with the progressive use of the field of possibilities. Theoretical considerations should, to a larger extent, also be prepared to take a substantial stand. Only in this way can an élitist division of labour - in which the intellectual reflection is responsible for formally raising the awareness of contingency - be prevented, while political practice is situated in the lowly spheres of existing struggles for substantial projects.⁹³ Such an approach fails to recognise that critical theory is inconceivable without practical attempts to recover the political, while every political practice itself also requires reflection. Since this is not only about the theoretical self-elucidation of the leeway of contingency, but also about a theoretically-informed discussion about how to fill it in times of financial crisis, the concept of global social rights is outlined in a twofold manner: on the one hand, the juridico-political debate about global social rights can trigger the renewed visibility of contingency and social conflict, which emphasises the “possibility-of-being-different”, in contrast to a mere continuation of a neo-liberal constitutionalism, and thus causes a recovery of the political beyond the (nation) state. On the other hand, global social rights with their demand for social and democratic fundamental rights, such as the right to participation, food, shelter or an unpolluted environment, foster a dynamic that runs counter to the continuing financial market capitalism which undermines social and democratic rights.

D. Wielsch & P. Zumbansen (eds), *Soziologische Jurisprudenz*, (Berlin: Walter de Gruyter, 2009), pp. 49-68, at 64; *idem*, “Critical Systems Theory”, (2010) 36 *Philosophy & Social Criticism*, forthcoming].

⁹² N. Luhmann, note 53 *supra*, p. 48.

⁹³ Following Horkheimer, it should, however, be insisted that there is no theory of society “that does not contain political motivations, and the truth of these must be decided not in supposedly neutral reflection but in personal thought and action, in concrete historical activity”, (M. Horkheimer, “Traditional and Critical Theory”, in: *Critical Theory: Selected Essays*, (New York: Herder and Herder, 1972) (Original edition, 1937), pp. 188-243, at 222).

In this way, *the Struggle for Law (Ihering)* turns out to be a counter-hegemonic agenda, which stands up to the systemic imperialism of the world economy from the *arcanum* of law.

III. GLOBAL SOCIAL RIGHTS: AN ALTERNATIVE TO FINANCIAL MARKET CAPITALISM?

“One cannot ever be sure in advance if what appears (within the register and the space of visibility of the ruling ideology) as ‘minor’ measures will not set in motion a process that will lead to the radical (evental) transformation of the whole field.”⁹⁴

For a number of years now, the global social movements are involved in a lively debate about transnational law and its potential to address the ecological and social problems of world society.⁹⁵ Whether the landless movement demands a just distribution of land,⁹⁶ German students take legal action against the introduction of tuition fees,⁹⁷ or the European trade unions demand a “social protocol” to qualify the Treaty of Lisbon⁹⁸ – in all these cases, the appropriation of law withheld by the global aristocracy stands at the centre of political forms of action. Different legal sources, such as the European Convention on Human Rights, the International Covenants on Civil and Social Rights, the European Social Charter or the ILO core labour standards, offer a starting-point for juridico-political activism. It is here that the legal rights to social security, food and co-determination, which have been undermined by the financial market-driven accumulation regime in recent years, are outlined. Does an alternative to global financial-market capitalism emerge by getting global social rights accepted in principle? Is it taken to court from within the *arcanum* of law? Although global social rights do not highlight a meticulous idea of transforming the economic order, they are, perhaps, the most promising approach for a counter-hegemonic project in the transnational constellation. This argument can be fleshed out at four levels.

⁹⁴ S. Zizek, *In Defense of Lost Causes*, (London: Verso Books, 2008), p. 389 *et seq.*

⁹⁵ T. Seibert, “Globale soziale Rechte”, (2008) 3 *Kritische Justiz*, p. 333 *et seq.*

⁹⁶ A.L. Wright & W. Wolford, *To Inherit the Earth: The Landless Movement and the Struggle for a New Brazil*, (Oakland CA: Food First Books, 2003).

⁹⁷ Freier Zusammenschluss der Studierendenschaften (FZS)/Gewerkschaft für Erziehung und Wissenschaft (GEW), The introduction of tuition fees in Germany and the United Nations International Covenant on Economic, Social and Cultural Rights (UNICESCR) by Wilhelm Achelpöhl, Andreas Keller, Klemens Himpele & Konstantin Bender, (available at: http://www2.fzs.de/uploads/sozialpakt_innenteil_en.pdf); see, also, S Lorenzmeier, “Rechtliche Zulässigkeit von Studienbeiträgen – Verfassungs - und völkerrechtliche Aspekte”, (2008) 13 *Humboldt Forum Recht*, pp. 130-132.

⁹⁸ See, also, the draft for a protocol of social progress by the European Trade Union Confederation (ETUC): <http://www.etuc.org/a/5175>; see, in general, R. Erne, *European Unions. Labor's Quest for a Transnational Democracy*, (New York: Cornell University Press, 2008).

First, global social rights contribute to a contemporary “re-visibilisation” of social conflict and thereby to a recovery of political forms of action. This is an important aspect, because a counter-movement to financial-market capitalism will not come from persuasion alone. The global social rights agenda refers to the existing “inscriptions of equality” (Rancière) in global law in order to emphasise the existential threat that financial market capitalism poses to humanity and nature. After all, this affects not only jobs and social security in the North, but also migrants flowing to the North reduced to their “bare life” by environmental catastrophes and the consequences of climate change.⁹⁹ In the struggle for global social rights, a link emerges which conveys the different dimensions of the crisis and makes the “‘share’ of the shareless” in the welfare of the global North the focus of attention. In this regard, an explicitly political project emerges which immanently appropriates the “inscriptions of equality” in transnational law and the legal texture of a “justice to come” (Derrida) in order to stand up to transnational capitalism. A “subaltern cosmopolitanism” forces its way through.¹⁰⁰ In turn, it is the medium through which “minimal” shifts towards a politicisation of the world economic order (*continuum* politics-“police”) which can trigger radical dynamics can be achieved. Therefore, the global social agenda amounts to a starting-point for a counter-project to financial-market capitalism, which does not reside in the claim for social regulation, but extends its reach to economic reproduction, instead. The International Covenant on Economic, Social and Cultural Rights entails, for example, the right to form unions and the right to strike; the human rights of the so-called “third-generation” emphasise the “the right to participation”.¹⁰¹ As the world economic crisis appears to be the result of shareholder-value priorities, such claims for more democracy and responsiveness of the economic order could inhibit the dynamics of short-term growth. Furthermore, a re-distribution of wealth is needed when claims for minimum wages (Articles 7.2. and 7.3.), social insurance systems (Article 9) or the right to food (Article 11.2.) and housing (Article 11.3.) are taken seriously. One should not under-estimate the fact that these re-distributive aspects also lead to a diffusion of power and to a re-structuring of class relations. Not least the world economic crisis is the result of a self-empowering managerial

⁹⁹ For the concept of “bare life”, see G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (Stanford CA: Stanford University Press, 1998).

¹⁰⁰ S. Buckel & J. Wissel, “Entgrenzung der Europäischen Migrationskontrolle – Zur Produktion ex-territorialer Rechtsverhältnisse”, in: H. Brunkhorst (ed), *Soziale Welt. Sonderband Recht und Demokratie in der Weltgesellschaft*, (Baden-Baden: Nomos, 2009), p. 397 *et seq.*

¹⁰¹ See E. Riedel, “Menschenrechte der dritten Dimension”, (1989) 16 *Europäische Grundrechte-Zeitschrift (EuGRZ)*, pp. 9-21.

class which succeeded in identifying its particular interests with the common wealth of world society. Possible economic alternatives depend on empowering other social classes: steps towards economic democracy cannot be conceived without re-distributive mechanisms and a diffusion of power, even empowering subaltern classes to demand their share.

Second, this can be illustrated with reference to different arenas of juridico-political contention. The programme of global social rights would, for instance, aim to subject private corporations and multinational companies to human rights and international law, in order to render these rights also directly justiciable *vis-à-vis* private actors.¹⁰² If human rights are freed from their state-centric frame, companies can be sued directly for the destruction of natural living conditions, for starvation wages (which contradict the precept of minimum wages of the UN Social Covenant) and the prevention of co-determination.¹⁰³ In this way, global social rights open up arenas of contention, which exceed the criticism of official state policies by far.¹⁰⁴ Even now, under the heading of “corporate social responsibility” (CSR) efforts to bind the corporate constitutions of multinational corporations to social and democratic principles can already be identified.¹⁰⁵ These codes of conduct state, for instance, that production has to comply with standards of environmental protection, health and safety. At the same time, it remains contested to what extent these codes are themselves justiciable, and whether transnational corporations are the subjects of international law at all, which would render them directly suable for human rights violations. On the one hand, a “transnational normative regime”¹⁰⁶ that is able to exert normative power on the practices of multinational corporations seems to develop here; on the other hand, relatively vague voluntary commitments are also a way to become immune to far-reaching demands for

¹⁰² See, for instance, P. Alston (ed), *Non-State Actors and Human Rights*, (Oxford: Oxford University Press, 2005).

¹⁰³ See the report of the UN Special Representative on Human Rights and Transnational Corporations (The Ruggie Report), Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises Business and Human Rights, Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN Doc. A/HRC/4/035 v. 9 February 2007.

¹⁰⁴ For such a re-formulation of human rights as institutional spaces of autonomy, which addresses the threat of global matrices, see G. Teubner, “The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors”, (2006) 69 *Modern Law Review*, pp. 327-346.

¹⁰⁵ See, for instance, A. Crane, A. McWilliams, D. Matten, J. Moon & D. Siegel (eds), *The Oxford Handbook of Corporate Social Responsibility*, (New York: Oxford University Press, 2008).

¹⁰⁶ John Ruggie, United Nations Special Representative (UNSR), in Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, business and human rights: Towards operationalising the “protect, respect and remedy” framework, UN Doc. A/HRC/11/13 v. 22 April 2009, para 47.

democratic corporate constitutions. Is the “UN Global Compact”, in which industrial associations, trade unions, NGOs and UN agencies participate, really a step forward¹⁰⁷ if “no state independent, legally-binding obligation of transnational companies” to human rights is assumed?¹⁰⁸ Or, to the contrary, does one have to insist that human rights already, and ever since the declarations of human rights in the *bourgeois* revolutions, represent a “*signum remorativum, demonstrativum, prognosticon*” which addresses humanity (and therefore also private actors) as a whole?¹⁰⁹

In any case, the *continuum* of politics-“police” would first suggest that the debate about a transnational corporate constitution cannot wait till state decision-makers agree on a legal framework for a standardised corporate constitution; in contrast, a field of contention can already be determined, in which trade unions, NGOs and corporations struggle for standards. It is then questionable to what extent “inscriptions of equality” can also be achieved in CSR agreements, or whether they are already present. At the same time, the distinction politics-“police” draws attention to the fact that “codes of conduct” can tend to fill a political moment in the “police” order by immunising corporate constitutions against stronger claims for co-determination and human rights. In the “police” CSR discourse, the framework agreement of the UN Global Compact appears as an alternative to the compliance with human rights and democratic co-determination and not as a first step in this direction. CSR efforts do not necessarily “constitutionalise” conflicts of interest, but they can, however, make them invisible. The *continuum* politics-“police” would certainly suggest a concrete assessment for the “political” and the “police” parts in the area of CSR, and an examination of the qualitative substance of this new corporate governance. However, in particular, the inscriptions of equality in human rights can also be used to bind private companies directly. In the *continuum* politics-“police”, the demand for such inscriptions of equality is not just a question of legal litigation, it also requires political forms of action that finally lead to inscriptions. Industrial co-determination could, for instance, be demanded directly by employees without a detour via state regulations. The scope of political forms of action

¹⁰⁷ See www.unglobalcompact.org.

¹⁰⁸ K. Weilert, “Transnationale Unternehmen im rechtsfreien Raum? Geltung und Reichweite völkerrechtlicher Standards”, (2009) 69 *Heidelberg Journal of International Law*, pp. 883-917, at 915.

¹⁰⁹ I. Kant, *Der Streit der Fakultäten*, (1798), A141; see, also, H. Brunkhorst, *Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft*, (Frankfurt aM: Suhrkamp Verlag, 2002), p. 107 et seq. [*idem*, *Solidarity. From Civic Friendship to a Global Legal Community*, (Cambridge MA: The MIT Press, 2005)].

ranges from juridico-political activism to political strikes, which themselves constitute the foundation for “inscriptions of equality” to be able to occur in the first place.

A further implication of global social rights is that they focus on the right to individual self-constitution. This includes individual rights and protection from violence and persecution, as well as a minimum of social security and unpolluted environmental conditions. The UN Civil and Social Covenants already suggest an insight formulated by Wolfgang Abendroth under the aspect of the co-originality of democratic and social rights.¹¹⁰ Accordingly, democratic participation depends significantly on the possibility of those subjected to rule to social self-constitution under secure circumstances. *Vice versa*, social rights insure this self-constitution only if they are comprehensively complemented by democratic rights. In this respect, global social rights offer a starting-point for granting recognition to the connection of socialisation, democratisation and social responsiveness in the transnational constellation. Therefore, they reject an understanding of human rights according to which a number of generations with different binding-effects can be identified: while a first generation of civil individual rights tends to produce a strong binding-effect, the social and cultural participation rights of the so-called second and third generation are mainly used to produce lofty documents, which exert only weak binding-force.¹¹¹ In contrast, the concept of global social rights takes as a starting-point that, in the historical development of human rights, the democratic principle of self-determination was gradually extended to other spheres of the social constitution and living circumstances.

Third, global social rights stand up to the dominance of globalised financial capitalism expressly without an appeal to the power of the state executives. It is, instead, the civil societal context, such as non-governmental organisations, trade unions or social movements, which carries the hope for another kind of globalisation. This can also be understood as a reaction to the fact that, in the transnational constellation, the patterns of

¹¹⁰ W. Abendroth, “Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der Bundesrepublik Deutschland (1954)”, in: *idem, Gesammelte Schriften Band 2*, (Hannover: Offizin-Verlag, 2008), 338-357; for a revisit, see K. Möller, “After the Lisbon Ruling. Where is Social Democracy”, in: A. Fischer-Lescano, Ch. Joerges & A. Wonka, *The German Constitutional Court's Lisbon Ruling. Legal and Political Science Perspectives*, (ZERP Discussion Paper 1/2010), pp. 83-91.

¹¹¹ For this periodisation and a plea in favour of an holistic approach stating that all generations are “human rights”, see E. Riedel, “Menschenrechte der dritten Generation”, in: *idem, Die Universalität der Menschenrechte*, (Berlin: Duncker & Humblodt, 2003), pp. 329-361, at 333 *et seq.*, which first appeared in (1989) 16 *Europäische Grundrechte-Zeitschrift (EuGRZ)*, pp. 9-21.

order can also be located beyond the state system.¹¹² The differentiation of patterns of order puts political forms of action, to a certain degree, under pressure to adapt, since the challenges of world society are certainly not successfully addressed by state executives alone.¹¹³ Global social rights provide forms of action, which start directly where problems of domination emerge, and do not nurture the illusion that the return to the nation state could offer an adequate solution to the crisis phenomena in world society.

Fourth, global social rights keep, for the moment, the question of what economic and juridico-political measures have to be implemented as an alternative to the financial market-driven accumulation regime open. Especially since the possibility post-neo-liberalism is still a long time off, this is not a weakness, but a strength of the concept.¹¹⁴ Global social rights are an expression of a common stock of social, democratic and ecological claims, which might eventually be able to establish a common bond between the Brazilian landless movement, Eastern European grassroots unions, and American environmental NGOs. After all, this is also a dimension of the crisis of world society: there is finally a need for actors to turn the politicisation of world society into *practice* and turn the inscriptions of equality in world law against the financial market-centric world economy. In this sense, global social rights can contribute to the re-construction of a world societal collective agency. By constantly shifting the *continuum* politics-“police” in the direction of political contention, the global social rights agenda remains open to further, even more fundamental claims.

IV. CONCLUSION: CRITIQUE AND CRISIS

The global economic crisis poses a big challenge to the transnational recovery of the political. An analytical consensus about the fundamental structures of crisis management is important, but it is only a first step. Without localising alternatives and without a revival of social struggles, the continuation of financial-market capitalism will endure. The global economic and financial crisis has so far not led to a turning-point that would indicate a fundamental change in economic policy paradigms. On the contrary, the crisis policies of the G20 are characterised by the fact that they stabilise the financial market-driven accumulation regime

¹¹² G. Teubner, “Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?” (Storrs Lectures 2003/04, Yale Law School) in: Ch. Joerges, I.-J. Sand & G. Teubner (eds), *Constitutionalism and Transnational Governance*, (Oxford: Hart Publishing, 2004), p. 3-28.

¹¹³ For a state-executive optimism, see A.-M. Slaughter, *A New World Order: Government Networks and the Disaggregated State*, (Princeton NJ: Princeton University Press, 2004).

¹¹⁴ See, for instance, the special issue of the journal (2009) 51 *Development Dialogue*, about “Postneoliberalism – a beginning debate”.

in a slightly different regulatory frame. In particular, they continue to adhere to the deep structures of economic liberalism and still regard the market as “veridiction” authority.¹¹⁵ With the help of Michel Foucault’s analysis of government, these deep structures can be penetrated and be examined for their power contents. Accordingly, economic liberalism is based upon its own truth regime, in which the “natural” and “just” market process expresses the “truth”. And, with its truth policy, it conceals the contingency, the possibility-of-being-different, of the societal formation of order.

In times of the economic and financial crisis, critique should be concerned to counter the G20’s obfuscation of contingency. This project of “re-visibilising” contingency again has, in the contemporary theory debate, been treated under the heading of the “return of the political”. Official state policy is confronted with forms of action that point to the contingency of the formation of social order and that can also be found beyond the state, for instance, in law, society and art. Jacques Rancière’s distinction between a “police” distribution, which stabilises existing societal patterns of order, and political forms of action, which upset the symbolic representations within a community, emphasises these two dimensions perhaps in the most radical manner. In doing so, however, Rancière faces argumentative problems which he can only solve by leaving behind a binary juxtaposition of repressive “police” and subversive politics, and by making concessions to the dialectics of modern law. On the one hand, the law appears as the epitome of “police” distribution; on the other, the “inscriptions of equality” of the inferior can be found here, which can be mobilised against the “police” distribution of the world. In this respect, it seems more sensible to conceive of the two dimensions of politics as a *continuum*, which distinguishes between fairly more “police” and fairly more “political” forms of action.

Against this backdrop, the demand for global social rights raised by the latest social movements represents a promising political form of action, in order to disrupt the continuation of the financial market-driven accumulation regime. Global social rights do not react with economic macro-alternatives to the economic and financial crisis, instead, they appropriate the existing inscriptions of equality in world law in order to counter the threats posed by global capitalism. In doing so, they take up existing juridico-political debates and make the “possibility-of-being-different” of the world society conceivable. This addresses substantial rights to food safety, co-determination, social existence and integrity, which try to

¹¹⁵ Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-79*, note 28 *supra*, p. 61.

fill the field of possibilities and qualify a different kind of globalisation. It is again about the “self-clarification (critical philosophy) to be gained by the present time of its struggles and desires”.¹¹⁶

¹¹⁶ K. Marx “Briefe aus den Deutsch-Französischen Jahrbüchern (1844)”, in: K. Marx & F. Engels, *Werke*, (Berlin: Dietz-Verlag, 1976), Band 1, pp. 345-346.

CHAPTER 12

THE ETHICS OF THE FINANCIAL CRISIS

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“Der Weltlauf sei - trotz allem - mehr Nichtkrise als Krise”^{*}

Odo Marquard

I. INTRODUCTION

Historically, the concept of crisis is closely-related to the evolutionary transformations of the Eighteenth century in the United States, Latin America and Europe, namely, to the transition from a stratified form of societal differentiation to the modern primacy of functional differentiation. In contemporary world society, we are not confronting a global change like that, but the concept of crisis is applied to different topics in many fields. While, in the Eighteenth century, *the crisis* consisted of a distance between a utopian morality and the present,¹ in the Twenty-first century, its main concern becomes the uncertainty and risk of the present.² In other words, the future was a *known land* for utopian thinkers; the problem was a present that could not be adjusted to this normative expectation.

With the rise and worldwide expansion of functional differentiation, it became clear that the built-in resistance to the learning involved in normative expectations was not completely adequate to deal with the increasing complexity and contingency of modern society. Differentiation rejects the moral identity of the entire society. Normative expectations were then either restricted to religion, ideological politics or moral communication, or became more and more abstract - and were even proceduralised - in order

^{*} “The course of the world would – after all – be more non-crisis than crisis” (Author’s translation).

¹ R. Koselleck, *Kritik und Krise*, (Frankfurt aM: Suhrkamp Verlag, 2008).

² N. Luhmann, *Die Religion der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 2002).

to conserve the possibility of a unitary description of society.³ Meanwhile, their prominent place in the organisation of a functionally-differentiated society was taken up by cognitive expectations, particularly in fields such as science, technology, and economy.⁴

The difference between normative and cognitive expectations lies in how disappointments are managed. While the former holds the expectation in view of disappointments, the latter is willing to learn from them and to re-orient the expectation. Cognitive expectations are better adapted to the loss of a consistent and transparent style of behaviour in modern society. Since complexity entails non-linear dynamics of the whole, the cognitive style of expectations can move through the ambiances of uncertainty and risk in a more relaxed way than normative expectations. Instead of reacting against uncertainty, the cognitive style tries something else. Two crucial conditions are needed to accomplish this: there must be a sufficiently-structured social situation that offers contingent possibilities in order to carry out the intended expectation, on the one hand, and no normative de-differentiation of the cognitively-structured social situation must take place, on the other.

In the case of the financial sub-prime crisis, the first condition was accomplished; the absence of the second condition triggered the crisis. The aim of this chapter is to explore the relationship between normative and cognitive expectations with regard to the financial sub-prime crisis. My general thesis is that normative political expectations de-differentiate the cognitively-driven operations of the financial system and over-impose a long-lasting normative conditioning upon autonomously-organised cognitive procedures. The American Dream of an “affordable home” becomes a foreclosure auction when the cognitive procedures of the financial system can no longer distribute the risks of an on-going housing policy for non-creditworthy clients. Finally, the financial system reacts with illiquidity to the normative political de-differentiation - the game was interrupted and the crisis began.

In order to provide the central steps of this argument, I begin with the Luhmannian, sociological approach to ethics as a reflexive theory of morality. Ethics as reflexive theory is a key theoretical issue to systematise the lessons derived from the financial crisis with regard to the relationship between cognitive and normative expectations for both individuals and

³ See, especially, G. Teubner, “Selbstsubversive Gerechtigkeit: Kontingenz- oder Transzendenzformel des Rechts?”, in: G. Teubner (ed), *Nach Jacques Derrida und Niklas Luhmann. Zur (Un-)Möglichkeit einer Gesellschaftstheorie der Gerechtigkeit*, (Stuttgart: Lucius & Lucius Verlagsgesellschaft, 2008).

⁴ N. Luhmann, “Die Weltgesellschaft”, in: *idem, Soziologische Aufklärung 2. Die Soziologie und der Mensch* (Wiesbaden: Verlag für Sozialwissenschaften, 2005).

systems (Section II). In this framework, highly-fixed normative-expectations tend to over-impose a simplistic whether-or-not model of selection on cognitively-driven social systems whose basic decisional structure relies on a somewhat contingent *either-or* model of selectivity. The unreflexive pressure of the norm upon the complexity and contingency of the world leads to crises (Section III). This can be analysed in the case of the financial crisis by considering, first, the complexly inter-connected cognitive structure to manage the uncertainties, risks and opportunities developed by the financial system (Section IV), and, second, by taking into account how the highly-fixed normative political expectation of an “affordable home” for non-creditworthy clients triggered a generalised operational illiquidity in the system and caused the sub-prime mortgage crisis (Section V). A first lesson from this problematical setting is that, in spite of complex risk-management structures and multi-layered calculability procedures, the financial system, as a cognitively-driven system, operates always close to the edge, which means that it is beyond any certainty of future events (Section VI). A second lesson deals with the conflictive relationship between normative and cognitive expectations in modern society. By elaborating on Luhmann’s approach to ethics as a reflexive theory, I argue that an ethic of contingency may contribute either to a cognitive openness of the norm to the contingency of the world, or to prevent the normativisation of cognitive expectations in cognitively-driven systems (Section VII). Finally, I present some concluding remarks (Section VIII).

II. ETHICS AS REFLEXIVE THEORY

The problem of the relationship between moral norms and the ethical conditions of acceptance or rejection in modern society has been a key analytical issue of moral and political philosophy. Schematically viewed, moral theory has followed three major paths in this regard: the description of what comprises morality, the definition of what is normatively desirable, and the orientation of individuals upon the basis of the precedent dimensions.⁵ Certainly, the concepts of morality and ethics have been subject to semantic transformations. However, alongside this development, different answers regarding these dimensions have come into being.⁶ Nonetheless, the dimensions remain. The rise of sociology opened up a new field for the analysis of the relationship between moral norms and ethics.

⁵ See, especially, A. Heller, *General Ethics*, (Oxford: Basil Blackwell, 1988).

⁶ See, generally, T. MacIntyre, *Historia de la ética*, (Barcelona: Paidós, 2006).

There is no question about the novelty and sophistication of the classical and contemporary sociological answers to this matter, particularly in Durkheim, Weber, Parsons, Apel and Habermas. However, I would like to concentrate here on the option that contemporary systems theory offers regarding the relationship between morality and ethics. In Luhmann's view, ethics as a reflexive theory of morality has a mediatory function, namely, as a societal speaker of morality and also as a translator of societal requirements towards morality.⁷ Reflection, in this case, means establishing a limit to the field of operation of morality, namely, to limiting the expansion of the moral distinction of good/bad as a standard by which the operations of other systems may be judged or decided in terms of esteem or contempt. In this sense, ethics as a reflexive theory, which also functions as a "speaker of morality and translator of societal requirements towards morality", seems to be more suitable for a cognitive approach to norms when - under conditions of high complexity - a cognitivisation of norms seems to be the best alternative in order to cope with uncertainty and risks.

Cognitivisation of norms does not mean the abolition of normative expectations. It is quite clear in Luhmann's theory that the genesis of normative expectations stems from the evolutionary stabilisation of recursively-selected communications that work as inviolable levels of action at different times and places. Such inviolable levels are called values, and values can move through different systemic communications, because there is no systemically-structured communication form for norms and values: "one can observe here the take-off of a medium".⁸ They are a floating communicative style which may be attached to integrative normative expectations and to different societal operations, no matter what particular functions are involved. This constitutes a problem in so far as, in modern society, the symbolic media operate as a functional equivalent to morality: while morality is inclined to integration, symbolic media take specific societal problems into their hands and produce a wide range of differentiated meaningful alternatives to cope with them.⁹ The question now is whether normative expectations can be deemed to be an adequate device to deal with highly-diversified constellations of meaning.

⁷ N. Luhmann, *Die Moral der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 2008).

⁸ N. Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1997), p. 340.

⁹ *Ibid.*, p. 317.

Meaning as described by Luhmann is a sequential production of complexity and risk, namely, complexity – contingency – selection – increase of complexity – risk.¹⁰ Since meaning exceeds what can be instantiated through actions and experiences by far, there is an over-abundance of meaningful possibilities that remain latent when something is actualised. In this case, the selection adopts the form of complexity. However, meaning entails a second structural form, namely, the *form* of contingency. This suggests that:

“the possibilities of further experience and action indicated in the horizon of actual experience are just that - possibilities - and might turn out differently than expected, *i.e.*, that these indications can be deceptive [...] In practice, then, complexity means the necessity of choosing; contingency, the necessity of accepting risks.”¹¹

Disappointments may come either from the fact that factual, social or temporal conditions have already changed and that the expectation cannot be fulfilled in the originally planned way, or from the internal conviction that the formerly-desired actualisation is no longer important for the instantiation of individual concerns and personal projects. Whatever they might be, life plans can always be realised in other ways.

Highly-fixed normative expectations cannot deal with this deep-seated contingency of meaning. They become overwhelmed by uncertainties, risks, alternatives and further possibilities. Nationality, identity, cultural authenticity, racial particularisms, religious certainties, political ideologies and sociological utopias are constantly inter-penetrated by massive flows of factual, social and temporal alterities that turn these normative expectations into *real fictions* with vested interests and instrumental-cognitive goals.¹² On the other hand, the knowledge-based complexity of significant functional systems in modern world society - such as the financial system, technical systems, science, economy, law¹³ - have developed a robust cognitively-driven structure to cope with risks and uncertainties, and are not willing to

¹⁰ See, especially N. Luhmann, “Sinn als Grundbegriff der Soziologie”, in: J. Habermas & N. Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie?*, (Frankfurt aM: Suhrkamp Verlag, 1971). See, also, N. Luhmann, “Systemtheoretische Argumentationen. Eine Entgegnung mit Jürgen Habermas”, in *ibid.*; N. Luhmann, *Soziale Systeme*, (Frankfurt aM: Suhrkamp Verlag, 1987); and N. Luhmann, “Wie lassen sich latente Strukturen beobachten?”, in: P. Watzlawick & P. Krieger (eds), *Das Auge des Betrachters — Beiträge zum Konstruktivismus: Festschrift für Heinz von Foerster*, (Munich: Piper, 1991).

¹¹ N. Luhmann, *Essays on Self-Reference*, (New York: Columbia University Press, 1990), p. 26.

¹² See, especially, A. Mascareño, “La cultura chilena como ficción real”, in: M. Vicuña & M. Figueroa (eds), *El Chile del Bicentenario: Aportes para el debate*, (Santiago: Universidad Diego Portales, 2008).

¹³ See Ladeur in this volume.

accept externally-imposed normative criteria without jeopardising the continuity of their own autopoietic operations.

A cognitivisation of normative expectations means, in this sense, both, a cognitive openness of normative expectations to the possibilities of meaning - *i.e.*, openness to complexity and contingency - and a reflexive limitation of normative expectations into cognitively-driven functional systems. Since ethics as a reflexive theory entails the function of limiting the field of operation of morality, and, therefore, of highly-fixed normative expectations, the ethical reflection becomes a crucial endeavour to keep things apart, particularly in times of crisis.

III. CRISIS AND THE NORMATIVISATION OF COGNITIVE EXPECTATIONS

The semantic polymorphism of the idea of crisis is well illustrated by Koselleck: in Greek linguistic usage (medical, judicial, theological), in its political form in the Eighteenth century, in its expansion to the philosophy of history, in everyday life experience, in its economical usage, and in the present understanding.¹⁴ Koselleck argues that the concept was always applied to life-deciding alternatives, namely, to “answer the questions about what is just or unjust, what contributes to salvation or damnation, what furthers health or brings death”, although, in the present, it has been somewhat transformed “to fit the uncertainties of whatever might be favored at a given moment”.¹⁵ It is precisely in this transformation that the key to understanding the reflexive ethical interpretation of the crisis lies: as long as the concept refers to *whether-or-not* alternatives, the options are not negotiable and become inviolable levels, namely, they adopt the form of values and highly-fixed normative expectations. The crisis moralises, and since morality is a systemically non-differentiated communication form, it can move through different systems and extend the crisis to them.¹⁶ In contrast, as long as the concept of crisis leaves the aspiration of normativisation aside and reflects the uncertainty of whatever might be favoured at any given moment, then the crisis assumes a cognitive style that may ask for new possibilities of dealing with risks. Its main concern becomes the uncertainty of the present, and it assumes the perspective of what I wish to call the cognitive *either-or* model.

¹⁴ R. Koselleck, “Crisis”, (2006) 67 *Journal of the History of Ideas*.

¹⁵ *Ibid.*, pp. 361, 399.

¹⁶ Luhmann, note 7 *supra*, p. 336.

While Koselleck understands this as “vagueness” and “imprecision”,¹⁷ Luhmann moves to a complementary interpretation of crisis:

“One can speak about crisis only when a turning point lies ahead in the near future — either for the better or for the worse. However, such a turning point cannot be foreseen [...]. The description as ‘crisis’ contains an unnecessary dramatization and suggests that a decision would be rendered. Yet, the decisions that are communicated as such do not actually help. One must rather assume that we are dealing with an evolutionary adaptation to the new situation.”¹⁸

Luhmann moves a step forward in relation to Koselleck: now, crisis has to do with decisions not yet rendered, which, once rendered, open up further possibilities. In other words, decisions reduce complexity and, in doing so, increase the complexity of social selectivity. A contingent world is a world whose complexity compels us to cognitively-driven decisions (selections) which, in turn, increase the complexity of the world and build systems to compensate for the immanent instability of the process with a cognitive *either-or* model of expectations.

An *either-or* model relies on cognitive expectations. This means that expectations learn from the disappointments triggered by structural constraints, on the one hand, and correct the corresponding behaviour to adapt the expectations to the structural enablements without losing their primary scope, on the other. In contra-distinction, a *whether-or-not* model relies on normative expectations, namely, on the reaction against learning when the expectation confronts disappointments. In the first case (the *either-or* model), a crisis may arise when, at the level of systems and symbolic media, there is no alternative to connect social selectivity and individual motivation - extreme poverty, refugees, migrants in war zones, the politically persecuted, *etc.* In such cases, individuals are confronted with an over-limitation of the structural limitation of the possible options normally provided by systems and symbolic media, which leads to situations of sub-inclusion.¹⁹ In the case of the *whether-or-not* model, a crisis seems to take place when highly-fixed normative expectations cancel

¹⁷ Koselleck, note 14 *supra*.

¹⁸ Luhmann, note 7 *supra*, p. 317 & 318.

¹⁹ See, especially, M. Neves, “Die Staaten im Zentrum und die Staaten in der Peripherie: Einige Probleme mit Niklas Luhmanns Auffassung von den Staaten der Weltgesellschaft”, (2007) 12 *Soziale Systeme*. See, also, N. Luhmann, “Inklusion und Exklusion”, in: *idem, Soziologische Aufklärung 6. Die Soziologie und der Mensch*, (Wiesbaden: Verlag für Sozialwissenschaften, 2005); and R. Stichweh, *Inklusion und Exklusion. Studien zur Gesellschaftstheorie*, (Bielefeld: Transcript Verlag, 2005).

the contingency of both systems and symbolic media, and compel a disruptive normative observation of cognitively-driven operations. This is the case of the financial crisis.

In this framework, a normativisation of cognitively-driven expectations does not provide us the required elements to develop a successful adjustment of individual motivation and social selectivity. Highly-fixed normative expectations cannot observe the contingency of the world. In cognitively-driven functional systems, this function is accomplished through specific structural responses and output, which aim to re-establish the disappointed expectations into alternative possibilities for instantiation. If one persists in the norm, one misses these options, and, in doing so, the system experiences a homogenisation of its communicative style: everybody wants to sell and no one wants to buy.²⁰ According to this, if a normative expectation is unreflexively applied to the cognitively-driven systemic fields, one must anticipate de-differentiation, homogenisation and integration of complexity, and an externally-imposed form of cancellation of contingency. This can only lead to a crisis.

IV. THE COGNITIVE STRUCTURE OF THE FINANCIAL SYSTEM

The financial system aims at the value creation of its own medium money, and must take into consideration the lack of reference points in the environment of the system: there is no factual correlation in the form of necessities or commodities for the financial value creation, as in the case of the real economy. This leads to a highly-dynamic double contingency which cannot be domesticated by rationality principles or efficiency criteria; on the contrary, one must rely on the robustness of the system to carry out selections and cognitively develop “the capacity to supersede own or someone else’s mistakes”.²¹ This entails a developing process of cognitivisation in the style of expectations. The creation of money through money cannot really succeed normatively: whoever holds the expectation of value creation in spite of permanent losses and does not introduce strategic modifications into his or her own operations and selections, is finally excluded from the system through bankruptcy. On the one hand, the cognitivisation of expectations increases the capacity to identify mistakes and, consequently, the capacity to take the necessary measures to correct them in a realistic temporal basis. On the other, it incorporates ignorance (non-knowledge) into the system as a risk to be reflexively managed, in particular by risk management tools.

²⁰ H. Willke, *Smart Governance*, (Frankfurt aM: Campus Verlag, 2007).

²¹ N. Luhmann, *Die Wirtschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1999), p. 122.

Factually, the system operates upon the basis of the code risk/opportunities.²² It aims at value creation of the medium money and does not exclude - as a matter of principle - speculative mechanisms, although it finds its own operational limit in the illiquidity. Socially, the system reveals a lack of interaction, which is mainly replaced by a complex technological structure of electronic media and the fragmentation of risks into securities and derivatives. And it is precisely this lack of interaction which pushes normative expectations into the background: individuals do not interact directly with each other, but with highly-determined de-personalisations in which there is no opportunity for the emergence of value commitments. This cognitivises the financial system and produces from the outside morally-loaded attributions of greed and opportunistic behaviour as a critique to the general operation of the system, and also furthers the radical interest in normatively-structured systems for a normative regulation of the financial operations. Finally, in a temporal dimension, the future is permanently introduced into the present as an option of value creation, which allows the system to function in the form of anticipation of payments (transactions) or anticipation of anticipation of payments (futures).²³

The management of risks and opportunities, the lack of interaction, as well as the remarkable relevance of “the future in the present” of the system, are sources of high uncertainty and risk. The most likely alternative to deal with this is to pay attention to the disappointments of expectations and react quickly to them. In doing this, the system must process its own uncertainty as part of the system thereby avoiding its externalisation in the form of normative criteria such as solidarity or justice. Even trust, which aims to establish a public sustainability of the system in certain political actions, must be neutralised: no financial operation can take the fact that that liquidity could be politically re-established into consideration once illiquidity rules. If this were a generalised expectation, the financial system would not have evolved at all. In fact, the system processes its own uncertainty by transforming its ignorance into risk, and introducing it as information into the system by means of accounting standards, credit ratings and risk management.

Accounting standards allow exchange and comparability of financial data, and provide a generalised description of the financial performance. In some cases, they can act

²² Willke, note 20 *supra*.

²³ K. Piel, “Recht als Bestandteil einer ‘intelligenten’ Suprastruktur der Finanzmärkte”, in: H. Willke (ed), *Systemisches Wissensmanagement*, (Stuttgart: Lucius & Lucius Verlagsgesellschaft, 1998).

either as regulatory structures - for example, the US Securities and Exchange Commission (SEC) - or as self-constitutional bodies with private self-reflexive structures - such as the Financial Accounting Standards Board (FASB) or the International Accounting Standards Board (IASB). Accounting standards function as assurance mechanisms of the system itself; if they are politically de-differentiated upon the basis of normative expectations, they can no longer reflect the financial performance. They must preserve their cognitive functioning in order to instantiate their sensibility to value variations and risks. Credit ratings, as provided by well-known agencies such as Moody's, Standard & Poor's, and Fitch, cognitivise the risk of investment by classifying the rather opaque issuer's credit-worthiness (and the quality of mortgages) into a standard model through which shareholders may decide to spread risks in bonds and securities. This makes risks comparable, and aims to introduce a future description of a reduced and manageable complexity into the current constellations of decision. In turn, risk management structures - such as the Basel I and Basel II Accords in the banking sector - are concerned with the quantitative and qualitative assessment of market risks in order to provide information to stabilise the highly-volatile expectations of financial markets through the standardisation of risks and self-produced criteria of self-regulation.²⁴

This cognitive quasi-constitutional structure of the system²⁵ has to deal with two immanent systemic risks: moral hazard and illiquidity. Paradoxically, it is moral hazard which represents the amorality of the system. It points out a cognitive risk, namely, the fragmentation of risks into securities, which can, in turn, be regarded as a cognitively adequate strategy to reduce risks. Historically, a bank would lend money and hold the mortgage until its maturity:

"If the mortgage holder defaulted, then the bank would usually make a loss. It therefore had an incentive to be careful who it lent to and prospective borrowers would be screened carefully: a sub-prime would-be borrower didn't have much chance of getting a mortgage."²⁶

Nowadays, by securitising the mortgage, the risk of a loss is fragmented in multiple derivative instruments. The incentive is placed on originating the loan and not on holding the

²⁴ T. Strulik, "Risiko- und Wissensmanagement in Banken", in: H. Willke (ed), *Systemisches Wissensmanagement*, note 23 *supra*.

²⁵ See Kjaer in this volume.

²⁶ K. Dowd, "Moral Hazard and the Financial Crisis", (2009) 29 *Cato Journal*, p. 143.

mortgage. “Heads I win, tails you lose” could be the motto;²⁷ or less dramatically expressed, the system develops an “originate-to-distribute model”.²⁸ Yet, securitisation is a highly efficient cognitive structure to reduce the risk of a single investment by fragmenting it into multiple portfolios and packaging them with other assets of diverse risk value, so that eventual defaults can be absorbed by the robustness of the system. The risk of default remains, because risks are not entirely quantifiable and far from being controllable. However, securitisation creates an environment of risk assessment that fosters the autopoietic dynamic of the system and the expansion of value creation. The cognitive unity of the financial system can, therefore, be observed as the control of moral hazard, acting thus as a sort of contingency formula.

The cognitive structure of the financial system has its operational limit in the illiquidity. While liquidity indicates:

“a crowd of willing buyers and sellers who are able to exchange assets without producing a significant disruption, [...] ‘illiquid’ indicates an absence of both buyers and sellers, and indeed that desperate sellers are likely to be present who are struggling to exchange assets and who are confronted by wide and volatile spreads between the ‘bid’ and ‘ask’ prices for the particular assets they hold.”²⁹

Illiquidity is thus part of the system; it must be communicatively processed as risk in order to avoid its presence *in the system* with the aforementioned cognitive mechanisms. This is because, when it comes to operational illiquidity, that is, when assets are not exchangeable at all, it also comes to bankruptcy, to an interruption of the systemic autopoiesis. In plain English: “A bankruptcy constraint closes the system.”³⁰ Bankruptcy is a temporal interruption of the autopoiesis of the system; it plays a similar role to that of violence for the political system: while violence suspends the communication through power as the symbolic media of the political,³¹ bankruptcy suspends the communication through money in the affected elements of the financial operations. Certainly, bankruptcy can be hardly viewed as a

²⁷ *Ibid.*

²⁸ D. Wigan, “Credit Risk Transfer and Crunches: Global Finance Victorious or Vanquished?”, (2010) 15 *New Political Economy*, p. 111 *et seq.*

²⁹ P. Langley, “The Performance of Liquidity in the Subprime Mortgage Crisis”, (2010) 15 *New Political Economy*, p. 77.

³⁰ B. Yandle, “Lost Trust. The Real Cause of the Financial Meltdown”, (2010) 14 *The Independent Review*, p. 351.

³¹ N. Luhmann, *Die Politik der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 2000).

symbiotic mechanism of the financial system. When there is a lack of interaction, there are no bodies to act upon. Nonetheless, bankruptcy symbolises the interruption of satisfaction of necessities in the “real economy” (a foreclosure auction, for example): thus, the possibility of financial value-creation is closed. On the one hand, bankruptcy breaks up the communication of money liquidity and, on the other, it triggers the external interest for normative criteria to re-stabilise the system in a structural coupling with law and politics.³² In this sense, a generalised operational illiquidity in the financial system can be called a financial crisis.

V. FROM A WHITE PICKET FENCE TO THE FORECLOSURE OF THE AMERICAN DREAM

The question now is what produces a generalised operational illiquidity in the cognitively driven financial system. In my view, the problem arises when, at the level of functional systems, individual normative-expectations are condensed as highly-fixed normative structures *of society* and thus generalised to cognitively-driven fields of communication. A key for the sociological understanding of the financial crisis lies in the fact that normatively-driven political expectations de-differentiate the cognitively-driven field of the financial system and over-impose a normative structure upon autonomously-organised cognitive procedures. In other words, the normative political-expectation of an “affordable home” or a “white picket fence” - a key issue in the semantics of property ownership of the *American Dream* - became a “sub-prime crisis” in the cognitively driven financial system and led to the “foreclosure of the American dream” at the level of individuals. And when the crisis knocked at every sub-prime door and every prime penthouse, politicians turned out to speak of the opportunistic behaviour and greed of Wall Street, and of the need for a new normative regulation of the financial system, *i.e.*, for a normativisation of the immanent contingency of the cognitively-driven financial operations.

There is no doubt about the fact that miscalculations played a role in the financial crisis, but this is a situation to be expected in complex systems where ignorance (non-knowledge) is incorporated in the system as risk. In fact, complex systems are not fully-calculable because highly contingent events that chaotically amplify their consequences through the interconnectedness of their inbuilt networks constantly emerge. This is the reason why cognitive expectations react better than normative ones to contingent events: they can adapt themselves to new facts and learn from errors. Certainly, mistakes may help to explain

³² See Renner in this volume.

why particular firms fell out of the system into bankruptcy, but the illiquidity of the whole system (its autopoietic collapse) must be identified in the couplings with other systems, namely, in policy distortions that led to the generalised financial instability: credit expansion and subsidies to risky mortgages.³³

The core of the problem lies in what Leonard Seabrooke has called the *welfare trade-off*:

“where citizens choose to favor state-based welfare and are happy to rent and receive better welfare services, or where citizens choose lower taxes in return for a better increased opportunity to accumulate individual or familial wealth.”³⁴

From the days of the Great Depression, the US Housing Policy has followed the latter. Some of the institutional outcomes of these policies (such as credit expansion and subsidies) can be schematically described as follows:³⁵

- 1934 – The creation of The Federal Housing Administration (FHA) to insure mortgage loans.
- 1938 – The creation of The Federal National Mortgage Association (Fannie Mae). Fannie was divided in 1968 to create Ginnie Mae which was oriented to low-income and minority borrowers. Fannie Mae became a government-sponsored private corporation to expand the access to a line of credit through the US Treasury.
- 1970 – The creation of the Federal Home Mortgage Corporation (Freddie Mac) with analogous functions to Fannie Mae but for Savings and Loans institutions.
- 1970 – The Emergency Home Finance Act allowed Fannie Mae and Freddie Mac to compete in private market (Ginnie Mae in public market).

³³ L. White, “How did we get into this Financial Mess?”, (2008) *Cato Institute Briefing Papers*, number 110.

³⁴ L. Seabrooke, “What do I get? The everyday politics of expectations and the Subprime Crisis”, (2010) 15 *New Political Economy*, p. 56.

³⁵ See, for example, P. Boettke, “What happened to ‘Efficient Markets’?”, (2010) 14 *The Independent Review*; and Yandle, note 30 *supra*; White, note 33 *supra*; and Seabrooke, note 34 *supra*.

- 1977 – The Community Re-investment Act - Congress-amended in 1995 - promoted partnerships between banks and community groups to lend money to low-income borrowers formerly considered non-creditworthy.
- 1993 The pressure on lenders by the Department of Housing and Urban Development (HUD) to relax down-payments and income qualifications.
- 1996 – The HUD designs a plan for Fannie Mae and Freddie Mac: 42% of mortgage to borrowers under the middle level; 50% in 2000 and 52% in 2002.
- 1997 – The Clinton Administration furthers Fannie Mae and Freddie Mac to buy poor-quality mortgages.
- 2003 – The Bush Administration passes the American Dream Downpayment Act, thereby reducing thus the costs required to qualify for a mortgage.
- 2006 – The Federal Reserve System reduced the federal funds rate under the inflation rate - borrowers began to gain in proportion to what they borrowed.

One cannot expect that all these policies, which instantiate highly-fixed and normatively-based political expectations acting upon financial operations, have no effect on the cognitively-driven financial system. First, the hydraulic normative pressure on lenders bring them to extend credit - by relaxing the down-payments and the income qualifications - to those which, from a cognitively driven point of view, were previously considered to be non-creditworthy clients (the sub-prime). Second, because the cognitive structures of the financial system react cognitively to new events - that is, because they learn from the world - they deal with these normative political-expectations through the cognitive means which they have at their disposition: accounting standards, credit ratings, securitisation, derivatives, risk management - all of them oriented to control moral hazard and to avoid illiquidity. Third, because these cognitive financial means learn, they aim to cognitivise the uncertainties which the external normative-expectations produce in the system by transforming them into a cognitively-contingent model of risk which, on the other hand, never provided certainties or necessities (the *whether-or-not* model), but only future-contingent possibilities (the *either-or* model). Fourth, because the highly-fixed and normatively-based political expectations observe this contingent model of risk normatively, they expect no major alterations in the financial system when reacting to pressures; they expect normative stabilities and not

contingent possibilities.³⁶ And fifth, as the financial system reacts cognitively by producing illiquidity in order to stop the de-differentiation pressures, the political semantics of “greed”, “opportunistic behaviour”, “social irresponsibility”, “seriously delinquent” and “kamikaze manner”³⁷ came into play to debase the cognitive-functioning of the financial system as a whole, and to pave the way for *innovative* normative regulations, *creative* political de-differentiations and *original* policy distortions.

Because the financial system operates globally,³⁸ the US housing bubble had supranational consequences. Such highly-fixed normative pressures are hardly manageable for cognitively-driven systems because they must accept the form of the norm and make an effort to translate it into cognitive criteria. The norm then becomes fragmented into alternative possibilities. The political normative-expectation of a “white picket fence” or at least an “affordable home” for the “sub-prime electors” then became partitioned into financial strategies which aimed to manage the financial risk implicit in the norm. This cognitively-driven financial process has been meticulously described by D. Wigan:

“It starts with a high yielding mortgage sold by broker A to a US customer in a rising housing market and with a two-year ‘teaser’ rate. Broker A sells the debt to Bank B. Bank B sell this to investment Bank C, which pools it with other mortgages in a Residential Mortgage Backed Security (RMBS). The RMBS in turn is placed in a, possibly hybrid, tranching CDO [Collateralized Debt Obligation]. The equity, mezzanine and senior tranches are sold to investors with varying risk appetites and mandates. A further layer of exposures is created by writing CDS [Credit Default Swaps] on the lower two tranches of the CDO. Here the process becomes synthetic and these CDS can be written by any number of market participants (any number of times) since no ‘real’ exposure of the underlying is required to write a derivative. Bank D then buys, for instance, 100 such CDS and amalgamates them in a further CDO. Bank E pays cash to buy this CDO, rendering it a ‘funded’ CDO. Bank F pays a fee for exposure to the payment associated with the CDO’s performance, rendering it ‘unfunded’. This is a synthetic CDO written on CDS, written on a cash flow CDO, written on a RMBS, written on a mortgage. Hedge fund G then buys ten such

³⁶ See Teubner in this volume.

³⁷ J. Brassett, L. Rethel & M. Watson, “The Political Economy of the Subprime Crisis: The Economics, Politics and Ethics of Response”, (2010) 15 *New Political Economy*, p. 2.

³⁸ G. Thompson, “‘Financial Globalisation’ and the ‘Crisis’: A Critical Assessment and ‘What is to be Done’?”, (2010) 15 *New Political Economy*.

synthetic CDOs and re-engineers their tranches to create 30 further distinct synthetic CDOs. The spaghetti thickens.”³⁹

Thus, the spaghetti thickens globally, and globally also gives us the certainty that the state has saved us all from the total collapse of the financial system. Yet, what begins normatively can only be finished and re-started again normatively. The supranational fragmentation of the US housing bubble and the final reaction of the financial system when actualising the reflexive value “illiquidity” was the only cognitive strategy to cope with the risk of normative policies and the pressures of de-differentiation coming from the political system upon the financial structures. Illiquidity is, in this sense, a sort of *last warning* on the part of the financial operations to stop the game for a while and start the cognition over again. Politics can only observe this normatively by speaking of the “greed of Wall Street” and other semantic related issues such as the construction of “moral panic” that the crisis triggers on the public, and whose function lies in hiding its own political role in the problem, on the one hand, and in performing a positive public-setting for a new political normativisation of the post-crisis times, on the other. As stated by T. Sinclair:

“What is apparent in the moral panic is an initiative to discipline the agencies pursued by a regulatory state, using public shaming as a governance instrument, intent on improving performance [...] Governments need to show that they are taking responsibility.”⁴⁰

The normativisation comes back and starts all over again, namely, policy distortions and de-differentiation pressures upon the financial operations, as the political plan to save the Euro zone in 2010 makes clear:

“Finally, and perhaps most importantly, the European Central Bank went off and agreed exactly the thing that banks and politicians had been urging it to do, *i.e.*, start buying up government bonds on the financial markets. Where does that leave ECB independence? In a tricky place, not to mention the ECB’s central mission to fight inflation, which is in danger of being trumped by political demands from the national governments of the eurozone.”⁴¹

³⁹ Wigan, note 28 *supra*, pp. 118-9.

⁴⁰ T. Sinclair, “Round Up the Usual Suspects: Blame and the Subprime Crisis”, (2010) 15 *New Political Economy*, p. 102.

⁴¹ The Economist, “Europe’s 750 billion euro bazooka” (2010), available at: www.economist.com/blogs/charlemagne/2010/05/euro_crisis_2?page=3.

However, normative policy-making does not learn from its own mistakes. In other words, “policy-makers were too attached to the idea that the euro protects against all ills”.⁴² If this is the beginning of a new future world financial crisis, it is still an open question, but it becomes clear that normative policy-making cannot restrain itself from doing what *ought to be done*, and, in doing so, it overwrites the contingency of a cognitively driven financial system.

VI. CLOSE TO THE EDGE

A cognitively driven system is always close to the edge; it is always *at risk*, simply because risk means opportunities. The self-regulating structures of such a social system must deal with risks and not normatively reject them. In so far as a normative rejection of financial opportunities as well as a normative persistence in risky options may lead to a crisis of illiquidity, the system must provide itself with reflexive mechanisms to guide the internal drift of cognitive expectations by stabilising the balance between risk and opportunities. It must manage its own “*either-or*” model. External normative political-expectations only produce instability in this relationship by either normatively rejecting or promoting the (“*whether-or-not*” model) options that the system can only cognitively adjust by producing illiquidity. As a final warning, illiquidity prevents the system from falling into the abyss; it certainly produces a crisis, but the crisis itself becomes an opportunity to re-start the cognitive autopoiesis of liquidity before it is too late.

With regard to the regulatory structures of Basel II, H. Willke posits a major change in regulatory matters:

“[Basel II] creates a ‘supervisory review process’ that shifts from control to cooperation, from authoritative controlling to appreciative inquiry, from normative positioning to cognitive reasoning [...] The cognitive turn in supervision follows a deeply seeded and ongoing cognitive turn of the economy in general - from industrial economy to knowledge economy - and of the financial system in particular - from normatively regulated national capital markets to a knowledge-based global superstructure.”⁴³

⁴² *The Economist*, “After the Fall”, (2010), available at: www.economist.com/business-finance/displaystory.cfm?story_id=16167998&source=hptextfeature.

⁴³ Willke, note 20 *supra*, p. 162.

A cognitive turn means, on the one hand, that there is no possible predictability in risk calculations; that greater transparency and harder penalties do not cancel the risk or the contingency of financial operations. It follows from that, on the other hand, that the system must rely on its own reflexive mechanisms to cope with the “residual uncertainties” of its calculations.

With regard to this, G. Thompson argues for de-centralised responses in a model of “distributed preparedness to resilience”, in which regional - and even national - financial structures produce competing regulatory innovations to cope with uncertainties in a bottom-up manner initiating a period of mutual learning.⁴⁴ Central banks seem to have a great deal of significance in this strategy, but - as seen - even a regional central bank such as the ECB can surrender to the pressures of highly-fixed normative expectations. In a more innovative way, J. Best argues in favour of a shift from valuation techniques to non-statistical forms of risk assessment.⁴⁵ Stress-testing could be an alternative in this regard - by modelling future possibly catastrophic events, actors may decide how to respond effectively to them in the present. But, as Best notices, calls for a more sophisticated stress-testing were already made in the 1990s in the wake of the Asian crisis. Ten years later, it has become an issue again.

Be that as it may, in both cases, the immanent contingency of the system cannot be pushed aside. In a bottom-up model of distributed preparedness to resilience, a stronger political influence and complex regime-collisions are expected: safeguards against foreign investments, state protectionism against securitisation, normative-national public order against financial cognitivisation, national structures against supranational orders.⁴⁶ Stress-testing or more qualitative assessments, on their part, may reflect contingency in a more complex way, but they cannot establish future “necessities” or “impossibilities”, precisely because contingency rejects both values and has no major problem with living *close to the edge*. What is needed is a quantum leap “from a world in which uncertainties are ultimately

⁴⁴ Thompson, note 38 *supra*.

⁴⁵ J. Best, “The limits of financial Risk Management: Or What we didn’t learn from the Asian Crisis”, (2010) 15 *New Political Economy*.

⁴⁶ See, especially, A. Fischer-Lescano & G. Teubner, *Regime-Kollisionen*, (Frankfurt aM: Suhrkamp Verlag, 2006), and also P.F. Kjaer, “Three-dimensional Conflict of Laws in Europe”, (2009) in Zentrum für Europäische Rechtspolitik, ZERP-Diskussionspapier 2.

resolvable into carefully calculated risks into one in which ambiguity, interpretation and inter-subjectivity are recognised as inescapable”.⁴⁷

VII. THE ETHICS OF CONTINGENCY: THE COGNITIVISATION OF NORMATIVE EXPECTATIONS

Such a quantum leap calls for a novel interpretation of the relationship between normative and cognitive expectations. In a contingent world, normative expectations do not provide for any natural certainty in upcoming events. This is the reason why morality and religion have lost their central position in modern society, and it is also the reason why a political system has a conflictive relationship with other systems: it is hard for the political system to harmonise the production of normative world-views with the required learning-capacity to know how, when, and to what extent, goals must be altered, delayed or even discarded in order to protect the norm from dramatic disappointments. This is precisely what *did not* happen with the highly-fixed normative expectation of a “white picket fence”.

In contrast, systems such as science, technology, and the economy do not have this problem:

“[they] are currently based on a distinctively cognitive style of expectations.”⁴⁸

Since disappointments in these contexts are well-structured social situations, individuals can build up new expectations to protect their primary concerns both rapidly and safely - they may, for example, transfer the mortgage when it becomes a burden for the normative expectation of a better quality of life. But this is not possible when a persistent normativisation of a cognitive system takes place, as the case of the sub-prime mortgage crisis has shown. In dealing with a cognitive style of expectations, normative expectations must be able to learn from the world. This does not mean the abolition of norms, but it proves how important it is to adapt them reflexively in order to keep them in another form.

Thus, ethics as a reflexive theory of morality has a double function: a) it may contribute to the instantiation of normative expectations by offering alternative possibilities of realisation. This means that a cognitive openness of the norm to the contingency of the world has to be furthered. The primary concern of the norm can be protected by its cognitivisation against devastating disappointments; and b) it can also prevent the

⁴⁷ Best, note 45 *supra*, p. 42.

⁴⁸ Luhmann, note 4 *supra*, p. 72.

normativisation of cognitive expectations by limiting and regulating the consequences of morality and thus re-establishing the maximalisation of choice proper to cognitively-driven systems. Since moral norms tend to promote future necessities that *must be* factually, socially and temporarily instantiated, or since they aim to establish specific impossibilities which cannot be materialised at all, moral norms cancel the cognition of a contingent world and put themselves into a paradoxical situation: whether one holds the norm in spite of a clearly upcoming dramatic disappointment, or one abandons the norm and allows oneself to be swept away into an anomic situation. In this regard, ethics as a reflexive theory of morality avoids both extremes through a reflexively organised cognitive openness of the norm and the limitation of its pressures upon cognitive structures. Thus, it becomes what I want to call the *ethics of contingency*.

In its philosophical meaning, contingency has adopted many semantic forms.⁴⁹ Applied to sociological and anthropological matters, the world is contingent in so far as it is neither necessary nor impossible.⁵⁰ Contingency entails thus a double negation: the negation of necessity and the negation of impossibility. It is an *Eigen-value* of modern society;⁵¹ otherwise formulated: it is the inviolable level of modern society.

As an inviolable level of modern society, contingency has an in-built pre-disposition to defend itself from highly-fixed normative expectations. The moral structures of society seem to begin to understand this ultimate truth of functional differentiation as they morally react, in some cases, against a moralisation of systemic codes. In this context, a moralisation of systemic codes would mean:

“that the office holder is morally good, the simple citizen is morally bad; having low grades in school makes a morally bad pupil; having no property a bad citizen [...] Criticism in science or arts would turn into a moral battle. We see the temptation, but we also see that our society has to avoid such confusion of moral and other codes. [§]

⁴⁹ See, especially, H. Blumenberg, “Kontingenzt”, in: K. Galling (ed), *Die Religion in Geschichte und Gegenwart*, III. Band, (Tübingen: J.C.B. Mohr, 1959); see, also, F. Wetz, “Die Begriffe ‘Zufall’ und ‘Kontingenzt’”, in: G. Graevenitz & O. Marquard (eds), *Kontingenzt*, (Munich: Wilhelm Fink Verlag, 1998); M. Makropoulos, “Modernität als Kontingenztkultur. Konturen eines Konzepts”, in: G. Graevenitz & O. Marquard (eds), *Kontingenzt*, this note *supra*; H. Lübke, “Kontingenztzerfahrung and Kontingenztbewältigung”, in: G. Graevenitz & O. Marquard (eds), *Kontingenzt*, this note *supra*; O. Marquard, *Apologie des Zufälligen*, (Stuttgart: Reclam, 1986); *idem*, *Philosophie des Stattdessen*, (Stuttgart: Reclam, 2000); and *idem*, *Skepsis in der Moderne*, (Stuttgart: Reclam, 2007).

⁵⁰ O. Marquard, *Apologie des Zufälligen*, note 49 *supra*; N. Luhmann, *Beobachtungen der Moderne*, (Opladen: Westdeutscher Verlag, 1992).

⁵¹ Luhmann, *Beobachtungen der Moderne*, note 50 *supra*.

The most remarkable fact is that we would morally object to such a fusion of codes [...]. The moral itself accepts and even postulates this dissociation, this loss of sovereignty, this negative self-restraint as a condition of its autonomy.”⁵²

Only a cognitivisation of norms may lead to such negative self-restraint. Nonetheless, in modern society, this is not a generalised standard situation. With regard to the financial crisis, the persistent pressure of normative expectations upon a cognitively-driven systemic setting has seriously affected its own autonomous operation and has even blamed it for the crisis by attributing to it the moral stigma of the “greed of Wall Street”. In such cases, the ethics of contingency - as reflexive theory - become a kind of immune device of society to preserve the “*either-or*” model of a contingent world and keep things apart.

By offering alternatives for a reflexively organised cognitive openness of the norm and preventing a moralisation of systemic codes, the ethics of contingency entail the recognition of an undetermined and multi-layered diversity of partial *Eigen-values* in modern society, and it pre-supposes also the possibility of their recreation and disappearance. However, it presumes that no recreation of partial *Eigen-values* can take place for the sake of *necessity*, and no disappearance of any of them can be previously justified as an *impossibility*. If these conditions were accomplished, the conflict between *Eigen-values* might be regulated by a cognitive mode of producing co-ordination that enforces the contingency of the co-ordinated social constellation. Thus, the ethics of contingency promotes a sort of *modus vivendi*, whose “only moral pre-selection said to be ethically permissible is the pre-selection that guarantees the freedom of selection”.⁵³ The rest, we can say, is risk and uncertainty, and the same applies for both systems and individuals. While, in the case of the financial system, the risk is fragmented to create new opportunities by means of cognitively-constructed mechanisms, individuals have to deal with risks through the whole process of instantiation of their personal projects of social inclusion.⁵⁴ These projects are *normative* in the sense that individuals continuously seek for opportunities to instantiate their primary and secondary concerns despite the disappointments that they may confront in specific social situations; in turn, they are *cognitive* because individuals may reflexively adjust their primary and

⁵² N. Luhmann, “The Sociology of Moral and Ethics”, (1996) 11 *International Sociology*, p. 35.

⁵³ W. Rasch, “Immanent Systems, Transcendental Temptations, and the Limits of Ethics”, (1995) 30 *Cultural Critique*, p. 217.

⁵⁴ See, especially, M. Archer, *Realist Social Theory: The Morphogenetic Approach*, (Cambridge: Cambridge University Press, 1995); and *idem*, *Structure, Agency and the Internal Conversation*, (Cambridge: Cambridge University Press, 2003).

secondary concerns in disappointing social situations by adapting them to the structural enablement and the possibilities of social selectivity offered by symbolic media and functional systems. Personal projects of social inclusion are thus the cognitivised normative-expectations of individuals.

Thus, the normativisation of cognitive expectations entails more necessity and impossibility than an *Eigen-value* can process without becoming unstable as such. To this extent, the ethics of contingency are - on the one hand - a reflexive assessment of the systemic relationships among autopoietic systems which aim to prevent major de-differentiation problems which may certainly lead to a generalised societal crisis, and - on the other - a cognitive form to adapt normative expectations to the possibilities of the world, without losing the primary concerns that guide their individual life plans.

VIII. CONCLUSION

The rise of functional differentiation seems to lead to a major shift in the pre-dominant style of expectations in society. While, in segmentary, centre/periphery and stratified societies, the prevalent style of expectations is the normative form, in functionally-differentiated modern societies, cognitive expectations have acquired an increasing significance in diverse systems. Since normative expectations do not disappear from the modern world, but, instead, converge on specialised systems, such as religion and politics, and on specific communication fields, such as moral and values - while other systems, such as science and the economy, adopt a cognitive style of expectations - conflicts that confront normative aspirations with cognitive operations may arise among functionally-differentiated systems. The financial sub-prime crisis can be regarded as an example of such conflicts: the highly-fixed and normatively-driven political expectations of an “affordable home” for low-income clients de-differentiate the cognitive operations of the financial system and over-impose a normative construction upon cognitive procedures. This cancels the contingency of financial operations and triggers illiquidity.

It does not seem to be pointless that the ethics of contingency as a reflexive theory not only warns against the moralisation of systemic codes, but also against a normativisation of the immanent contingency of cognitively-driven operations and offer alternatives to a reflexively-organised cognitive openness of the norm. This means a reflexive observation and assessment of the problem of normativisation of cognitive expectations, because these de-differentiation pressures cancel the contingency of the world and turn cognitive decision-

making into an unfeasible undertaking. In this sense, contingency is not only a key element for the continuity of societal autopoiesis, but also a crucial motive to notify individuals that there is more than one form of instantiation for their life plans. If the ethics of contingency accomplish this, there would be no crises, at least, not for a while.

Section III.3

Constitutional Transformation

CHAPTER 13

THE FUTURE OF THE STATE

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I. WHAT IS A STATE?

I.1. THE SEMANTICS OF STATEHOOD: TERRITORIAL SOVEREIGNTY

The modern state was not established in 1648. In most parts of Central Europe, the year 1649 was not marked by a political structure that was discernibly different from that of 1647. In fact, throughout the territories of the Holy Roman Empire, which were most strongly affected by the Peace of Westphalia, in 1649, no institutions recognisable as sovereign states existed: except, debatably, the Empire itself, whose power – it is now commonly suggested – had suddenly been replaced by a number of sovereign territorial states. In fact, with the qualified exception of England, in 1649, no society in Europe was centred around a state-like institution possessing a full monopoly of power. In 1649, in most parts of Europe, political power was constructed and applied through overlaid jurisdictions, in which supreme territorial authority (as far as it existed) was balanced by, and interwoven with, local, seigneurial and other semi-private powers. Most regents lacked even the most rudimentary insignia of statehood such as territorial control, fiscal and jurisdictional supremacy, and independent statutory authority. In the sphere of legal enforcement, in particular, few states had capacities that equipped them to apply judicial power equally across all the territories that they incorporated, and states were still constitutionally prevented by their struggle for primacy with bearers of patrimonial judicial competence from using power in evenly concentrated legal forms.¹ Despite this, however, it might be observed that the period following 1648 began, very tentatively, to put flesh on the idea that a state was an aggregate of institutions that could assume a monopoly, or at least a high density, of political authority in one distinct region. Few states seriously realised the implications of this concept of the

¹ To support this, see S. Kettering, *Judicial Politics and Urban Revolt in Seventeenth-Century France. The Parlement of Aix*, (Princeton NJ: Princeton University Press, 1978), p. 336.

state until much later than 1648. However, after 1648, political actors began gradually (and rather haphazardly) to stabilise their power above seigneurial authorities, to apply this power generally across one geographical terrain, and to assert the right to include all agents situated in a particular territory within their power. The key innovation in this period, therefore, was that political power began to explain itself through reference to the principle of *territorial sovereignty*, and the projective idea of the state as a sovereign actor in one region began to create a horizon in which power could be inclusively extended across increasingly unified and extensive societies.

It is habitually assumed, from a contemporary perspective, that the concept of statehood as territorial sovereignty was first devised to consolidate the form of the state against external forces. It is, therefore, widely argued that the early idea of territorial sovereignty coincided with the intensification of an exclusionary/international dimension in politics: that is, that states claimed sovereignty to defend and assert themselves against other states. In fact, however, the converse is the case. The territorialisation of political power was, in the first instance, a process in which power was linked (or projected itself as being linked) to one place and to one geographically-localised group of institutional actors in order to reduce the privatistic transaction of political power within a particular society, which typified the political dimensions of feudalism: that is, to prevent the alienation of lands, cross-boundary ownership of land, indiscriminate fusion of private and public resources, and the private seigneurial disposition over political goods. In this respect, the principle of statehood as territorial sovereignty was inextricably bound to the articulation of power as a resource that was detached from private or particular status or control, that was abstractly constructed as applicable to an entire society, and that effectively included society and all its members in relatively uniform positive fashion. The consistent fusion of territory and statehood, in other words, was an expression of a formatively underlying process of *political inclusion* within European society.² In this process, power broke through the super-imposed private/public forms of later feudalism, and it identified *territory* as the primary unit of socio-political inclusion.

² On the beginnings of this inclusionary process, see the classic study, G. von Below, *Die landständische Verfassung von Jülich und Berg bis zum Jahre 1511. Eine verfassungsgeschichtliche Studie*, in 2 parts (Düsseldorf: Voss, 1885). On the post-1648 context, see J. Kunisch, "Staatsbildung als Gesetzgebungsproblem. Zum Verfassungscharakter frühneuzeitlicher Sukzessionsordnungen", in: D Willoweit (ed), *Gesetzgebung als Faktor der Staatsentwicklung*, (Berlin: Duncker & Humblot, 1984), pp. 63-8.

Upon this basis, the notion of the state as a repository of territorial sovereignty can be seen as the first conceptual or semantic block which, with substantial regional distinctions, made possible a generalisation of power as an inclusively usable resource in European societies. That is to say, by accounting for itself as attached to the bearers of territorial sovereignty, power was able to effect a partial de-privatisation (or *de-patrimonialisation*) of its foundations, and, in imagining itself as *belonging* to a particular region, it was able to perceive itself as inclusively authorised across wide societal variations of status, rank, patronage, influence, and *time*. The longer aftermath of 1648, in consequence, saw an increased veto on the transfer of domains from one house to another, it saw the establishment of fixed patterns for the cross-generational transmission of power, and - above all - it gave rise to a process in which intermediary or corporate organs employing quasi-political power were reduced in importance, so that members of society gradually entered a more even, independently determined and temporally consistent relation to power. This process of inclusionary state-building took a long time, and it was not concluded (if at all) until the Nineteenth century. Yet, the idea of statehood as territorial sovereignty can be tied to this process of political inclusion, and this concept assumed the societal function that it gradually and pre-formatively contributed to the emergence of power as a differentiated and inclusionary facility in European societies.

I.2. THE SEMANTICS OF STATEHOOD: NATIONAL SOVEREIGNTY

In most parts of Europe, it was only in the Eighteenth century that states began to assume a dominant status in the exercise of jurisdictional power in particular societies. The realisation of this condition was extremely fitful, and, throughout this *époque* power remained counter-balanced by the vested jurisdictional powers of potent private actors (mainly in the nobility, but also in guilds and other social *corps*). As a result, far into later early modernity, political power was normally only applied at a low level of generality and inclusivity, and actors seeking to utilise such power were forced endlessly to negotiate with local or intra-societal bearers of influence. Even the most centralised – or, to use the widespread parlance, the most “absolutistic” – states of the *ancien régime* did not exist as institutions that remotely approached (in a Weberian sense) a monopoly of power, and the controversy over the centration of judicial and fiscal authority between state executives and private/corporate bodies remained the key source of structural/constitutional tension within European states.³

³ On this account, Weber’s ideal type of the state as an administrative institution containing a “monopoly of

In France, for example, it was only in 1788 that the Bourbon monarch obtained (or, more exactly, tried – unsuccessfully, therein expediting the revolution – to obtain) a unitary court and a centralised judicial order.⁴ In Prussia, the common legal code [*Landrecht*] of 1794 was based in a complex strategy of compromise and equilibration between regents and nobility,⁵ and it did not eliminate private control of the law.⁶ The construction of integral states, however, experienced its most dramatic impetus in the revolutions that began in the 1760s and 1770s in the British colonies in America and in the late 1780s in France. Crucially, these events conjoined diversely to form a state-building laboratory, in which, in France, in particular, the defining structural predicaments of governmental “absolutism” – that is, the inability of regents to dislocate power from private *milieux* and patrimonial offices and to transmit power evenly through society – were (temporarily) overcome through the advent of constitutional rule. The revolutionary establishment of constitutional rule in the late Eighteenth century exponentially accelerated the tendency towards the centralisation of political power that had been initiated, but not completed, under absolutistic regimes. In fact, the constitutions founded in the revolutionary era substantially heightened the abstracted generality and the positive inclusivity of the reserves of power stored in society, and they translated political power into a differentiated form that could be more simply and iterably circulated across the highly variable societal terrains now incorporated in European societies.⁷ Moreover, by virtue of the fact that constitutions enabled states to convert power

legitimate physical coercion” never existed. See M. Weber, *Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie*, 5th edition, edited by J. Winckelmann, (Tübingen: J.C.B. Mohr, 1921), p. 29.

⁴ J. Egret, *La pré-révolution française, (1787-1788)*, (Paris: Presses Universitaires de France, 1962), pp. 270-5; D.A. Bell, *Lawyers and Citizens. The Making of a Political Elite in Old Regime France*, (Oxford: Oxford University Press, 1994) 181. Generally, see J.A. Carey, *Judicial Reform in France before the Revolution of 1789*, (Cambridge MA: Harvard University Press, 1981). See, also, the excellent recent account of patrimonial justice and its ultimate obstruction of unitary statehood in France, in: J. Krynen, *L'état de justice. France, XIII-XX siècle. L'idéologie de la magistrature ancienne*, (Paris: Gallimard, 2009), pp. 265-266.

⁵ See R. Koselleck, *Preußen zwischen Reform und Revolution. Allgemeines Landrecht, Verwaltung und soziale Bewegung von 1791 bis 1848*, 2nd edition (Stuttgart: Klett-Cotta, 1977), p. 24; G. Birtsch, “Die preußische Sozialverfassung im Spiegel des Allgemeinen Landrechts für den preußischen Staat von 1794”, in: J. Wolff (ed), *Das Preußische Allgemeine Landrecht. Politische, rechtliche und soziale Wechsel- und Fortwirkungen*, (Heidelberg: Müller, 1995), pp. 133-148, at 145.

⁶ The drafters of the *Landrecht* accepted the legitimacy of patrimonial courts as representing a “competence of the noble landowner”, and they acknowledged that not all power could be concentrated in the state. See C.G. Svarez, *Gesammelte Schriften*, edited by P. Krause, in 6 vols., (Stuttgart: Frommann-Holzboog, 2000), 4/1, p. 69.

⁷ To support the account of the French Revolution as a state-reinforcing event, see R. Brubaker, *Citizenship and Nationhood in France and Germany*, (Cambridge MA: Harvard University Press, 1992), p. 49; C.H. Church, *Revolution and Red Tape. The French Ministerial Bureaucracy 1770-1850*, (Oxford: Clarendon Press, 1981), p. 110.

into a relatively generalised and abstracted form, they also made it possible for states to fortify their boundaries against other societal actors, and to cement a firm distinction between political power and private sources of influence. To this end, in particular, the constitutions of this time developed the formula of *national sovereignty*, often coupled with the principle of citizenship, in order to account for the sources of statehood, and the idea of statehood, as produced by a sovereign nation which had deeply consolidated the abstractive and generally inclusionary tendencies shaping European societies.⁸

The principles of national sovereignty and citizenship that became prevalent after the 1790s were concepts that brought manifold benefits – largely of a pre-emptive nature – to the emergent form of modern society, and most especially to the volume of political power contained in modern society. In particular, the concept of statehood, as national sovereignty allowed emergent states to offer an *ex-nihilo* account of their origin and authority. Moreover, as they began to refer to themselves as authorised by highly-abstracted social subjects or *collective singulars* (that is, by the pluralistic nation in the form of the solitary sovereign), they were able to apply their power throughout society at a greatly heightened level of positive and inclusive autonomy. The reference to national sovereignty had particular importance in uncertain and highly-contingent periods of transition such as in the American states in the 1770s and the 1780s. However, in the European setting, this reference permitted states to construct their power as conclusively distinct from particular bearers of seigneurial privilege, and the idea of power as a collectively-produced commodity dramatically increased the unifocal concentration of power - as inclusive power - within the state. In both settings, in fact, the definition of statehood as an expression of national sovereignty or citizenship had the distinctive significance that it established within the state a circular relation between the state itself and the bearers or addressees of the state's power, and it made it possible for increasingly centralised and abstracted states to reflect themselves as applying power to diverse social agents in a form that these agents might observe as *their own power*. This circular formula created a spontaneously-enlarged reserve of inclusive power within the state: it meant that the state was able to account for itself as factually identical with its subjects, that it could validate itself by internalising a highly-abstracted, generalised and socially

⁸ For example, Article 2 of the Mecklenburgh Resolutions stated: "That we do hereby declare ourselves a free and independent people; are, and of right ought to be a sovereign and self-governing association, under the control of no power, other than that of our God and the General Government of the Congress: To the maintainance of which Independence we solemnly pledge to each other our mutual co-operation, our Lives, our Fortunes, and our most Sacred Honor."

impervious source, which it could use to accompany and simplify all applications of its power, and thus that, in its circular inclusivity, it could authorise itself exclusively to incorporate and to utilise *all power* in a society. The concept of statehood as national sovereignty, in sum, offered a formula that dramatically increased both the inclusionary and the monopolistic dimensions of state power, and this enabled power to internalise and, positively or recursively, to re-iterate the grounds of its validity. This, in turn, meant that factual bearers of power obtained a series of practical/functional advantages: in particular, it meant that political actors were able to disconnect resources of power from highly-specified persons (including from regents themselves), to apply power as indifferent to locality or to the socio-structural determinacy of single agents, to rotate persons factually applying power, and so, for all these reasons, to obtain sharply-intensified flexibility in the statutory transmission of power through society. In all these respects, the construct of statehood as national sovereignty gave rise to a pronounced increase in the mass of abstracted and usable power stored in states, and it enunciated an inclusionary formula that finally extracted society's power from the diffusely privatistic fabric of society under late feudalism: often (rather absurdly) called absolutism.

On these grounds, it can be observed that the ideas of statehood as *territorial sovereignty* and *national sovereignty* developed successively as two components of a conceptual reservoir – or even of a conceptual memory – in European society, which greatly facilitated the abstracted circulation of political power throughout society as a whole. These principles might, in fact, be identified at once as the functional and normative pre-conditions of the emergent political self-construction of modern European societies, and they allowed different societies to obtain supplies of power that could be transplanted across societal divides and used iterably across distinctions of place, structure, and time. If we identify modern societies as being characterised at once by their growing differentiation and inclusivity, therefore, power was formed as being adequate to these societal features by virtue of the fact that it internalised and derived legitimacy from these two conjoined concepts, both of which converged around and distilled the idea of the modern state.

I.3. THE SEMANTICS OF STATEHOOD: CONSTITUTIONAL RIGHTS

In addition to this, it is notable that the process of political formation in the later part of early modernity also began to forge a connection between concepts of statehood as territorial and national sovereignty and the concept of *subjective personal rights*. The idea of rights was not new at this time. This concept already had a long and diverse history: it was evident, first, in

the medieval concepts of chartered privilege and immunity; second, in the Roman-law concept of equity; third, in the increasingly dominant principle of freely contracted obligation which characterises the private law of early capitalism; and, fourth, in the doctrines of natural law promoted through the Seventeenth and Eighteenth centuries. However, the constitutional documents of the Eighteenth century greatly increased both the simplicity and the societal prominence of these principles by promoting the concept of subjective/personal rights as a primary source of statehood. It needs to be noted here that the idea of rights was not an exclusively-political construction at this time. Other areas of social practice, most notably the economy, but also the sciences, publishing, science and education, also began to produce rights to cover and stabilise their exchanges. In the economy, for example, this involved the assignation of rights to sustain and guarantee contracts, investment, and lending, and to solidify relations of ownership more generally.⁹ In publishing, this entailed the progressive assertion of rights against censorship, serving to securitise free flows of information. In the sciences and education, this was evident in the increasing assumption that scientific assertions did not require endless double-coding in relation to political authority, and that educational qualifications could be autonomously transacted, in relative indifference to personal chains of influence. It was in the political arena, nonetheless, that, in the later decades of early modernity, the semantic of rights acquired the greatest societal significance. In this functional setting, the articulation of rights as a dominant societal principle meant that states were increasingly able to insist that power was entrusted to them as the protectors of rights (that is, that the state was formed by a common desire for possession of rights),¹⁰ that states began to account for their power as at once deduced from, and applied to, persons (or citizens) as *rights-holders*, and that states obtained from rights an internal conceptual apparatus in which they could render their use of power positively meaningful and normatively inclusive for all social agents.

Vitaly, the construction of statehood as a simultaneous pooling and protected re-allocation of rights began to assume a functional status analogous to that of earlier or related concepts of legitimacy, and, like other such concepts, it acted rapidly to augment the volume of power contained in the state and made disposable for society, and it heightened the level of

⁹ For the classic study of this, see P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, (Oxford: Oxford University Press, 1979), p. 87.

¹⁰ J. Locke, *Two Treatises of Government*, (Cambridge: Cambridge University Press, 1960); T. Paine, *Rights of Man*, (London: Penguin, 1985).

positive generality, iterability and inclusivity at which power could be circulated. This was the case for a number of reasons. First, as they learned to refer to their power as being founded in subjective/personal rights, states were able to account for themselves as monopolistically legitimised by rights: that is, as possessing, through rights, *all legitimate power* in society. Second, in explaining power as derived from rights, states were able to use rights to differentiate political power from other sources of authority: that is, they could clearly select the persons to whom power had to be assigned, they could mark out some persons as categorically entitled to use power, and they could generally simplify the transaction and rotation of power through the state. Third, as states enshrined rights in regular laws, rights enabled states to construct clear and articulated procedures in which to unify their judicial systems and reproducibly to include those subject to law and power. This allowed states to confer regularity on their external societal boundaries, and to limit the private acquisition of public power through the courts: the unremitting war fought by states against the re-patrimonialisation of their power was only (to a large degree) concluded when states began to apply power to persons constructed as bearers of general/subjective rights. This is exemplified by the emphatic prohibition of private or patrimonial courts that had a prominent place in most post-1789 constitutions.¹¹ Fourth, rights contained in states allowed power to define, and then to preserve an image of, itself as applicable to simply and iterably

¹¹ Note the famous law of early August 1789, in which the French National Assembly decided to abolish the residues of feudalism, and to declare illegitimate the seigneurial powers preserved by the nobility: especially those rights concerning tax exemptions and patrimonial jurisdiction. The French Revolution as a whole revolved around an intense hostility to external judicial power. The first report on the judiciary in the Constituent Assembly (1790) concluded that the “ancient judicial institutions” had eroded the power of the state by promoting “privileged procedures” and a corrosive “esprit de corps” (H. Carré, *La fin des parlements*, (Paris: Hachette, 1912), p. 201. One of the first victims of the revolution, in consequence, was the “idea of an independent judiciary, charged with guarding fundamental laws”, (Bell, *Lawyers and Citizens*, note 4 *supra*, p. 189). This suppression of private courts was still more prominent in other constitutions founded in the wake of 1789-91. One example of this was the constitution of Bavaria of 1808 (never fully enforced). For comments, see H.-U. Wehler, *Deutsche Gesellschaftsgeschichte*, vol. I: *Vom Feudalismus des Alten Reiches bis zur Defensiven Modernisierung der Reformära 1700-1815*, (Munich: Beck, 1987), pp. 381-82; L. Doberl, “Maximilian von Montgelas und sein Prinzip der Staatssouveränität beim Neubau des Reiches Bayern”, in: H.H. Hofmann (ed), *Die Entstehung des modernen souveränen Staates*, (Cologne: Kiepenheuer und Witsch, 1967), pp. 273-292; *idem*, *Adelige Herrschaft und souveräner Staat. Studien über Staat und Gesellschaft in Franken und Bayern im 18. und 19. Jahrhundert*, (Munich: Kommission für Bayerische Landesgeschichte, 1962), p. 285. As late as 1848, the prohibition of private courts and the termination of patrimonial justice remained an important component of the German constitutional endeavour. Given the Frankfurt provenance of this volume, it is also worth noting Section 6, Art. 10 of the *Paulskirche* constitution. Generally, see S. Werthmann, *Vom Ende der Patrimonialgerichtsbarkeit. Ein Beitrag zur deutschen Justizgeschichte des 19. Jahrhunderts*, (Frankfurt aM: Klostermann, 1995); M. Wienfort, *Patrimonialgerichte in Preussen. Ländliche Gesellschaft und bürgerliches Recht 1770-1848/49*, (Göttingen: Vandenhoeck und Ruprecht, 2001). On the similar functions of the Cadiz constitution of 1812 in Spain, see F.J. Hernández Montalabán, *La abolición de los señoríos en España 1811-1837*, (Madrid: Biblioteca Nuova, 1999), p. 12; S. de Moxó, *La disolución de régimen señorial en España*, (Madrid: Consejo superior de investigaciones científicas, 1965), p. 114, 124 & 156.

constructed social agents: this greatly increased the ease with which states were able to pre-empt the conditions of the application of power, and so predictably to structure the circulation of power across society's regional, structural and temporal variations. In this respect, rights allowed states to imagine themselves as the bearers of power confronted with, and surrounded by, a very uniform societal environment, and the application of power to agents situated in this environment was rendered simple, routinised, and even, increasingly, subliminal. This greatly facilitated the iterable use of power across societies in a condition of rapid geographical, functional and temporal expansion. Fifth, rights also brought the inestimable advantage for states that they eliminated huge swathes of social responsibility from power, and they ensured that (except in exceptions) many questions of societal importance were permanently located outside the purview of political power. Sixth, then, in organising a system of controlled inclusion in the state, rights also brought the functional benefit that states could easily obtain consented access to vital material resources – especially to taxes. Rights were of fundamental importance in allowing states to raise taxes: they allowed states to demonstrate societal agreement and consent, they made it possible for states to borrow in good faith, and they enabled states to construct regionally-overarching fiscal systems.¹² Notably, in most European societies, the establishment of uniform judicial orders coincided with the establishment of comparably uniform fiscal systems. In each respect, the principle of rights as a primary source of statehood and legitimacy played the most deeply revolutionary role in consolidating the abstraction of power, its uniformity, and the facility of its societal circulation. Rights, thus, came to overlay territorial sovereignty and national sovereignty as core articulations of statehood, and the threefold semantic/conceptual nexus between territorial sovereignty, national sovereignty and constitutional rights generated an ideal *corpus* that allowed societies to use their power in a delineated and inclusionary fashion.

To summarise this argument, therefore, we can observe that, through the course of their elaboration, rights evolved as formative elements within political power: they both dramatically augmented the positive and inclusionary capacities of political power, and they allowed states to resolve the crisis potentials (*i.e.*, potentials for re-privatisation, fiscal shortfall, judicial irregularity, and general low political intensity) that had characterised “absolutism”. For this reason, the entire normative analysis of rights, which accounts for

¹² See M. Dincecco, “Fiscal Centralization, Limited Government and Public Revenues in Europe, 1650-1913”, (2009) 69 *Journal of Economic History*, pp. 52-53.

rights as part of a set of moral or deductive checks imposed externally on power,¹³ is sociologically mis-constructed. In fact, rights originally evolved *inside power* – as the internal/reflexive pre-condition of modern power’s inclusionary dimensions. Rights evolved, not as institutions that imposed moral obligations on the positive form of power, but as institutions that rapidly increased the volume of positive power in society, and that implanted, in power, a reflexive instrument from which it could at once sensibilise and project positive accounts of itself to simplify its application. For instance, the rather crude, earlier-modern ideas of natural law, although habitually seen as standing against the positivity of power and constructing moral limits to constrain the use of power, acted to generate power as an easily-circulated social resource, which was supported by iterable and internally-accessible self-examinations, and which could be used and explained in many diverse and complex social terrains.¹⁴ The subsequent advent of a formal/constitutional rights regime in European societies after 1789, then, brought the positive/inclusionary formation of political power towards a conclusion, and the Eighteenth-century constitutional revolutions shaped power into a form that was internally occluded against structural variations and could be simply and multiply irrigated throughout society as a whole.

Most importantly, however, it also needs to be observed that the formation of rights as dominant elements in the *inclusionary* grammar of statehood also, at the same time, performed an intrinsic *exclusionary* function for political power. Whilst the dual ideas of sovereignty (territorial and national) had helped political power to consolidate and articulate its *inclusivity*, rights, as examined, furthered this process. Yet, from the earliest stages of their formation, rights contained important counter-flowing and even dialectical implications. Whilst augmenting the iterable inclusivity of power, rights also allowed the nascent political

¹³ Classically, see Locke, *Two Treatises of Government*, note 10 *supra*. For the primary analysis of rights as “rights against the state” in more recent theory, see R. Dworkin, *Taking Rights Seriously*, (London: Duckworth, 1977), p. 149. For further recent advocacy of rights as institutions for protecting individual persons as distinct from power, see N. Bobbio, *The Age of Rights*, translated by A. Cameron, (Cambridge: Polity Press, 1996), p. 90.

¹⁴ This is the reason for the habitual connection between the rise of natural-law theory and the construction of central states. The prevalence of natural-law ideas was notable in societies requiring accounts of easily transmissible power. Hobbes might be viewed as the classical example of a theorist for whom natural law and positive law are not fully divisible, and for whom natural law in fact actively serves the positivisation of law. However, Svarez might also help us to illustrate this point. Svarez insisted that national positive law had to be founded in principles of natural right and personal autonomy (See G. Oestreich, *Geschichte der Menschenrechte und Grundfreiheiten im Umriß*, (Berlin: Duncker & Humblot, 1968), p. 55. However, he applied principles of natural law as institutions for enforcing political centralization, and for bringing private actors under the “highest territorial jurisdiction”: C.G. Svarez, *Gesammelte Schriften*, 4/1, note 6 *supra*, p. 69.

system to control and supervise the peripheries of power, and they ensured that many societal exchanges (and persons) were *excluded* from power. Indeed, it is observable that, in the revolutionary era, most rights specifically constructed social agents and social exchanges as only *exceptionally* in need of political power, they defined most activities in society as irrelevant for power, and they precisely specified both the moments and the procedures in which power was to be applied through society. In some respects, in fact, rights reproduced, at a general subjective and uniformly inclusive level, the functions of immunities in medieval societies, and they facilitated the transmission of power and underscored its legitimacy by offering a clear definition of those spaces to which power was *not* applicable. In doing this, rights printed an exclusionary reflexivity on power, and they ensured that power remained a functionally-specialised societal resource. Moreover, even more importantly, rights performed the additional function that – in dialectical fashion – they restricted power against the conceptual categories of its own inclusivity, and they made sure that the claims of power to obtain legitimacy through inclusion were diluted and counter-acted by parallel processes of exclusion. The outcome of this, most particularly, was that societies generating inclusive legitimacy for their power by asserting national sovereignty and citizenship as the foundations of statehood were able to utilise rights to manufacture filters within their political system in order to supervise, proportion and curtail the dimensions of their sovereign inclusivity: if construed as obtaining sovereign power through the inclusion of persons *qua* rights-holders, states could calibrate exactly how they integrated the factual sources of their power, they could distinguish and specify those social exchanges and those personal demands that needed to be incorporated (*politicised*) in the political system, and they were able to legitimise themselves through claims to popular-sovereign inclusivity whilst, in fact, ensuring that the factual members of the sovereign body were, as rights-holders, not actually or immediately inside the structure of power. This idea was clearly expressed in Emmanuel Sieyès's unused drafts for the Thermidorean constitution (1795), and it was later expanded by Benjamin Constant.¹⁵ Both these theorists tried to show that rights could be used by states in order at once to include factual persons in, and to exclude factual persons from, the societal exercise of sovereign political power, and to ensure that the sovereign inclusive legitimacy of power did not depend on its concrete identity with all the social agents from which it derived

¹⁵ Sieyès's views on the need for a legal "guardian" for the constitution are reprinted in Appendix 4 in: M. Troper, M. *Terminer la révolution. La constitution de 1795*, (Paris: Fayard, 2006), pp. 523-539. See, also, B. Constant, *Fragments d'un ouvrage abandonné sur la possibilité d'une constitution républicaine dans un grand pays*, (Paris: Aubier, 1991), p. 401.

legitimacy.¹⁶ This idea also appeared, tentatively, yet crucially, in the Judiciary Act of 1789 in the USA,¹⁷ and in the theoretical arguments that supported it.¹⁸ In both cases, it was the coalescence of rights and national sovereignty that created the dynamic that allowed modern states and modern power to evolve: the fusion of these concepts enabled states to operate and obtain legitimacy as actors which were positively inclusive and expansively sovereign, yet which were also able to avoid structural interlocking with other parts of society, capable of distilling their operations around a pre-selected number of functions, and – vitally – equipped to *de-politicise* certain social themes and their reactions to these themes.

The semantic fusion of sovereignty and rights might be seen as the dialectical centre of the modern state and of modern society more widely. On the one hand, these concepts allowed the state to consolidate a distinct sphere of political power and to employ political power as an abstracted and inclusive resource. Yet, these concepts also allowed the state restrictively to preserve and to delineate a functional realm of political power, and to diminish the political relevance of most social themes, most exchanges, and most social agents. The emergence of modern society as a whole as a disaggregated body of exchanges, included in certain specific respects within power and law, yet also separated out from, and selectively counter-posed to, the institutional bearers of power and law, was induced by this dialectical finesse – this relation between sovereignty and rights – which underlies the historical formation of modern political power.

II. THE HISTORICAL PARADOX OF THE MODERN STATE

The perspective urged here suggests that the basic structural vocabulary through which we examine power, states, and the legitimacy of power, has conventionally been marked by a highly – indeed excessively – literalistic perspective. What we take to be objective descriptions of institutional realities, analytical or normative accounts of desirable or undesirable patterns of political/structural formation, or even the necessary pre-conditions for

¹⁶ For an alternative account of the dialectic between *souveraineté-principe* and *souveraineté-exercice*, see the outstanding analysis in: P. Rosanvallon, *La Démocratie inachevée. Histoire de la souveraineté du peuple en France*, (Paris: Gallimard, 2000), p. 20. For further highly illuminating analysis of this key problem in French history, see M. Gauchet, *La Révolution des pouvoirs. La souveraineté, le peuple et la Représentation 1787-1799*, (Paris: Gallimard, 1995), p. 152.

¹⁷ On subsequent early ideas of judicial review, see D.P. Currie, *The Constitution in the Supreme Court*, in: 2 vols. (Chicago IL: Chicago University Press, 1985), vol I, p. 55 & 70.

¹⁸ Alexander Hamilton, a leading advocate of judicial review, saw the power of rights in courts as a means for ensuring that the “delegation of the government” could be restricted “to a small number of citizens”: J. Madison, A. Hamilton & J. Jay, *The Federalist Papers*, (London: Penguin, 1987), p. 126.

the justifiable use of power, are, in fact, functional self-articulations within the medium of the power of society. These conform to, and intensify the processes of, the inclusionary and exclusionary elaboration that characterise the evolution of *modern power*: that is, of power as a resource for structuring collective environments that can be effectively utilised in a pluralistic and differentiated society.¹⁹ The conceptual paradigm of modern statehood, in fact, emerged as a theoretical sensibility *within power*, which at once externally controlled the inclusivity of power externally, and internally adapted power to the need for an adequately abstracted and pluralistically attuned process of societal politicisation.

If we accept this view, however, we can also identify two deep-set paradoxes in the formation of the modern state. In the first instance, we might observe – historically – that the semantic/conceptual grammar of statehood that marked the inception of political modernity in Europe and the USA was only able to find limited purchase in societal reality, and, in fact, it projected models of abstracted inclusionary politicality to which these societies were unable to adapt. The pre-emptive dimensions of the political concepts supporting early statehood looked far beyond the realities to which they factually referred, and they constructed power at a degree of inclusivity to which societies of the Eighteenth and Nineteenth centuries were not sustainably adjusted. It was, in fact, only in the early decades of Twentieth-century Europe that, owing to the escalating fiscal requirements triggered by the costs of modern warfare, the inclusionary features of modern statehood were conclusively established, and that states obtained the characteristics of monopolistic political jurisdiction that their anticipatory conceptual structure had articulated for them. 1914, not 1789, was thus the great historical *caesura* in the process of inclusionary state construction. It was only in this year that states truly began to incorporate largely uniform societies, that they came to apply power in relative indifference to status and socio-structural distinction across their societies, and that they used instruments of approximately even and equal legal/political inclusion to maintain their operative foundations. If the established form of modern society is quintessentially defined by the fact that all social actors have an immediate and (in principle) even relation to state power, that laws are, in the final instance, equally and similarly backed by state power, and that power contains reproducible or iterable methods of inclusion and mobilisation to support itself, this only became a factual condition in Europe in the course of

¹⁹ Here, I am strongly indebted to the brilliant essay by J. Clam, “What is modern power?”, in: M. King & C. Thornhill (eds), *Luhmann on Law and Politics. Critical Appraisals and Applications*, (Oxford: Hart Publishing, 2006), p. 152.

World War I. It was only at this time that state power was effectively mobilised throughout modern societies and that all persons entered a relatively immediate and uniform relation to power.

The reality of European statehood after 1914, however, gave rise to what we might diagnose as the primary paradox at the centre of modern power, and it is in reference to this that, in the first instance, we need to examine and envision the future of statehood. This paradox resides in the fact that exactly at that point (that is, after 1914) where political institutions finally crystallised the characteristics of modern statehood that had been imagined and pre-figured through their earlier semantic/conceptual structure, they immediately proved incapable of sustaining these characteristics: they were not able to hold together the mass of power allocated to them as monopolistic societal actors. In the wake of 1914, as states assumed dominant and evenly inclusionary status in European society, they were immediately forced to extend and enlarge their functions beyond all precedent or anticipation, and, owing to the conditions of warfare, they were directly compelled to internalise responsibilities for tasks that had traditionally fallen well outside the conventional sphere of state power. These responsibilities included, in particular, the responsibilities for controlling wartime industrial production, for regulating labour conditions, for channelling investment, for placating rivals in economic conflict, for mobilising civilian populations, and for administering, consonantly, vast civil-service bureaucracies. In order to fulfil these functions further, states were immediately obliged to co-opt a whole array of private actors into their structure, and they began frenetically to pass laws to widen the periphery between the public and the private arena, to devolve key political functions to private organisations, and to secure support from private actors for the fulfilment of the objectives that had been accorded to them. Examples of such legislation included Lloyd George's *Munitions Act* in Britain and similar acts of labour-market regulation in Italy.²⁰ A more extreme case of this was the *Auxiliary Service Law* [*Hilfsdienstgesetz*] in the last years of Imperial Germany, which at once militarised parts of the civilian population and co-opted both trade unions and industrial

²⁰ See J.H. Horne, *Labour at War. France and Britain 1914-1918*, (Oxford: Clarendon Press, 1991), p. 15, 208, & 219; D. Broadie, *A History of British Labour Law 1867-1945*, (Oxford: Hart Publishing, 2003), pp. 119-121. For important contemporary commentary on the Munitions Act and its coercive content, see C.H. Northcott, "The Organization of Labour in War Time in Great Britain", (1917) 32 *Political Science Quarterly*, p. 213. On Italy, see L. Tomassini & C. Frost, "Industrial Mobilization and the Labour Market in Italy during the First World War", (1991) 16 *Social History*, pp. 59-87; R. Vivarelli, *Storia delle origini del fascismo. L'Italia dalla grande guerra alla marcia su Roma*, in: 2 vols (Bologna: Mulino, 1991), vol I, p. 429.

associations into a trilateral corporate-bargaining system that underpinned governmental order in the last years of the war.²¹ A still more striking example of such legislation was the *Military-Economic Enabling Law* passed in Austria in 1917 [*Kriegswirtschaftliches Ermächtigungsgesetz*],²² which performed similar functions in even more coercive style. Important elements of these laws, born in the exceptional conditions of World War I, persisted beyond the armistice and abidingly set the political/constitutional form of interwar European societies.

The most important and far-reaching consequence of the expansionary re-configuration of statehood in the wake of 1914, however, was that it meant that states never became the institutions whose reality had been defined and semantically pre-imagined in the classical vocabulary of statehood. In fact, precisely at the moment at which they entered a condition of full public/political inclusion, they immediately suffered a partial reversal to a semi-privatistic pattern of political organisation. Or, expressed in slightly different terms – the moment (1914) at which European states finally assumed a fully centric *territorial* and *national* monopoly of power was also the moment at which they relinquished, necessarily and as a result of the same process, the *functional* monopoly of power. In fact, as mentioned, like earlier “absolutistic” polities, most states responded to their assumption of political primacy in society in World War I by beginning, once again, to shore up their power by delegating many functions to informally-organised bodies and corporate actors, which migrated uncertainly across the state/society or public/private boundary, and the consummation of European state-building thus coincided with a rapid widening of the state’s societal boundaries and an incipient re-corporation of society as a whole. It is also notable in this respect that, at the precise moment when states assumed equally centric territorial/national control, they also re-configured their use of rights, and they reacted to their rapidly-altering objectives and need for societal support by changing the functions that they imputed to rights. At this juncture, rights began to be used as politically-augmentative institutions of *material*

²¹ See G. Bender, “Vom Hilfsdienstgesetz zum Betriebsrätegesetz. Zur rechtlichen Regulierung des industriellen Verhandlungssystems zwischen Reform und Revolution (1916-1920)”, in: H. Mohnhaupt (ed) *Ius Commune*, Sonderheft 37: *Revolution, Restauration. Formen der Veränderung von Recht und Gesellschaft*, (Frankfurt aM: Klostermann, 1988), p. 200. See Weber’s related commentary on wartime collectivisation, in: M. Weber, “Der Sozialismus”, in: *idem*, *Gesammelte Aufsätze zur Soziologie und Sozialpolitik*, 2nd edition (Tübingen: J.C.B. Mohr, 1988), pp. 492-518.

²² See G.D. Hasiba, *Das Notverordnungsrecht in Österreich (1848-1917). Notwendigkeit und Mißbrauch eines “Staatserhaltenden Instrumentes”*, (Vienna: Verlag der österreichischen Akademie der Wissenschaften, 1985), pp. 157-163.

inclusion, and the expansion of state functions was correlated with an escalating extension of the inclusionary objectives imputed to rights.²³ The great catastrophes of European statehood in the course of the Twentieth century, then, can be observed against this background. The catastrophic “totalitarianism” of the 1920s and 1930s, most specifically, emerged as a condition of statehood in which, in order to control and include national societies, political power guaranteed high levels of autonomy to particular actors both within and outside the party apparatus, it renounced the pretence of sovereign territorial control, it relinquished its facilities of inclusionary self-diminution through rights, and it allowed states (selectively at least) to dissolve back into a neo-patrimonial functional form.²⁴

The catastrophe of modern statehood, in consequence, is that, in their initial self-construction as fully-inclusionary centres of political power, states produced an inflated and over-centric semantic form for themselves, which they were not able to realise. As they factually approximated to this paradoxical form in the course of World War I, states were forced immediately to re-privatise the factual organs that they used for applying power. The simultaneous reality of unmanageable political centrality and quasi-feudal structural/political weakness that defined many states of interwar Europe was the reality assumed by states as they catastrophically failed to realise their inner semantic apparatus.

In consequence of this, the modern vocabulary of statehood can be observed as revolving around the paradox that it describes, projects and pre-emptively constructs a condition of statehood as an inclusive public order which, despite its reflexive utility, is, in the final analysis, always impossible and *unreal*. In articulating power as a highly inclusionary resource, concepts of statehood have projected a condition for power that maps very uneasily onto, and, in fact, widely fractures in the face of, any existent sociological reality. If we concur that the established definition of the state implies that modern statehood describes a set of institutions which combine territorial sovereignty, integrated national-sovereignty, and a uniform fabric of rights in order to include all society in political power, a

²³ See my analysis of this, in: C. Thornhill, “Towards a Historical Sociology of Constitutional Legitimacy”, (2008) 37 *Theory and Society*, pp. 161-197.

²⁴ This is clearly a controversial view: it is more habitual to see fascism, not as a destruction, but as a dramatic *over-potential* of statehood. My claim, though, is that, in each fascist system in Europe, power was sustained by the co-opting of particular interest groups into the state periphery and by the acceptance of high levels of freedom amongst ministerial or regional actors operating under merely partial party-systemic control. See my analysis of this, in: C. Thornhill, *A Sociology of Constitutions. Constitutions and State Legitimacy in Historical-Sociological Perspective*, (Cambridge: Cambridge University Press, 2011 forthcoming).

state of this kind – we can boldly assert – has *never existed*: it never came into being. Indeed, although a theoretical construction of the state has allowed the addressees of state power to imagine the state as a relatively uniform set of institutions, we can observe, first, that this construction is a semantic fiction, and, second, that this semantic has placed paradoxically impossible burdens on political power. The catastrophe of the modern state, in short, is a more paradoxical and deeper lying catastrophe than we normally assume: the catastrophe of the modern state is that it does not exist, that it has been dreadfully overburdened by its own paradoxical form, and that, in consequence, it collapsed precisely as it came into life. Analysis of statehood, for this reason, is always analysis of *post-catastrophic* statehood, and inquiry into statehood is necessarily an inquiry into states as catastrophically other than their semantic pre-imagination. In fact, the assumption that contemporary states are distinctively afflicted by a particular catastrophe marks a failure to observe that the state is always in a crisis, that the condition of modern statehood is always a societal reaction to the impossibly inclusive paradox of the state.

III. THE CONCEPTUAL PARADOX OF THE MODERN STATE

This first paradox of the state discloses a second paradox at the centre of modern statehood. If we accept that the basic principles of statehood underlying modern political reflection have a semantic function and create a body of references in which power might be utilised, it is also observable that the functional reality of political power is always distinct from its internal institutional or descriptive forms: the semantic (either institutional or theoretical) construction of power always exists in a dialectical disjuncture with the quality of power as a specific societal resource. Indeed, it might be concluded that the factual congruence between power and its semantic (institutional or normative) constructions is necessarily partial, and that there always exists both a dialectical tension and a paradoxical displacement between power and the concepts and institutions in which it is vested, or which claim to monopolise it (*i.e.*, states). In particular, we might observe that the institutions and descriptions forming or constructing power are at once paradoxically internal and external to power: that is, these institutions and reflections provide forms of attribution and inclusion for power, but they are never identical with power, and power uses them to simplify itself – dialectically – as both unified with, and distinct from, these forms. The institutional and conceptual forms of power thus take themselves to be external and objectively valid descriptions of power and its legitimacy. Yet, they are, in fact, internal articulations within power, of which power avails

itself, but in relation to which power also retains a functional and morphological independence.

Crucially, therefore, this paradox means that, when we examine the state, we need to make a distinction between power and the state, and we need to perceive the state, and the constructions of legitimacy that are attached to it, as reflexive elements within power. These elements are correlated with power at particular junctures in its inclusionary formation, but they are not homologous with power. To comprehend the state, in other words, we need to place the primary analytical focus, not on the state, but on *power* itself: on power as a social facility that has only a semantic/functional coincidence with states. In so doing, then, we need to observe ways in which power has paradoxically utilised the state and referred to principles of statehood and legitimacy to secure its inclusive circulation through society: that is, we need to examine the structure of statehood as both functionally and reflexively interlaced with the evolution of power, and we need to understand both the institutional forms of statehood and concepts of state legitimacy as at once remembering, re-articulating and also pre-emptively structuring the social articulation of power. In this respect, as above, analysis of statehood needs to examine the state as invariably other to its paradoxical form, it needs to account for the state, not as a distinct institution, but as a reflex of power, and it needs to appreciate the state, in double paradox, as a construct that has acted both inclusively to simplify power, but also to produce deeply perturbing resonances for power. This change of paradigm allows us to offer a more adequate analysis of power, statehood and legitimacy in modern society, and it allows us to side-step the literalistic *aporia* and simplistic pre-constructions arising from the reserves of meaning which have become historically attached to states. More importantly, though, it is only through this change of paradigm that we are able to approach the question of the state's future accurately. To analyse the future of the state, we need to determine whether any, and, if so, which, semantically-embedded elements of statehood might assume relevance for the future circulation of power, and we need to consider whether some aspects of statehood have performed institutional and semantic functions that cannot be revived (*i.e.*, whose inclusionary status is exhausted) in contemporary societal-settings. In the first instance, in consequence, the analysis of the future of the state must step outside the presumptive homology of power and the state, and it must concentrate on analysing the future of power: we can only observe the future of the state by examining the state as paradoxically attached to the future of power.

To proceed with this, it is necessary, first, to assess the basic semantic elements of statehood both in the light of their internal contingency and of their functional utility or adequacy for constructing the societal inclusivity of power. This, then, makes it possible to imagine the future of the state.

III.1. TERRITORIAL SOVEREIGNTY

In the first instance, we can observe that the idea of statehood as territorial sovereignty contains a necessarily superseded pattern for the inclusion of power, and, from its inception, it contains the sources of its own redundancy. On one level, this concept allowed power to dislocate itself from highly regional actors and to concentrate itself as abstracted from particular subjects. Yet, it also reflected an inclusionary intelligence within power, through which power necessarily constructed itself as politically specialised and as including distinctively *political* social themes beyond sectoral and temporal boundaries in society. The construction of power as the power of territorial states, therefore, could only ever express an interim stage in the differentiated abstraction of power, and the functions of this concept in allowing power to overarch socio-sectoral fissures necessarily formed power as an even and increasingly extensible resource, whose inclusivity would eventually reach beyond national/geographical limits.

III.2. NATIONAL SOVEREIGNTY

The same argument might be made, with some reservations, about the conceptual construction of statehood as national sovereignty. At one level, it is demonstrable that certain functional dimensions of this concept persist. For example, we might observe that power still transplants itself effectively across societies through processes of local or practical inclusion, and it creates viable terrains for its application through the active integration of its addressees in the form of citizens. Moreover, it is clearly the case that some original advantages accruing to political power through its attachment to the concept of national sovereignty are still in evidence. These include the fact that institutions bearing power rely on the rotation of the people factually implementing power, and the conceptual pre-condition that power is authorised by abstract subjects – or collective persons – that cannot be conflated with natural persons still provides vital support for the flexible use of power. However, it is rather absurd to argue that nationally or even physically localised processes of participatory inclusion provide a factual basis of legitimacy for power, or that all political power authorises its inclusion of social agents because it is constructed by an aggregated national-sovereign or spatial-sovereign will. This was never the case. The sovereign will was always a fictionalised

point of attribution, possessing a certain degree of semantic utility. Now, the utility of this concept is very strained, and states rarely sustain the use of power through justifications articulated through singular concepts of sovereignty.

III.3. RIGHTS

In the third element of the classical semantics of statehood, however, we encounter a different constellation. Indeed, it is clear that the functions of rights in respect of the construction and circulation of power have substantially increased in importance through the refined development of modern societies. At both an institutional and at a normative level, the idea of the state as founded in rights has accompanied the formation and transformation of political power even after the relative redundancy of other political/theoretical constructs, and the construction of power around the allocation of rights remains functionally pervasive and essential. In fact, it might be suggested that rights form an enduringly dominant semantic in the emergence of political power in modern society, and that modern power continues both internally and externally to rely on rights.

IV. RIGHTS AND POST-CATASTROPHIC POLITICS

As argued above, the first emergence of the idea of statehood as a condition of governance through rights meant that states obtained a facility for hardening their boundaries, and for supervising their functions of inclusion and exclusion. In their inclusionary dimensions, as discussed, rights have historically allowed power to project from within itself stable conditions for its application and attribution. Further, rights have also assumed a vital *de-politicising* function: throughout the formation of modern society, they have acted to pre-select social themes internalised within the state, they have demarcated a sphere of relatively apolitical operative liberty around the state, they have delineated much of society as not eminently or as only exceptionally political, they have simplified and pre-constructed the environments to which power has been applied, and they have allowed power to dilute and dialectically to police the implications of its other internal concepts. It has also been noted above that, in the earlier Twentieth century, rights underwent a fatal inflation, which both facilitated the opening of European states to structurally parasitic private/corporate interests and produced a temporary catastrophic implosion and fragmentation of statehood. However, in the stages of political construction, which have given the dominant emphasis to contemporary societies, the more restrictive and dialectical functions of rights have acquired the highest degree of functional salience. Rights, in fact, have contributed in diverse and decisive fashion both to the institutional order and to the semantic/legitimatory reserves of

statehood and power in modern societies, and, in many respects, they have created a terrain for the use of power which has allowed states to evolve in a distinctive and sustainable post-catastrophic form. At one level, rights have made it possible for societies to adapt to their experience of the unsustainable paradoxicality of simple or societally-centred statehood, and they have allowed societies to re-design political power in the light of the paradoxical catastrophe of their inherited political semantics. In particular, rights have evolved as re-inforced institutions in modern societies because they have enabled these societies adaptively to reflect the fact that power cannot be monopolistically condensed in states, and that power requires composite, multi-centric and complex political forms for its sensible inclusion. Yet, at the same time, whilst reflecting the impossibility of social convergence around power, rights have helped to articulate power at a new and more reflexively controlled level of abstraction and functional distinction, and, above all, they have acted to help societies to preserve a distinct political structure by evading any re-patrimonialisation of their stores of political power. Most vitally, in short, rights have allowed modern societies to maintain reserves of inclusive power in the face of their two defining political challenges, both of which result from the catastrophic paradox of the state: that is, they have allowed societies inclusively to utilise power in the face of the threat of excessive political centrality and, also, in the face of the (very closely-related – or perhaps identical) threat of privatistic loss or the re-convergence of political power. The political consequence of this, then, is that rights have produced a reality in which the paradoxical homology of power and states is broken, in which states act merely as one amongst a number of institutions supporting the inclusionary application of power, and in which rights construct, and facilitate the application of, power in highly multi-centric societal structures.

These functions of rights for modern power can be viewed in a number of different institutional processes as we shall see.

IV.1. CONSTITUTIONAL COURTS

The amplified significance of rights in the structural formation of modern polities and modern power initially became evident in aftermath of World War II, and, at this time, subjective rights began concretely to cast the political form of contemporary society in a variety of ways. In particular, first, some societies of this period saw the emergence of a distinctive constitutional order, foreshadowed by Hans Kelsen in 1919/20, in which constitutional courts, acting as the custodians of rights, served both to preside over, and to insulate states through periods of normatively uncertain post-authoritarian democratic

transition. During this time, constitutional courts and their role in respect of rights-based statutory review performed a number of vital functions for emergent democratic or clearly post-catastrophic states, most notably for Italy and the Federal Republic of Germany. Constitutional courts, for instance, applied rights to generate trust for states in conditions in which confidence in regular judiciaries was low,²⁵ they produced reserves of legitimacy for states that had weak traditions of parliamentary stability and discipline, and whose place in society was strongly contested, and the rights-determined control of legislation performed by courts set normative foundations that facilitated the uncontroversial introduction of new, positive statutes and the repeal of old laws.²⁶ Furthermore, in removing issues of high controversy from state executives, constitutional courts alleviated states of excessive requirements for legitimacy, and their provision of rights-based rulings allowed states to limit the intensity of their political functions. Moreover, constitutional courts promoted rights to create a focus of legitimising normative identity within the state, which meant that states experienced a decrease in the extent to which they personalised political power, and, because of this, states obtained heightened flexibility in their reserves of power as they were regularly able to rotate power between government and opposition. In addition, constitutional courts also clarified the unitary statutory order of different states as they performed functions of bolt-tightening between central states and regional powers: this acted to suppress the corporate and regional rights that had previously enabled private access to public power and led to the re-particularisation of state power in the interwar era.²⁷

In each of these respects, the emergence of a governmental system in which states were flanked and supported, and in which they even accepted their potential overruling, by constitutional courts applying rights-based constitutional review provided a defining template for the formation of political systems after the catastrophes of interwar Europe. In each respect, rights served – once again – to trace out sustainable lines of inclusion and intersection between states and other spheres of society, and they stabilised the political

²⁵ See J. Ferejohn, “Judicializing Politics, Politicizing law”, (2002) 65 *Law and Contemporary Problems*, pp. 55-57.

²⁶ M.L. Volcansek, “Political Power and Judicial Review in Italy”, (1994) 26 *Comparative Political Studies*, p. 495; M.E. de Franciscis & R. Zannini, “Judicial Policy-Making in Italy: The Constitutional Court”, (1992) 15 *West European Politics*, pp. 73-4.

²⁷ D.G. Farrelly & S.H. Chan, “Italy’s Constitutional Court: Procedural Aspects”, (1957) 6 *The American Journal of Comparative Law*, p. 316; T. Cole, “The West German Federal Constitutional Court: An Evaluation after Six Years” (1958) 20 *The Journal of Politics* 280; P.M. Blair, *Federalism and Judicial Review in West Germany*, (Oxford: Clarendon Press, 1981), p. 112.

system both against possible re-subsidence into functionally-interlocked relationships with other social systems and against the assignation of power to private actors. This dramatically re-inforced the differentiation of state power, and, in allowing states to devolve legislative scrutiny to relatively apolitical bodies, it obviated the haphazard politicisation of both state and society, which had characterised the interwar years. In consequence, the functions of *intensified political abstraction and displacement* that constitutional courts offered to states meant that, throughout the later Twentieth century, the model of rights-based constitutional review became a widespread element of political inclusion. This was clear in the later transitions in Portugal, Spain, Eastern Europe and many countries in South America.²⁸ Indeed, by the 1980s, and certainly by the 1990s, the construction of power as self-restricted by constitutional review meant that power could itself circulate as a facility which was easily adapted to internationalised societies, and which obtained immediate legitimacy by referring to international patterns of legal ruling and interpretation.²⁹ Judicial rights thus pervasively contributed to the formation of multi-national or many-tiered models of statehood, in which power was detached from its convergence around single states and subject to territorially indifferent processes of legal refinement and self-checking.

IV.2. UNIVERSAL STANDARDS OF HUMAN RIGHTS

Similar arguments can be made about the (closely-related) process in which common standards on rights were established and implemented in many post-1945 European societies: for example, through, first, the European Convention on Human Rights and, decades later, the Helsinki Accords. In creating an implicit supra-national order of legal norms, these agreements produced an overarching legitimacy matrix to which states could refer in order to borrow support for their statutory processes, and to strengthen their most essential positive functions against external encroachment or unbearable politicisation. In particular, in proposing a framework in which states could obtain external and politically withdrawn

²⁸ Portugal is especially important and illuminating in this respect. The first democratic constitution in post-authoritarian Portugal (1976) left some powers of judicial veto and appeal in the hands of the military (that is, in the Council of Revolution). It was only in the constitutional revisions of 1981-82 that the functions of de-controversialisation attached to constitutional courts became clear. For expert analysis, see Pedro Magalhães, *The Limits to Judicialization: Legislative Politics and Constitutional Review in the Iberian Democracies*, (PhD Dissertation, Ohio State University, 2003, available at: http://etd.ohiolink.edu/view.cgi?acc_num=osu1046117531). See, also, Walter C. Opello, Jr, "The Transition to Democracy and the Constitutional Settlement as Causes of Political Instability in Post-Authoritarian Portugal", (1990) 27 *Luso-Brazilian Review*, pp. 77-94.

²⁹ This view is now synonymous with the work of Anne-Marie Slaughter. See, by way of example, A.-M. Slaughter, "A Global Community of Courts", (2003) 44 *Harvard International Law Journal*, pp. 191-219.

criteria for interpreting and ratifying legislation, these international standards allowed states to shake off the burden or expectation of full sovereignty or societal centrality, and they enabled states inclusively to pass legislation without being forced to generate and defend reserves of legitimacy for every single decision or every single statute. In addition, it is important to note that, in Eastern Europe before and after 1989, international conventions regarding rights, and the construct of a transnational legal domain articulated in these conventions,³⁰ also played an indispensable role in allowing states to perceive their power as a societally-differentiated and institutionally-specific resource, and to imagine themselves as constitutionally distinct from singular persons and singular parties. In this setting, as early as the late 1970s, a strong prejudice in favour of rights began in some countries, notably Poland, to reduce the expectation that power should be amorphously applied through society, to restrict power to defined functions of state, pervasively to de-couple political power from its integrity with deeply interlocked political parties, and so to increase and to underwrite the reserves of positive flexibility in political power.³¹ Owing to the emergence of a growing international legal domain, in fact, some Warsaw Pact states also began to obtain constitutional courts in the early 1980s, and this ultimately cleared the terrain for an internal differentiation of power within states (*i.e.*, a power/party split), and it generally proved conducive to a more flexible construction of state power in the late 1980s.³² Eventually, during the period of constitutional reform in the later 1980s and 1990s, the rights-based powers of constitutional review vested in courts played a profoundly revolutionary role, and, in laying down expectations in respect of rights, they created a simplified and normatively insulated route towards a societal order marked by a more differentiated pattern of political construction. In this respect again, moreover, power also necessarily began to construct itself as internationally uniform, and the generality of legitimating norms used to articulate and to accompany power meant that state power could be applied in a form that remained (more or less) unresponsive to previously embedded geographical boundaries. This function of rights thus also coincided with, and intensified, a suspension of territorial constraints on power, and

³⁰ J. Kurczewski, "Transformation as Emancipation", unpublished paper, pp. 8-12.

³¹ M.F. Brzezinski, *The Struggle for Constitutionalism in Poland*, (Basingstoke: Palgrave, 1998), p. 138.

³² H. Schwartz, "Eastern Europe's Constitutional Courts", (1998) 9 *Journal of Democracy*, p. 103; R. Procházka, *Mission Accomplished. On Founding Adjudication in Central Europe*, (Budapest: Central European University Press, 2002), p. 38; H. Schwartz, *The Struggle for Justice in post-Communist Europe*, (Chicago IL: University of Chicago Press, 2000), p. 56; M.F. Brzezinski & L. Garlicki, "Judicial Review in Post-Communist Poland: The Emergence of a *Rechtsstaat*?" (1995) 31 *Stanford Journal of International Law*, p. 30.

it marked an incipient construction of multi-leveled, multi-national political orders, in which the power of singular state actors was balanced and proportioned nationally in overarching judicial centres.

IV.3. INCREASED RIGHTS FOR PRIVATE INDIVIDUALS

This functional increment of rights within state institutions also found a parallel and an extension in the increased recognition of subjective personal rights through most European and other Western societies. One dominant feature of contemporary society is the construction of the person as (notionally) entitled to lay juridical claim to multiple rights, and this has led to a proliferation of singular rights attached to distinct points of agency in society. At one level, this process has dramatically extended the inclusionary quality of statehood and power: it has had the consequence that all persons are diversely recognised under law, it has reduced embedded variations in the application of power, and it has rendered power sensitive to highly singular structural distinctions and variable legal claims in society. In addition, though, this process also means that less and less *factual singularity* needs to be included in the law, that power can adjust and limit its own sensibility to social distinctions or to particular exchanges and refer even to the most personalised controversies to easily routinised judicial procedures, and that, in sanctioning specific exchanges as covered by rights, power can ensure that these exchanges (and the controversies attached to them) are largely preserved as external to the political system. In each of these dimensions, therefore, the dramatic increase in singular rights has acted to produce functionally-legitimizing resources for political power, it has substantially simplified the circulation of power through society, and it has again re-drawn the societal boundaries of the political system. Both within and outside the state, therefore, modern societies are deeply structured by a twofold “rights revolution” – that is, by a revolutionary expansion of justiciable rights and by a revolutionary expansion of the singular rights accessible in society or even in “civil society”.³³ In the first instance, however, both these revolutions are adaptive revolutions *within the form of power*: in conjunction with one another, these rights revolutions trace and pre-structure conditions for the sensibilised and highly abstracted transmission of power through society, and they counter-vail the convergence of society around avoidable emphatic applications of power and legitimacy.

³³ C.R. Epp, *The Rights Revolution. Lawyers, Activists, and Supreme Courts in Comparative Perspective*, (Chicago IL: University Chicago Press, 1998); S. Walker, *The Rights Revolution. Rights and Community in Modern America*, (New York: Oxford University Press, 1998).

IV.4. SYSTEMIC RIGHTS

As a most recent innovation, we can also observe that modern societies have a tendency to produce rights in a further dimension, and that, in the contemporary world, rights are now commonly formed across the boundaries between the political arena and other spheres of social exchange, and that they assume an intensified objective autonomy outside the (narrowly constructed) political system. As a result of this, actors in different social sub-systems are routinely acknowledged both as the *claimants over* and as the *producers of* rights, and the exchanges conducted in different sub-systems, extending across national-geographical boundaries, are now both formative of rights and formative of the constraints placed on political power. Gunther Teubner has provided important examples of this: his analysis of the growing horizontal power of particular rights, originating in extra-political spheres of social exchange (most notably in medicine), to impose obligations both on governmental regimes and on private actors is at the forefront of this inquiry.³⁴ In addition, though, the case of Google in China might also be mentioned as a very illuminating (albeit still unresolved) recent example of this process: in this case, claims over rights generated in media and commerce began to assume both horizontally and vertically powers of political obligation and construction. Upon this basis, if we borrow a metaphor (although not a comprehensive historical narrative) from T.H. Marshall, we might observe that modern societies have developed rights in successively incremental layers, and, in addition to the earlier sediments of procedural rights, civil rights, and political rights, we can currently discern a thickening of *systemic rights* in society. That is to say, we can now observe a process in which rights are formed that are embedded and articulated in societal sub-systems and capable of demanding implementation through diverse (both formally judicial and more spontaneous) processes, but that they are not eminently attached to, or brought into force by, any unifocal source of personal/political authority. Most particularly, though, we can observe that, in the particular conjuncture of contemporary society, these rights again act as inner articulations of power. These rights, like earlier rights, form a further structure of intra- and inter-societal self-restriction for power, and they at once objectivise the probable boundaries for the application of power, solidify new procedures for power's inclusionary transmission, and protect the wider political acentricity of society as a whole. Moreover, to a greater extent even than earlier rights and norms derived from rights, these systemic rights ensure that

³⁴ See G. Teubner, "The Anonymous Matrix: Human Rights Violations By 'Private' Transnational Actors" (2006) 69 *Modern Law Review*. p. 328.

power is constructed as (to a large degree) geographically indifferent, and that its functions of inclusion are only marginally attentive to particular places or particular personal distinctions. In this respect, too, therefore, rights have accompanied and re-inforced the formation of power as international power, and they have acted both to secondarise regionally-centred states as primary political actors and to promote the acceptance of internationally diffuse states as factually adequate repositories of power.

Several points can be made concerning the multi-layered functions of rights in contemporary society. First, we can observe that, if rights performed the initial function for modern societies, that is, they underwrote their overarching differentiation, they obviated a migration of all societal themes towards the political system, and they allowed power to emerge and to be circulated as an abstracted, positive and, in tendency, *de-politicised* resource – these functions still accrue to rights, and they have, in fact, been intensified through recent societal formation. It has become fundamental to the balanced fabric of modern societies that societies transmit power through the ultra-sensitive multi-faceted self-checking of power through rights. Second, if we can suggest that modern societies have tended to elaborate their resources of power by adopting patterns of reflexive inclusion and exclusion in order to police their societal boundaries, and that rights have acted to check the over-inclusionary aspects of other semantics which are formative of power, then rights retain primary importance as the institutions that facilitate this. Third, if modern societies are marked by reserves of power that tend inevitably to require application both at a level of heightened uniformity and generality and at a level of pluralistic selectivity, rights also retain substantial importance in this dimension.

This analysis of rights allows us to make certain general observations about the *conjuncture of power* in contemporary society, and we can conclude that the existing reality of power (and thus also of statehood) is marked by a threefold, structurally constitutive rights-regime in society. Modern societies are likely to apply power as an adequate inclusionary resource if they administer its circulation through the following institutions: (1) through judicialised rights within single-state and international constitutions, usually applied by courts with powers of constitutional review;³⁵ (2) through a plurality of personal/singular

³⁵ This has become the case even in states that have no written constitution. Not much more than a decade ago, Britain was viewed as “an especially inhospitable site” for judicially enshrined rights (See Epp, note 33 *supra*, p. 131). On changes on English statutory procedures resulting from the Human Rights Act, however, see K.D. Ewing, “The Human Rights Act and Parliamentary Democracy”, (1999) 79 *Modern Law Review*,

rights in society, both at national and at international level; (3) through the *de facto* acceptance by single states and international states of systemic rights that emerge in different spheres of global exchange. In each of these dimensions, the construction of rights is likely to detach power from single centres of sovereign authority, and it inevitably creates nationally disarticulated and interlocking constructions of statehood, involving both national and international ministries, courts and regulators, which act simultaneously both to restrict and to apply power. The emergence of internationally-structured statehood is an inevitable corollary of the political functions that are always implicit in rights. Rights, thus, are the institutions through which contemporary societies manage their complex politicality, through which they counter-vail their tendencies towards inter-systemic convergence and centrality, and through which they hold their mass of political power at an endurable level of inclusivity and exclusivity. Above all, these are institutions that have grown throughout society as a result of the catastrophe (or the non-occurrence) of statehood in early Twentieth-century Europe, and they have facilitated the inclusive circulation of power without either re-fusing political power with private authority or reducing the whole of society to unsustainable centration around the state. As such, rights hold the power of society in its only currently conceivable condition of inclusivity: in a non-privatistic multi-centric displacement. It is only where rights define, pre-form and multiply power that a societal condition with political/structural features recognisable as “statehood” might persist. In other words, it is only where rights exercise *exclusionary* force to balance and protect power against its own original *inclusionary* paradox (statehood) that a residual (and necessarily diffuse) form of statehood might persist.

V. THE FUTURE OF POWER

This creates a framework in which we can approach the question of the state and its future. In each respect, the question of the state’s future needs to be posed as a question concerning the *future of power*.

In the first instance, it can be assumed that the future of states is likely to become precarious if political actors erode the more nuanced resources that power has obtained through its formative semantic self-constructions, and if, in so doing, they negate the constructs that have facilitated the differentiated inclusionary circulation of the power of society. Above all, the future of the state is likely to become unsettled if the state again begins to lend credence to the paradox of its own conclusive homology with power. This is

most likely to happen through *violations of rights*, in their different dimensions: that is, if actions which transmit power threaten to unstitch the fabric of rights in society, which has evolved through the differentiation of power and which now supports the application of power. Under conditions of protracted rights violation, political actors are likely to encounter protracted functional crisis and incorrigible loss of legitimacy.

In this respect, we can imagine some scenarios in which precarious statehood might be caused by political actors themselves: that is, in which such events have evidently *political causes*. One imaginable instance of this might arise if political actors begin to move power across society in a manner that is controversially indifferent to rights: that is, if power is rendered insensitive to the judicial rights (in courts), to the singular rights (of persons), or to the systemic rights (of medial exchanges), through which power normally differentiates itself and accompanies its diffusion. There is no certainty that this need *necessarily* produces a dramatic deterioration in the state or its legitimacy. Yet the *de-sensibilisation* of power to its societal rights fabric might easily create pre-conditions for a deep crisis of the state. In such a setting, the political system might be forced to impose power throughout society through highly personalised and localised coercion, and it might be forced to maintain multiple channels of direct communication and coercion between itself and otherwise private spaces in society. In consequence, power might lose the functions of dispersal and de-centration which it obtains through rights, and it might be forced dramatically to intensify itself around particular decisions and prerogatives, thus generating manifold resistance and the further requirement for obdurate force at different societal levels. More generally, under such circumstances, a singular society might be brought into unmanageable convergence around political power, and, as a result, power might be expected to hold an excess of exchanges at a heightened level of controversy or political volatility. In extreme cases of such socio-structural simplification through the violation of rights, power might even be forced to express, justify and underwrite itself in religious, aesthetic, or scientific disputes, and, in so doing, to compel a large number of properly distinct and erratically incubated controversies to migrate into its own structure. The inclusionary alleviation accruing to power through rights would thus, under such conditions, be badly eroded or even suspended, and it is difficult to imagine how, in a modern society, state power could be applied in this manner for a longer period of time. The state would, in all probability, be rapidly required to rectify its procedures for reflecting rights.

A variant on this example of state crisis might be a case in which political actors proclaim monistic and highly-exclusionary definitions of legitimacy to support the use of power. In such cases, there is always the likelihood that political actors will construct power as an amorphous facility, which, in Schmittian style, insinuates itself into all social exchanges and imagines all social exchanges as implicated in the production and circulation of power, and that they will observe the plurality of rights in society as an intrusion on, or hostile fragmentation of, the power of the state. If this occurs, a singular society might again be required to mobilise power in an emphatic form that brings all society into convergence around power, that constructs each use of power as a moment of dramatic or even *total* societal self-confrontation, and that results in a fatal reduction of the finely-calibrated structures (rights) that facilitate the use of power. A further variant on this case might be a situation in which political actors colonise other spheres of society – let us say, science, religion, or the economy – in order to borrow or re-inforce concepts of legitimacy, and in which they propose their legitimacy in terms that either control, or accept, extreme influence from, external functional exchanges. Such situations are either likely to lead to a degradation of the rights attached to exchanges in other social functions, or, in defining particular scientific, religious or economic objectives as the pre-conditions of legitimate power, they are likely to lead to an erosion of political rights and to a subordination of political rights to fundamentally external directives and imperatives. If this occurs, first, a situation might easily arise in which the borrowing of political legitimacy from other spheres creates malfunctions in these spheres. Moreover, it might create a situation in which political actors begin systematically to co-opt other societal agents for the formation and transmission of power, and in which they soften the perimeters of the political system in order to sustain, circulate and legitimise political power throughout society. This might easily lead to an excessive distribution of power, or even to unmanageable contests over power within local or sectorially specific spheres of exchange. In addition, this might also mean that the political system will become precariously sensitive to changes in the systems from which it borrows legitimacy, and so vulnerable to external de-stabilisation. Most importantly, this is always likely to threaten society with a process of effective re-corporation, and it might mean that power, itself, is forced to transmit through very personalised patterns of interlocking agreement and distribution, and thus that it forfeits the internally positivised and inclusionary form upon which modern society relies.

A further case of state crisis through rights violation might be envisioned at a more systemic level. That is to say, a crisis of state might occur if a single state organises its legal form so as to prove obdurate against systemic rights or to obstruct the articulation of rights through international function systems. A state of this kind might be forced to re-nationalise its power, to concentrate its resources on geographically-limited or even nationally-limited processes of inclusion, to mobilise resources in order to block the legally-formative force of transnational communications, and even to assert a high degree of political control over judicial procedures.³⁶ To some degree, this remains a constant latent pre-condition of all statehood, and, in some settings, states might acquire a temporary boost of *anti-systemic legitimacy* by pursuing policies of this kind. However, states intent on such policies are required to preserve a high volume of programmatic intensity in their use of power, and to hold many exchanges in society at a very high level of politicisation. This might ultimately require a change within the rights structure in the state itself, and it might necessitate an increasing deployment of rights as objective sources of integration. Overall, although sustainable in some settings, this is unlikely to constitute an enduring form for the contemporary circulation of power. States promoting such strategies are likely, over longer periods of time, to suffer from over-reach, to internalise too many societal problems, to destroy the simplified forms of the transmission of power, and – most damagingly – to rely on private or even neo-patrimonial support through society to enforce political decisions. Even in ultra-modern societies, the danger of a re-patrimonialisation of state power is never fully absent, and the *inflationary simplification* of state power through the obliteration of rights can still easily lead to the effective privatisation of power.³⁷

In addition, however, we might suggest that a crisis of state or even a loss of legitimacy in political power might also occur for *societal reasons*: that is, for reasons originating outside the political system. This might, for instance, be the case if exchanges in one social sphere begin to cause distortion throughout society as a whole, if a society is

³⁶ Some people suggest that this is the case in contemporary Venezuela. See A.R. Brewer-Carías, “Judicial Review in Venezuela”, (2006-7) 45 *Duquesne Law Review*, p. 463; *idem*, “Principle of Separation of Powers and authoritarian Government in Venezuela”, (2009) 47 *Duquesne Law Review*, p. 818. Whether this view is believable or not is open to debate.

³⁷ We can find salient examples of this in pre-1970s Spain and Portugal. See R. Gunther, *Public Policy in a No-Party State. Spanish Planning and Budgeting in the Twilight of the Franquist Era*, (Berkeley CA: University of California Press, 1980), p. 259. For a similar point about Portugal, see P.C. Schmitter, “Liberation by Golpe: Retrospective Thoughts on the Demise of Authoritarian Rule in Portugal”, (1975) 2 *Armed Forces and Society*, p. 20.

forced into inter-systemic coalescence through this distortion, and if a society is obliged to lend an improbable or unmanageable quantum of political power to regulate or sustain exchanges in other parts of society. One example of this might be an acute banking crisis, in which political actors internalise responsibility for social exchanges in the monetary sub-system, and are then forced to deepen their intersection with the economy via changes to the fiscal regime. This might, perhaps, also have the consequence that it necessitates a re-drawing of the political system's boundary exchanges with, and a re-defining of the related rights in, all other parts of society, including education, the sciences, the arts, and even the law.

In considering a case of this kind, it should be emphasised that modern-style banks were first formed in early modern Europe as institutions which reflected the progressive differentiation of social functions, and they evolved pre-dominantly in societies with strongly elaborated and functionally independent legal/judicial systems, free-standing procedures for political decision-making, and, to an increasing degree, semi-autonomous economic systems. In the earliest differentiation of European societies, in fact, banks had developed (rudimentarily) as private lending institutions that reflected the differentiation of state, economy, religion and law: for example, both the Jews and the Lombards, who formed the first substantial money markets in Italy, (what is now) Belgium and London, used their fluid economic position to extricate themselves from the dictates of ecclesiastical law in order to provide capital loans for merchants and rulers.³⁸ At the same time, in some medieval polities, patterns of public lending also developed, which offered indispensable fiscal resources to support the growing functional autonomy of the earliest urban polities.³⁹ Into early modernity, then, private banks widely yielded ground to public banks,⁴⁰ and these played a vital role in underscoring the first rise of modern statehood. The construction of states as distinctively political institutions initially depended on the ability of political actors at once to approach and reflect economic exchanges gradually as a *bloc* of practices that were not connected to particular persons or private *milieux*, and to cement a uniform political (public)

³⁸ See the classic study by R. de Roover, *Money, Banking and Credit in Medieval Bruges. Italian Merchant-Bankers, Lombards and Money-Changers. A Study in the Origins of Private Banking*, (Cambridge MA: Medieval Academy of America, 1948), p. 152.

³⁹ See T. Molho, *Florentine Public Finances in the early Renaissance, 1400-1433*, (Cambridge MA: Harvard University Press, 1971), p. 169.

⁴⁰ On the widespread late-medieval decline of private banks, see J. Kirshner (ed), *Business, Banking and Economic Thought in late Medieval and early Modern Europe: Selected Studies of Raymond de Roover*, (Chicago IL: University of Chicago Press, 1974), p. 219; A.P. Usher. *The Early History of Deposit Banking in Mediterranean Europe*, vol. I (Cambridge MA: Harvard University Press, 1943), p. 269.

regime for regulating their interactions with economic (private) exchanges. In the most advanced (most differentiated) early modern societies, this gave rise to early experiments in raising public debt through established national banks, and where such banks were founded (for instance, the Bank of Amsterdam in 1609 and the Bank of England in 1694), they facilitated a system of confidently secured public debt maintenance, which greatly simplified the functions of statehood: that is, they allowed states to borrow from widening capital markets, and so to operate without imposing deeply alienating taxes or obdurately resisted forced loans on their subjects.⁴¹ In this respect, banks fostered monetary trust in the state, they stimulated the growth of parliamentary institutions and rights-based representation as guarantors for the state's fiscal levies, they re-inforced the financial stability and self-reliance of the state through secured loans, and, more widely, they enhanced opportunities for increased independently taxable economic activity.⁴² In short, therefore, banks originally evolved as institutions that at once clustered around and cemented the differentiated nexus of power, law and money. Indeed, in each of these respects, banks also played a role in promoting the structure of rights particular to each emergent societal system: they promoted obligatory rights of free transaction in the economy; they promoted the formalisation of monetary rights and rights of obligation in the law;⁴³ and they promoted rights of representation and fiscal accountability in the state. A relatively autonomous banking apparatus might thus be viewed as a distinctive historical pre-condition of a society with a differentiated rights-based political structure.

In more recent history, clearly, there have been several cases in which banks have deeply unsettled the fabric of societal differentiation in which they initially developed. On

⁴¹ On practical political benefits brought by banking in Amsterdam, see M 't. Hart, "The Merits of a Financial Revolution: Public Finance, 1550-1700", in: M. 't Hart, J. Jonker & J.L. van Zanden (eds), *A Financial History of the Netherlands*, (Cambridge: Cambridge University Press, 1997), pp. 11-35; V. Barbour, *Capitalism in Amsterdam in the 17th Century*, (Ann Arbor MI: University of Michigan Press, 1963), pp. 80-1.

⁴² See B.G. Carruthers, *City of Capital. Politics and Markets in the English Financial Revolution*, (Princeton NJ: Princeton University Press, 1996), p. 119. See, also, D.C. North & B.R. Weingast, "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England", (1989) 44 *The Journal of Economic History*, pp. 803-832, at 805, 817 & 819. North and Weingast argue that the post-1688 period drew great financial strength from the fact that it granted independence to the judiciary and rights of fiscal veto to parliament. In particular, this contributed to the emergence of independent banks (which allowed the state to borrow more money and further re-inforced its power), and thus promoted the growth of economic autonomy more generally and the resultant further expansion of public finance.

⁴³ The earliest banking experiments triggered a codification of monetary rights, and these rights underpinned the extension of the early capitalist economy across national and temporal boundaries. See Usher, note 40 *supra*, p. 3, 7 & 30.

more than one occasion (for example, the different crises in the period 1929-1933), this has rendered porous the juncture between political power and economic influence to such a degree that both systems have suffered near or factual functional collapse. In particular, deep banking crises have the potential to de-stabilise the political system as they burden states with the expectation that they must use power and consume legitimacy in order to stabilise exchanges throughout all parts of society, and that power must integrate structurally independent and erratically dis-oriented economic exchanges within the functions of statehood. In contemporary societies, this phenomenon is particularly exacerbated as, in regulating major banking crises, states are occasionally (although not invariably) expected to call in, or even to *re-nationalise*, precarious monetary exchanges originally conducted by banks as global actors. States are thus often compelled, not only to heighten their integrity with the economy through banking regulation, but also to propose themselves as national centres for an international economy and to underwrite transactions and monetary claims whose national attribution is highly uncertain. Despite, this, however, the greatest threat posed by the most extreme cases of banking crisis results from the fact that they have the disruptive capacity to produce a partial dissolution of the rights fabric of society. They have the capacity to cause conditions in which states begin to steer production, science, law or education in order to keep (or pretend to keep) fiscal problems under control, and in which they suppress the rights of autonomy (economic liberties, integral rights of redress, freedom of inquiry and instruction, *etc.*) specific to each of these systems. Moreover, they sometimes even create a situation in which states tie their legitimacy primarily to the resolution of fiscal crises and thus actively annex and negate the normative institutions which uphold the autonomy of other social spheres. Where this is the case, it can easily occur that the state allocates its power to private actors, in which it allows its legitimacy to be constructed and contested in erratic fashion across all society, and in which it becomes vulnerable to highly unpredictable and systemically indeterminate challenges to its legitimacy. The crisis of the state and its legitimacy occurring in this context would thus, as in other cases, also be the result of an excessive and unstructured dissemination of power through society, of a volatile disruption of the rights fabric of society, and of a renewed paradoxical expectation that too many exchanges must be upheld and supported by political legitimacy.

Rights, to summarise, act as institutions that support power and underwrite its legitimacy in a contemporary society by insulating or *immunising* contemporary society against excessive and structurally-unsettling transfusion with power. As discussed above,

rights are the form of power after the catastrophe of statehood: they are the form of power in societies in which integral and societally-centric states have proven illusory and paradoxically untenable, but which still (like all societies) possess a requirement for abstracted and inclusionary reserves of power. Dialectically, in fact, under the societal circumstances produced by rights, the form of political power only becomes legible, to a large degree at least, *ex negativo*: that is, in referring to rights, power constructs and transmits itself through a finely-ramified and equilibrated normative order, and it creates an exclusionary reality to protect societies from their own paradoxical demands for excessive legitimacy or from protractedly exceptionalist political centration or self-confrontation.⁴⁴ Modern political power, although often seen as obtaining legitimacy by declaring categorical and overarching principles of form for all society, in fact, articulates itself through the reflexive capacity of a society for evading centrally paradoxical self-confrontations and for delicately counter-vailing the need for structurally dominant assertions of legitimacy. Rights fulfil this function. Modern states require rights to reflect the pluralistic acentricity at the core of power, and to preserve themselves from catastrophic intensification of their original paradoxes.

Extreme precariousness in the form of power is (or can be) caused where, either for originally political or societal reasons, the inclusionary articulation of power and rights is forfeited, and power is forced either to construct itself integrally around states or to incorporate private actors in its societal circulation. Political systems are normally likely to respond to such cases, as far as possible and over a longer period of time, by re-objectivising the rights that separate one system from another, by re-producing the distinct structures of the judicial, civil and systemic rights underlying society, by re-constructing – perhaps at a modified level of articulation – the fissures between itself and other spheres of exchange, and by again diminishing or counter-vailing their own primary paradoxes. The future of the state is thus likely to remain closely attached to the post-catastrophic functions of rights, and it is difficult to see how, if the wider conditions of modernity persist, a radically new form of statehood might evolve. After any renewed catastrophe, states are likely to resort to and to re-use the store of post-catastrophic institutions (rights) that they already possess, and the solutions to catastrophe are already implicit in the existing fabric of the multi-centric displacement that underlies contemporary statehood.

⁴⁴ See C. Thornhill, “The Autonomy of the Political: A socio-theoretical Response”, (2009) 35 *Philosophy & Social Criticism*, pp. 705-735.

VI. CONCLUSION

It is fundamental to the classical form of the state that it contains both the origins and the causes of its own termination. The function of the state was to construct an arrangement for the general and inclusionary circulation of power, and it surrounded itself with a legitimacy institutional and conceptual apparatus that made this possible and allowed power to simplify and to condense itself accordingly. The single national state, however, was, of necessity, a momentary paradoxical apparition in the application of power. As discussed, the national/territorial condensation of society's power around the state never became a constant or even meaningfully factual reality. Furthermore, as discussed, the state is always only paradoxically tied to power, and a functional/semantic approach to power illuminates single statehood as a transient and impossible reflection of power. For this reason, in the future, many primary semantics of the state and its legitimacy – territorial and national sovereignty – are likely to play a rapidly diminishing role in future functions and normative operations of state power.

At the same time, however, we might also say that the future of the state, or, to be more precise, the future articulation of political power in society, is likely, as, and, in fact, to a greater extent than, hitherto, to be correlated with the function of rights. Although single national states are improbable forms for the future of power, there is no diminution of power in modern society, and power, in altered form, is, likely, in the future, to remain attached to overlapping, multi-structural international models of statehood. Primarily, however, it appears probable that rights will continue to produce operative legitimacy (both normatively and functionally) for power, and that rights will generate future patterns of statehood. Rights will, we might anticipate, achieve this by facilitating the transmission of power through complex and expansive societies, by simplifying power's internal construction of its addressees and hardening it against private arrogation, by protecting power from paradoxical emergencies, and – more widely – by stabilising multiple resistance to power throughout all functional realms in society. In particular, rights will continue to support power by offering a reflexivity that curtails and excludes the more extreme inclusionary dimensions and paradoxes of power. This co-genetic relation of modern power and rights first solidified the power of states. But it has also allowed power adaptively to displace itself after the catastrophe of states, and, in today's society, it has formed a multi-structural fabric for the use of power: indeed, this relation is the functional wellspring for the internationalisation of power and of the institutions that use power in contemporary societies. The future form of the

state is likely to persist (and experience further consolidation) as one element in an arrangement of political power in which power is both globally transmitted through, and globally self-counteracted by, three dimensions of rights. These rights are neither the rights of states nor the rights of persons: they are rights in which power articulates itself after the catastrophe of statehood.

In reaching this conclusion, of course, we need to concede that it is probable that, in order to sustain its inclusionary application, political power will, in the future, be obliged to maintain a balance between the autonomous functions of displacement and de-politicisation implicit in rights, and the possibility that concrete interventions (even of single states) might occasionally re-draw the contours of the rights which structure society. To some degree, this is already in evidence, and it might be possible to imagine fiscal exceptionalism (*i.e.*, the rapid raising of taxes, the re-routing of public revenue, the intermittent integration of lending organs in the public economy) as a new and increasingly widespread phenomenon. Indeed, in this respect, some contemporary (national and international) states have proven that they possess a far higher volume of interventional power than states supposedly operating in the golden age of sovereignty. The powers of high-level fiscal regulation under “totalitarian” regimes, notably, were largely devolved to specially appointed, quasi-privatistic societal actors [*i.e.*, *Sondergewalten*], and where these states did regulate banks, they usually ceased to act as distinctively public organs: economic intervention led to an indiscriminate migration of private power into public power and a collapse of the public integrity of states.⁴⁵ Very speculatively, therefore, we might hazard the observation that one reason why contemporary (national and international) states appear to be reasonably adept at condensing their powers of fiscal regulation (or are, at least, able to integrate banks without ceasing to be states) is that their power has been finely abstracted, through its filtration through different levels of rights, into a relatively refined exclusionary form. This means that, even under conditions of regulatory exceptionalism, states contain a (partial) immunity to amorphous expansion into, or amorphous inclusion of, other functions. Where states have potent instruments for preserving their exclusivity, therefore, short-lived acts of expansionary re-configuration of statehood are more likely to be sustainable.

⁴⁵ Generally, see B. Gotto, “Polykratische Selbststabilisierung. Mittel- und Unterinstanzen in der NS-Diktatur”, in: R. Hachtmann & W. Süß (eds), *Hitlers Kommissare. Sondergewalten in der nationalsozialistischen Diktatur*, (Göttingen, Wallstein-Verlag, 2006), pp. 28-51. On partial state absorption of banks in Germany in the 1930s, see C. Kopper, “Banking in National Socialist Germany 1933-39”, (1998) 5 *Financial History Review*, p. 52.

Despite such potentials, however, it is highly improbable that the basic structure of the modern state, as one institution in an arrangement that simplifies and facilitates the variably inclusionary use of power, will de-couple itself from the diverse functions of rights. It is probable that the future of power will continue to rely on instruments through which it gradually constructed itself after the first catastrophe of statehood: that is, the simultaneously inclusionary and exclusionary functions of displacement and de-centration contained in legal rights. Future analysis of the state and its power will need to continue to read the reality of power (and statehood) through the reality of rights, and to observe rights as concepts that articulate both the functional/institutional and the normative pre-conditions for power.

CHAPTER 14

LAW AND ORDER WITHIN AND BEYOND NATIONAL CONFIGURATIONS

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I. INTRODUCTION

An analytical distinction can be made between internally- and externally-induced crises. The former represents a discrepancy between the scope of meaning production (*Sinnproduktion*) and the intra-systemic resources available to support the production of meaning components. Such a crisis can thus *also* be understood as a crisis related to the internal production of time, in the sense that such crises tend to short-circuit the autopoietic reproduction that unfolds from moment to moment. The external forms of crisis take the form of crowding-out effects, negative externalities and asymmetries between social systems. In *praxis*, a crisis, however, tends to be a mixture of both forms. An externally-induced crisis will have internal effects and *vice versa*.

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 (and not just political entities in the state form), at the same time as they frame the transfer of the meaning components between the social entities and their environments.

Thus, the financial crisis of 2008 can be understood as a symptom which 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-re-inforcing* structural transformations. First, there is the increased globalisation of functional systems, which has led to massive dis-locations 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 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.

II. FORMS OF CRISES

In its immediate form, a crisis represents a discrepancy between expectations and actual developments. In a more profound structural sense, a crisis represents a condition in which the scope of the meaning production (*Sinnproduktion*) of one or more social systems is being reduced over a considerable period of time. Such reductions might lead to various degrees of anomie, in the sense that the internal order of a given system is put under pressure, or it can be mortal, in the sense that it reduces the scope of meaning production to a degree which endangers the continued existence of the system(s) in question.

One set of reasons for why reductions in meaning production occur is internal in nature. For example, a crisis related to the economic system might simply be the result of the fluctuations of a business cycle which reflect a form of “systemic overstretching”, in the sense that the expansion of meaning production reaches an unsustainable level, thereby creating a discrepancy between the scope of meaning production and the intra-systemic resources and the material basis available to support the production of the meaning components. Pyramid schemes within financing and other forms of financial speculation which lead to economic bubbles might be interpreted as representing severe forms of such overstretching. Military commanders who go a bridge too far, and – in more general terms - the ancient phenomenon of imperial overstretch in relation to political and military structures, are other examples of this.¹

¹ Stress-related mental-breakdowns might reflect a similar form of discrepancy-induced crisis in relation to psychic systems. It might also be possible to understand internal crises, or at least the frequency of such crises, as a reflection of the increased acceleration (*Beschleunigung*) of the reproduction of societal structures. For a German critical theory perspective on the time structures of modern society, see H. Rosa, *Beschleunigung: Die Veränderung der Zeitstrukturen in der Moderne*, (Frankfurt aM: Suhrkamp Verlag, 2005); for a French post-structuralist perspective, see P. Virilio, *Vitesse et Politique: essai de dromologie*, (Paris: Galilée, 1977); for an American critical theory perspective, see W.E. Scheuerman, *Liberal Democracy and the Social Acceleration of Time*, (Baltimore MD: Johns Hopkins University Press, 2004). For a systems theory perspective, see N. Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM:

But a crisis might also be a result of a more profound structural process due to a weakening of a particular close-coupling between systems due to increased differentiation (*Ausdifferenzierung*). For example, the continued crisis of the German university system might be traced back to an inability to adapt to the increased weakening of the institutionalised linking of the systems of science and education within the framework of the Humboldtian model. Scientific discoveries can, moreover, undermine established scientific facts, thereby potentially provoking a crisis in relation to an established scientific paradigm.² Another example can be found in the relative weakening of the position of the religious system in society due to the emergence of a whole range of functional systems in early modernity. Indeed, this led to an internal crisis for the Catholic Church due to an increased undermining of the world view upon which its coherency relied and an internal re-configuration of the religious system through the reformation.

As we will return to in more detail later on, a different form of internal re-configuration crisis stems from the increased globalisation of one or more systems. For example, the breakdown of Europe as a specific legal and political space (*Raum*)³ in the first half of the Twentieth century certainly led to a crisis of catastrophic dimensions. When viewed from a long-term perspective, this development was, however, intrinsically linked to an increased globalisation of the kind of statehood which characterised Europe at the time, due to the gradual inclusion of, first, the United States and Japan, and, eventually, the entire globe, in the modern state system.⁴ Although those affected by the European meltdown were, for good reasons, unlikely to understand the developments in such terms, the increased globalisation of statehood implied an increase in the meaning production of the global (-ising) political and legal systems when viewed from a long-term structural perspective. Hence, even though specific sub-systems, such as political sub-systems in the form of the

Suhrkamp Verlag, 1997), p. 997.

² The consequence of the implosion of scientific paradigms however tend to be the emergence of an increased number of competing sub-discourses within a specific academic field. This, again, might have an increase in the scope of meaning production as a long-term consequence. For the emergence and implosion of scientific paradigms, see L. Fleck, *Entstehung und Entwicklung einer wissenschaftlichen Tatsache: Einführung in die Lehre vom Denkstil und Denkkollektiv*, (Frankfurt aM: Suhrkamp Verlag, [1935] 1980); T.S. Kuhn, *The Structure of Scientific Revolutions*, (Chicago IL: Chicago University Press, [1962] 1996).

³ C. Schmitt, *Der Nomos der Erde. Im Völkerrecht des Jus Publicum Europaeum*, (Berlin: Duncker & Humblot, [1950] 1997), especially, p. 200 *et seq.*

⁴ R. Stichweh, "Dimension des Weltstaats im System der Weltpolitik", in: M. Albert & R. Stichweh (eds), *Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung*, (Wiesbaden: Verlag für Sozialwissenschaften, 2007).

major European powers, lose out, increased differentiation or system-internal re-configurations often tend to imply mere contemporary reductions in meaning production, but a possible increase in meaning production in the long run. In this specific sense, differentiation and re-configuration crises might also be understood as potentially “constructive” forms of crises.

Another set of reasons for the occurrence of a crisis is external in nature, in the sense that negative externalities, crowding-out effects and asymmetries between systems lead to a reduction in the meaning production of one or more of the systems involved. From a purely analytical and somewhat “formalistic” Kantian and Spencer-Brown inspired perspective, the term “*external*” cannot be understood in a strict causal sense.⁵ The crossing of system boundaries is a form of operation which requires time.⁶ As the receiving system, like all other systems, operates or, indeed, produces time in its movement from operation to operation, it will never be quite the same system at the time at which the external components arrive, as it was at the time at which the meaning components in question were dispatched. The receiving system is always one step ahead. In addition, external influences only have an effect when they are internally conceived and processed within the receiving system. The sovereignty of interpretation (*Deutungshoheit*) always remains the prerogative of the receiving system. Except for cases in which a system is entirely eradicated in the Carthaginian sense, even the most systematic and prolonged forms of external pressure should, therefore, leave a certain degree of autonomy to the system which is the subject of external pressure.⁷ From a genuine sociological perspective, such autonomy is, however, often more a formal, than a real, prerogative, because, in practice, asymmetries tend to take the form of processes of impalpable coalescence (*Zusammenfließen*) which potentially leads to a slow, but steady, erosion of system boundaries. In most cases, such processes only create an atmosphere of continued dysfunctionality, but they are also capable of inflicting far more fundamental disturbances within the systems in question because the weakening of system boundaries can potentially lead to system dissolution.

⁵ Early insights going in similar direction, see N. Luhmann, *Zweckbegriff und Systemrationalität: Über die Funktion von Zwecken in sozialen Systemen*, (Frankfurt aM: Suhrkamp Verlag, [1968], 1973), p. 250.

⁶ Although this might not necessarily be the case if an operation is repeated. See, also, P.F. Kjaer, “Systems in Context. On the Outcome of the Habermas/Luhmann Debate”, (2006) *Ancilla Iuris*, p. 70 et seq.

⁷ An equivalent figure related to subjects is Hegel’s point that the slave always has the possibility of dying in freedom through revolution or suicide. See G.W.F. Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse*, *Werke Band 7*, (Frankfurt aM: Suhrkamp Verlag, [1821] 1970), § 57.

Externally-induced asymmetries can, at least in principle, occur between all social systems, as issues such as doping (health *versus* sports), evangelism in the school system (religion *versus* education), sexual harassment at the work place (intimacy *versus* formal organisations), pollution (economy *versus* the socially-constructed ecological environment), Islamic financing (religion *versus* the economy), pornography and the *paparazzi* phenomenon (mass media *versus* intimacy) illustrates. Such asymmetries, however, rarely lead to any profound crisis as long as they remain purely binary relations. Instead, they merely imply the existence of inter-systemic “grey zones” which serve as causes of irritation for the systems involved, which subsequently tend to trigger regulatory attempts of containment by the legal system. In most cases, a “real” crisis first occurs when a complex constellation consisting of a whole range of mutually entangled and overlapping asymmetric relations between several systems manifest themselves over a considerable period of time, thereby generating a mutually re-inforcing drift towards systems decay. Thus, the form of crisis which they potentially provoke differs from system constellation to system constellation.

Another reason for variations in the form of crisis is that the relative weight between (self-) reflection (*Reflexion*), performance (*Leistung*) *vis-à-vis* other social systems, and societal function (*Funktion*) towards society as whole, differs from system to system. The consequence is that different systems produce different forms of effects *vis-à-vis* their social environments, and thus create different forms of crises. For example, within the systems of art, intimacy, and certain strands of religion and science (*Wissenschaft*), reflection plays a relatively bigger role than within other functional systems due to the porous and very “fluid” media of communication upon which these systems rely. The consequence is that the forms of communication of which these systems consist tend to emerge as irritations within the most unexpected settings in their social environments. This again creates a tendency within these systems to elevate momentary, but creative, forms of de-differentiation into a systemic imperative (*Systemziel*), in the sense that art systematically seeks to break boundaries just as true love is supposed to defy all restrictions. As expressed in the strong reliance on a semantic of subjectivity, crisis experiences, moreover, tend to be framed in a personalised “existentialist” manner within these systems. But if the kinds of de-differentiation that these systems produce succeed in sustaining themselves over a considerable period of time, a semantic backlash which emphasises the danger of a decadent “Late Roman” downfall of society in its entirety tends to emerge, with the implication that hidden forces are mobilised against the *Rasputins* of this world.

The political system is, on the other hand, characterised by a relatively stronger emphasis on the function which it produces *vis-à-vis* society in its entirety. When the political system operates in the state form, the strong emphasis on societal function is expressed through its orientation towards the (re-) construction of territory and the production of collectively-binding decisions. The relatively stronger focus on societal function does not, however, provide the political system with any sort of superiority. This is, first of all, the case because no hierarchy exists between function, performance and reflection. The integration of society remains conditioned by the simultaneous existence of all three forms. The three dimensions are not related to each other in the style of Russian dolls, in which each one is contained in the following one. Second, although the tasks which the political systems reproduce are of a very fundamental nature, the relatively higher focus on the reproduction of functions *vis-à-vis* society as whole is reflected in an equally strong reduction of the range of tasks which the political system in the form of the state deals with.⁸ The political system might produce more compact components than systems with a stronger emphasis on reflection, but, as we will return to soon, the price paid is that the reach of political language remains limited, a limitation that subsequently tends to be “covered-up” through the kind of ideological semantics which, on paper, remain oriented towards society in its entirety.

The extreme denseness, but the equally reduced form, of meaning production within the political system is also reflected in the forms of crises which the political system produces. In most cases, a political crisis, such as a crisis of succession, which threatens to break the autopoietic chain from operation to operation, only affects a small circle of players who operate within the kind of policy-networks which tend to surround the peaks of political organisations.⁹ Even when a *coup d'état* is orchestrated, life on the streets tends to return to normality within days. But as the totalitarian form of the political, in the form of Fascism, National Socialism, Communism and radical Islamism,¹⁰ illustrates, the political system is, under certain conditions, capable of taking unexpected evolutionary leaps through sudden

⁸ We are here following Chris Thornhill, “Towards a Historical Sociology of Constitutional Legitimacy”, (2008) 2 *Theory and Society*, p. 161.

⁹ Another example is the EU where the autopoietic chain goes from treaty revision to treaty revision and where crises semantics emerges every time a revision process is delayed or threatens to fail. See, also, P.F. Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation*, (Oxford: Hart Publishing, 2010), p. 21 *et seq.*

¹⁰ For the argument that present-day Islamism is a variant of “traditional” Twentieth century totalitarian ideologies, see M. Mozaffari, “The Rise of Islamism in the Light of European Totalitarianism”, (2009) 1 *Totalitarian Movements and Political Religions*, p. 1.

expansion, thereby indicating that a close link exists between the general restraint of political forms of communication and the tendency of occasional *tsunamis* of massive energies.¹¹ The presumption that a link exists between the general restraint of the political system and such *tsunamis* is also supported by the fact that totalitarian politics tends to emerge within settings with relatively weak states, whereas strong states tend to be capable of exercising sufficient self-restraint.¹² When such *tsunamis* occur, the consequence is a radical expansion of the segments of society which are succumbed to the political form of rationality, thereby introducing drastic reductions in the meaning production of other systems. As the history and fate of most forms of totalitarian politics indicates, such expansions, however, tend to lead to systemic overstretch and sudden implosion at a later stage.

But also within the segment of the global political system characterised by democracy, the misuse of political and bureaucratic power and the “over-expansion” of government clearly remains a permanent theme as the century-long endeavour to limit the arbitrariness of political decision-making through constitutional safeguards illustrates. The expansion of political rationality has been closely-linked to a tendency of juridification (*Verrechtlichung*) because the implementation of political-decisions remains conditioned by the transformation of such decisions into generalised legally-framed bureaucratic measures which, again, produce their own forms of anomalies.¹³ The fact that the legal system coins such anomalies with the term “*juridification*” indicates that the legal system has a different societal emphasis than the political system in so far as performance *vis-à-vis* specific sections of society are the most dominating trademark of law. In terms of performance, the legal system acts as the transaction cost-system *par excellence*. Almost all forms of the operability of social systems rely upon a legal framing, or, at least, upon the potential reference to legal instruments in their internal operations as well as in their reflections of their respective environments. Thus, the legal system provides far more specialised “services” to the remainder of society than the political system. On the one hand, this tends to reduce the degree of collateral damage caused by legal operations when compared to political

¹¹ J.M. Lotman, *Kultur und Explosion*, (Frankfurt aM: Suhrkamp Verlag, [Russian original 2000] 2010).

¹² The same argument can be found in Chris Thornhill; see, for example, “Towards a Historical Sociology of Constitutional Legitimacy”, note 8 *supra*, p. 161.

¹³ M. Weber, “Bureaucracy”, in: H. Gerth & C.W. Mills (eds), *From Max Weber*, (New York: Oxford University Press, 1946); see, also, J. Habermas, *Theorie des kommunikativen Handelns, Band I, Handlungsrationalität und gesellschaftliche Rationalisierung*, (Frankfurt aM: Suhrkamp Verlag, 1981), p. 447 *et seq.*

operations. On the other, the legal elements tend to have a deeper impact on the concrete set up and the operational mode of other systems. Thus, the legal system is interfering in far more settings and different problem constellations than the political system, but it tends to do this in a less generalised manner, thereby providing a basis for the common mis-apprehension that the legal system is a mere “implementing tool” of the political system.

The economic system also has a strong focus on performance. Intimacy and certain forms of religion are probably the exceptions which confirm the rule that functional systems cannot operate without relying on a continued flow of economic resources, and thus on the very tight couplings to the economic system. Whereas the legal system, in most cases, merely provides an overall framing, and, as such, tends to remain a “back-up” system which is only activated in cases of profound conflicts, the money medium, in contrast, enjoys a far more widespread use in the everyday operations of social systems. On the one hand, economic resources provide abilities, while, on the other, the continued need for financing tends to introduce a structural incitement of accommodation to economic rationality, as, for example, expressed in tendencies towards commercialisation within areas such as science, health, art and the mass media.¹⁴ Such accommodations mainly occur in contexts in which budget requirements have to be met. Thus, they mainly unfold within the framework of organisations such as universities, film studios, hospitals, art museums, newspapers and so on. This means that the effect on other functional systems is mainly indirect, in the sense that movements towards accommodation are rarely directly-oriented *towards* the logic which guides functional systems, but are, instead, oriented *against* the organisational infrastructure upon which they rely. For example, New Public Management tools which are deployed in order to optimise organisations economically only indirectly influence the functional systems which are dependent on these organisations. Hence, the accommodation to economic rationality does not make the specific functional rationalities disappear, but they do indirectly reduce the field of possible operations to be selected because they tend to frame the organisational structures upon which these systems rely.

The strong focus on performance within the economic system and the widespread use of the money medium means that an economic crisis is likely to have more frequent and more rapid epidemic effects than crises within most other functional systems. Suddenly, budgets

¹⁴ T.W. Adorno, *The culture industry: selected essays on mass culture*, (London: Routledge, 1991); T.W. Adorno & M. Horkheimer, *Dialectic of Enlightenment*, (New York: Herder & Herder, [1972] 1994), p. 120 *et seq.*

have to be cut and projects postponed, and typically this occurs in a relatively indiscriminate manner. Thus, the immediate form of a crisis, namely, a discrepancy between expectations and actual developments, is likely to be induced more frequently by the economic system than by most other systems. This, again, might explain why the economic system is often understood as being more prone to crises than other functional systems. But, although an economic crisis (for example, the Great Depression) is clearly *capable* of triggering massive societal transformations, this is rarely the case. A crisis within the economic system in its modern form seldom leads to a complete collapse in the integrity of other social systems, but merely introduces a temporary narrowing of possibilities. Thus, economic crises might be more frequent, but they also tend to have relatively superficial effects on the structural composition of the other parts of society.

III. THE LIMITED REACH OF CLASSICAL POLITICAL LANGUAGE

The temptation to bend objectives in order to accommodate the need for finance and the conception that the economic systems introduce frequent limitations on the scope of meaning production within other systems have traditionally produced a certain discomfort *vis-à-vis* the money medium and the logic which guides economic reproduction. One expression of this is the continued endeavour of political forces to “re-embed” the economic system.¹⁵ Political ideologies such as Conservatism, Socialism, Ecology, Nationalism and Islamism all share this aspiration. In their totalitarian versions, this is expressed in attempts to re-establish a holistic world through radical de-differentiation. In the softer and non-totalitarian versions, the aspiration is expressed in well-intentioned attempts to maintain “cosiness and ... rurality” (*Nestwärme und ... Ländlichkeit*).¹⁶ Such substantialist ideologies are, however, semantic fictions, in the sense that they are constructions which reflect the “second nature” (*zweite Natur*) of modernity.¹⁷ Hence, although such fictions tend to have real effects, they have never been capable of re-establishing the perceived blessings of the pre-modern world.¹⁸ The failure of substantialist forms of the political does not, however, mean, as liberalist ideology

¹⁵ For the thesis of dis-embeddedness, see K. Polanyi, *The Great Transformation. The Political and Economic Origins of our Time*, (Boston MA: Beacon Press, [1944] 2001).

¹⁶ Luhmann commenting on Ferdinand Tönnies’ concept of *Gemeinschaft*; see N. Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1997), p. 1068.

¹⁷ See G.W.F. Hegel, note 7 *supra*, § 4.

¹⁸ P.F. Kjaer, “The Structural Transformation of Embeddedness”, in: Ch. Joerges & J. Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, (Oxford: Hart Publishing, 2010 forthcoming).

in its purest form advocates, that the relationship between the economic system and its environment is not marred by conflicts. As illustrated by issues such as pollution, prostitution and corruption asymmetries, crowding-out effects and negative externalities between the economic system and its social environment remain a permanent theme.

However, irrespectively of the ideology chosen, a conceptualisation which relies on classical political-language fails to capture important dimensions. From the internal perspective of the political system, the question of the relation between the economic system and its environment is essentially reduced to the question of more or less statehood. But calls for “more state” ignores, as already indicated, the fact that blind evolutionary turns with real catastrophic effects tend to happen more often within the political, than within the economic, system. Moreover, political forces calling for a re-embedding of the processes of economic reproduction by the state fail to acknowledge that the state, too, is a dis-embedded structure. The modern state is, in contrast to pre-modern forms of rule, a distinct and abstract legal person, which is separate from its members. The modern sovereign state is a structure of generalised and impersonal rule, in the sense that all rules apply to all persons within a given territory. It is a form of rule which only requires a minimum of communication towards its subjects, and only in a form which refers to specific roles which unfold within specific settings.¹⁹ The constitutional structures of modern states can, therefore, only be understood as dis-embedded structures.²⁰ In addition, even “well-intended” ventures, such as the political striving for the establishment of welfare-state regimes, tend to produce negative side-effects in the form of reification and the transformation of citizens into clients, upon the basis of a, in the Weberian sense, rationalising logic.²¹ Thus, the market and the welfare state bureaucracy must be understood as two sides of the same dis-embedded coin. The classical state *versus* economy battle is, therefore, *not* a battle concerned with embedment. Instead, it is a battle

¹⁹ U.K. Preuß, “Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?”, in: P. Dobner & M. Loughlin (eds), *The Twilight of Constitutionalism?*, (Oxford: Oxford University Press, 2010), especially p. 26 *et seq.*

²⁰ The disembeddedness of the state is acknowledged by James Tully, but regarded as “undesirable”. Here, following Thornhill and others, it is, instead, seen as a pre-condition for statehood. See J. Tully, “The Imperialism of Modern Constitutional Democracy”, in: N. Walker & M. Loughlin (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, (Oxford: Oxford University Press, 2007), p. 318, and C. Thornhill, note 8 *supra*, p. 161.

²¹ For example, in relation to his re-formulation of Adorno and Horkheimer’s reification thesis (*Verdinglichungsthese*) one finds the following statement by Habermas; “The Social worker is just *another* expert which does not liberate the clients of the welfare state bureaucracy from their position as objects.” (my translation, PFK); J. Habermas, *Theorie des kommunikativen Handelns, Band 2, Zur Kritik der funktionalistischen Vernunft*, (Frankfurt aM: Suhrkamp Verlag, 1981), p. 544. Habermas’ italics.

concerned with the delineation of the meaning spheres, with none of the spheres in question possessing any particular substantialist superiority.²²

Whereas staunch defenders of the welfare state fail to acknowledge the dis-embeddedness of the state,²³ contemporary left- and right-Luhmannians circumvent the issue by taking a non-étatist stand. What they have in common is that they share a romantic vision of a self-organising society. In doing so, the left-Luhmannians follow in the footsteps of Marx, Gramsci, Polanyi, and Negri and Hardt, all of whom developed somewhat different, but equally vague, visions of a democratic, but non-state based, organisation of the economy.²⁴ The right-Luhmannians, on the other hand, advocate the self-organising network society upon the basis of Hayekian insights.²⁵ The right-Luhmannian network approach sees networks as the fundamental building-blocks of society, and might thereby over-emphasise the importance of the network phenomenon to a degree which makes it difficult to identify the specific performance and societal function of networks in society.²⁶ In relation to one central aspect, the approach does, however, possess an important theoretical advantage *vis-à-vis* the left-Luhmannian position, because one of its central points of focus is the concrete operational form of organisational structures. In contrast, the left-Luhmannians systematically tend to disregard the organisational aspect, and the question of the concrete organisational model which they wish to advocate remains unanswered by the left-Luhmannians.²⁷ Thus, the left-Luhmannian approach is not capable of providing an understanding of the kind of hyper-complex meltdowns of organisations and regimes, which can be observed in relation to the financial crisis which erupted in 2008. Instead, their central focus remains limited to various forms of civil society-based “street activism” as a strategy capable of mobilising pressure for change. They tend to ignore the fact that pressure for

²² Kjaer, note 18 *supra*.

²³ See, for example, W. Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy*, (Oxford, Oxford University Press, 2009).

²⁴ For the left-Luhmannian programme announcement, see A. Fischer-Lescano, “*Kritische Systemtheorie Frankfurter Schule*”, in: G.-P. Calliess, A. Fischer-Lescano, D. Wielsch & P. Zumbansen (eds), *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag*, (Berlin: Walter de Gruyter, 2009). See, also, S. Buckel, *Subjektivierung und Kohäsion. Zur Rekonstruktion einer materialistischen Theorie des Rechts*, (Weilerswist: Velbrück, 2007).

²⁵ See, for example, K.-H. Ladeur, *Der Staat gegen die Gesellschaft. Zur Verteidigung der Rationalität der Privatrechtsgesellschaft*, (Tübingen: Mohr Siebeck Verlag, 2006).

²⁶ P.F. Kjaer, “Embeddedness through Networks – a Critical appraisal of the Network Concept in the *Oeuvre* of Karl-Heinz Ladeur”, (2009), 4 *German Law Journal*, p. 483.

²⁷ See S. Buckel, note 24 *supra*, p. 316 *et seq.*

change needs to be transformed into generalised bureaucratic measures if pensions are to be paid, treatments to be carried out in hospitals and to be alphabets learned at schools. But making it explicit that the realisation of political claims in modern society is impossible without the reliance on complex forms of formal organisation automatically highlights the limited reach of the left-Luhmannian agenda, because it radically restricts the potential role which they can play in society. As long as they do not undertake a combined analysis of the institutions and march through the institutions (*Marsch durch die Institutionen*), they will confine themselves to a parasitic role in which they are merely capable of irritating the autopoietic processes of social systems without profoundly interfering with the actual *form* of these processes. In practice, the function of the left-Luhmannians remains restricted to a recycling of the kind of supplementary partisan semantics originally cultivated by the left-Schmittians, with the predictable outcome that Che Guevara-style struggles (*Kämpfe*) are ultimately elevated into an end in themselves (*Selbstzweck*).

In more general terms, emancipative social theory tends to ignore the fact that modern society is, above all, an “organisational society” (*Organisationsgesellschaft*).²⁸ The importance of the organisational dimension is underlined by the fact that it was the Seventeenth and Eighteenth century organisational revolutions, emerging from the preceding military revolutions,²⁹ which provided the basis for the political and economic revolutions which unfolded in the late Eighteenth century and throughout the Nineteenth century.³⁰ State bureaucracies and private firms have traditionally relied upon the same Hegelian and Weberian models of formal organisation.³¹ Thus, the economy-versus-politics dichotomy

²⁸ For an important exception see the work of David Sciulli; especially, *Theory of societal Constitutionalism. Foundations of a non-Marxist critical theory*, (Cambridge: Cambridge University Press, 1992), and *idem*, *Corporate Power: An Application of Societal Constitutionalism*, (New York: New York University Press, 2001).

²⁹ For overviews and paradigmatic texts, see M. Roberts, *The Military Revolution, 1560-1660*, (Belfast: Boyd, 1956); C. Tilly, *Coercion, Capital, and European States AD 990-1990*, (Oxford: Blackwell Publishing, 1990); J.A. Black, *A Military Revolution? Military Change and European Society 1550-1800*, (London-Basingstoke: Macmillan, 1991).

³⁰ G. Harste, *Modernitet og Organisation*, (Copenhagen: Forlaget Politisk Revy, 1997). Upon the basis of somewhat similar insights, Norbert Elias described the French Revolution as nothing more than a *coup d'état* in which one branch of the state bureaucracy, the *noblesse de robe*, ousted another branch, the *noblesse d'épée*. See N. Elias, *Über den Prozeß der Zivilisation. Soziogenetische und psychogenetische Untersuchungen, Band 2*, (Frankfurt aM: Suhrkamp Verlag, [1938] 1976), p. 230 *et seq.* For the alternative view that revolutions also imply broader emancipative forces, see H. Brunkhorst, “Machbarkeitsillusionen, feierliche Erklärungen und Gesänge. Zum Verhältnis von Evolution und Revolution im Recht”, in: G.-P. Calliess *et al.*, note 24 *supra*.

³¹ Hegel, note 7 *supra*, § 277 *et seq.*; Max Weber, “Bureaucracy”, in: H. Gerth & C.W. Mills, note 13 *supra*.

does not capture, and, indeed, actively hides, the fact that the core logic of the organisational structures which economic and political structures rely upon remains, to a large extent, identical. For example, the organisational structure adopted by modern firms in the breakthrough of industrialisation took the state bureaucracy as its role model, just as the introduction of New Public Management relies on the modern firm as its source of inspiration.³² The logic of disciplination and the systematic reduction of autonomy through subordination to hierarchy, as well as the “alienation” which occurs from the split between private and public are just as dominant within public as within private organisations. To the extent that one would want to identify an untapped potential for emancipation in late modern society, this can only be achieved through a break with the economy-*versus*-politics dichotomy and the quest for the politicisation of society as a whole. Instead, the focus has to be oriented towards a lower and deliberately de-politicised level, in the sense that a transformation in the organisational forms “on the ground” is the central issue. In the most functionally-differentiated parts of world society, the introduction of progressive pedagogical instruments in the school system and enabling management techniques aimed at increasing the autonomy and the self-organisation of employees is likely to have a far greater impact on the degree of autonomy of individuals than changes to the state constitution or random demonstrations in the streets. The patron-client relations of the chair (*Lehrstuhl*) based university, the equally semi-feudal structures of the family owned small- and medium-sized enterprises (SMEs) (*Mittelstandsunternehmen*) and the hegemonic power of the legal profession (*Juristenstand*), operating within the framework of the political and legal systems in the form of the semi-authoritarian state (*Obrigkeitsstaat*), are the real issues. Or, to express it differently, the very concrete question concerning what action a member of a formal organisation can take without obtaining a signature from his or her manager (*Vorgesetzter*) is the genuine emancipatory question in contemporary society. However, existing strands of emancipative political and legal theory, in the main, miss this point,³³ as is also illustrated by the performative contradiction which one can observe in many academic settings. Senior academics advocate emancipation in their academic work at the same time as they, with different degrees of eagerness, are forced to rely on the classical disciplinary instruments of

³² P.F. Kjaer, “Post-Hegelian Networks: Comments on the Chapter by Simon Deakin” in: M. Amstutz & G. Teubner (eds), *Networks: Legal Issues of Multilateral Co-operation*, (Oxford: Hart Publishing, 2009).

³³ For example, the question of the concrete organisational form is essentially absent in Habermas’ deliberative theory. See J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, (Frankfurt aM: Suhrkamp Verlag, 1992).

bureaucratic power when operating as science managers. Activation of the legal system is, moreover, not necessarily an answer to such problems. Formalised law merely tends to introduce even more inflexible and *de facto* hierarchical structures, in the sense that a strict legal framing tends to underpin, rather than to undermine, Weberian forms of organisation.³⁴

Étatist and non-étatist legal and political theory alike are frozen in a classical modernist ideological form which does not correspond to the actual form of social operations. Instead, management and organisation theory, together with pedagogical theory, are the most promising academic discourses when it comes to the question of producing meaning components which are capable of increasing the dynamics of emancipative social transformation in contemporary society. If one wanted to re-ignite a radically emancipative project today, seeking employment in a business school, in a school of public administration, or in a pedagogical college, would probably be more meaningful than entering the ranks of a legal or a social science faculty or partaking in a cross-over think tank.³⁵

IV. THE CONSTITUTIONAL ORDER OF NATIONAL CONFIGURATIONAL WEBS

The limited reach of political language has direct implications for the understanding of how social order is produced in modern society, in so far as the conventional understanding of the role of the political system in society is intrinsically linked to the idea that the establishment of social order is the prerogative of the political system. The political system in the form of states certainly plays a central role, but this has always been merely one of several dimensions. The phenomenon which, in mainstream language, is denoted as nation states should, instead, be understood as a far more complex configuration, consisting of a whole range of functional sub-systems, regimes, organisations, networks, professions, and more or less intangible cultural components, all of which relate to each other in a multitude of ways. Such configurations are characterised by a dense web of mutually re-inforcing structural couplings within a limited section of world society, which establish a convergence of expectations between multiplicities of observers. As such, they produce a kind of localised “higher order”, which cannot be reduced to the sum of its components. Instead, they have the

³⁴ For example, the difficulties of reforming public universities in Continental Europe seems to be closely linked to the difficulties of breaking the tight legal regulations provided by labour law in general, and the regulation of public sector employees in particular.

³⁵ For example, <http://www.solidarische-moderne.de>.

character of autonomous universes which, to a large extent, constitute the social reality of individuals.

Legal and political sub-systems clearly enjoy an important position within such configurations because their central societal function is to ensure the compatibility of the time structures of such configurations (*gesamtgesellschaftlichen Zeitausgleich*).³⁶ But this does not mean that such configurations merely represent the sum of the legal and the political systems, or that they can be understood as structures in which other societal structures are succumbed to the primacy of the political-legal complex. The limited reach of political and legal framings can be illustrated by the fact that the different dimensions of such configurations rely on different degrees of territorial boundedness. For example, whereas clearly-defined territoriality is very outspoken in relation to legal and political sub-systems, the term “national economies” remains a far more porous and metaphorical concept, notwithstanding the fact that a higher density of economic exchange can be observed within configurational orders. But the different dimensions do not just operate with different degrees of territorial boundedness. Prior to the introduction of the Euro, Belgium and Luxembourg were a common monetary area; the humanities (*Geisteswissenschaft*) and parts of social science which rely on the German language, are probably better understood upon the basis of linguistic, rather than territorial, delineations, thereby adding Austria and the German-speaking parts of Switzerland to the core of German speaking *academia*, just as one observes that Canadian baseball clubs play in the US league, rather than in a separate Canadian league and so forth. Such examples, first of all, illustrate that territorial delineations remain internal boundaries and are not politically- or legally-established frames. Moreover, that the existence of a configurational web is not conditioned by completely identical territorial-delineations within its different dimensions, but merely by a certain degree of territorial overlap. The idea that the sovereign state possesses absolute power within its territory is, therefore, a semantic fiction which has never actually existed in reality.³⁷

Thus, a configurational web does not constitute unity in a substantialist sense, and no singular state-embedded national culture exists.³⁸ Instead, it is possible to observe a multitude of mutually re-inforcing, overlapping and thus intertwined cultures in the form of, for

³⁶ N. Luhmann, *Recht der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1993), p. 429.

³⁷ For a reconstruction of such sovereignist thinking drawing on Jean Bodin, see U.K. Preuß, note 19 *supra*, p. 35 *et seq.*

³⁸ For the opposite perspective, see U. Haltern, *Was bedeutet Souveränität?*, (Tübingen: Mohr Siebeck, 2007).

example, national legal cultures, national political cultures, national science cultures and – within the economy – the specific social *praxis* of “doing business”. Apart from serving as “reservoirs” of knowledge, and thus as a basis for learning, such cultures also act as “internal environments” of the respective functional systems, in the sense that they frame the horizons which are taken into account in the continued selection of operations, thereby serving as stabilisation mechanisms which reduce the volatility of societal reproduction. They rely on “fictional semantics”, in the form of, for example, foundational myths and the social constructions of languages, traditions and “vested interests”, which are specific to each sphere of society. They are abstract constructions, or, in Hegelian terms, “second natures”,³⁹ which, nonetheless, remain “real”, in the sense that they have real effects in terms of which forms of communications are selected.⁴⁰ They serve as frames for the production of societal trust within their respective societal spheres, and, as such, provide a contribution to the internal stability of such structures, in the sense that they tend to reduce volatility. Whereas functional systems, in their core, operate upon the basis of clear-cut system boundaries and accordant internal density, system cultures are far more fluid and overlapping, and, as such, are far less dense, thereby establishing a high level of inter-systemic entanglement.

One central aspect of configurational webs is mutual stabilisation through the emergence of dense institutionalised links, in the form of, for example, (neo-) corporatist structures of the kind which emerged in the wake of the increased differentiation between the economic and the political system. Thus, configurational webs reduce the autonomy of the systems in question, at the same time as they tend to increase the ability of these systems to rely on the meaning components produced by other systems, thereby providing systems with additional “productive capacities”. Configurational webs represent highly improbable and complex evolutionary outcomes because they imply a mutual fixation of a whole range of systemic structures which allow for continued expansion at the same time as the internal volatility of system reproduction is reduced through the capture of the web. Successful configurations can thus be seen as evolutionary responses to the looming threat of crises, in the sense that they produce order, understood as social stability, through the reduction of the internal volatility within its different components at the same time as externally-induced crowding-out effects and asymmetries are minimised.

³⁹ G.W.F. Hegel, note 7 *supra*, § 4.

⁴⁰ A. Mascareño, “La Cultura chilena como ficción real”, in: M. Figueroa & M. Vicuña (eds), *El Chile del Bicentenario*, (Santiago de Chile: Ediciones Universidad Diego Portales, 2008).

The reality of configurational webs is mainly established at the level of organisations and regimes, in the sense that, as already indicated, formal organisation is the backbone of modern society. Formal organisation is the form through which internal order is established within functionally-delineated areas, just as they serve as the “contact points” for inter-systemic exchange. For example, within the economic system, major firms function as complex structures of ordering in which mother-companies, subsidiaries, suppliers, distributors, retailers and consumers are all drawn into mutually re-inforcing relationships, just as the “self-organisation” of the economic sphere is reflected in the establishment of complex conglomerates of firms, associations of employers, trade associations, unions, chambers of commerce and so forth. In addition, such structures tend to engage in institutionalised co-ordination mechanisms (*Verhandlungssysteme*),⁴¹ partnerships⁴² and networks⁴³ with extra-systemic organisations. Similar functionally-delineated compositions can be observed within areas such as science, religion, mass media and so forth. The form of stabilisation which such organisations produce is, however, conditioned by an instrumental harmonisation of social structures through a highly-intrusive social-engineering of social roles and *praxis*, which drastically reduces the span of their possible operations. For example, one crosses the Rhine and suddenly systems theory is *terra incognita* because it does not correspond with the institutionalised praxis of sociology in the French university system.⁴⁴

The consequence is that a particular form of second order politics can be observed, in the sense that the internal form of ordering within functional spheres becomes a question which is channelled into organisational arrangements which produce collectively-binding decisions or the functional equivalents to collective decisions within their respective functional areas. Such forms of the political do not, however, imply a totalising state or a “complete” politicisation of society. This is, first of all, the case because such forms of the political remain a “secondary code” which merely operates as an attachment to the codes of the system in question. Secondly, the strong reliance on formal organisation introduces forms of organisational stabilisation which are specifically-oriented towards enabling and limiting such forms of the political in the same operation, thereby reducing the chances that political

⁴¹ H. Wilke, *Systemtheorie III: Steuerungstheorie*, (Stuttgart: Lucius & Lucius, 1998), p. 109.

⁴² N.Å. Andersen, *Partnerships. Machines of Possibility*, (Bristol: The Policy Press, 2008).

⁴³ Kjaer, note 32 *supra*.

⁴⁴ H. Rabault, “La réception de l’œuvre de Niklas Luhmann en France: difficultés, analyse et prospective”, (2007) 13 *Soziale Systeme. Zeitschrift für Soziologische Theorie*.

communication is taken to the streets and subsequently turned into a witch-hunt by the mob. Thus, “societal” or non-state forms of the political remain limited to a specific form of organisational politics.

It follows from this that successful configurations neither operate upon the basis of a total subordination of society to political rationality, nor in a form in which the political only resides in the state in the narrow formalistic Luhmannian sense. Instead, a certain gradualisation of the political can be observed, in the sense that some linkages between the state-based form of the political and secondary forms remains tighter than others, just as the internal degree of hierarchy within the secondary forms differs from one societal area to another.⁴⁵ It is therefore not surprising that a radical restraint of the political, as, for example, advocated by libertarians, or the totalisation of the political through a quest for “radical democracy”, have shown themselves to be equally unviable evolutionary paths for the political system.

The central institutional structure which configurational orders rely upon is the constitutional form. In relation to configurational webs, a whole range of constitutional structures can be observed in the form of, for example, state constitutions, economic and social constitutions, church constitutions and the constitutions of organisations (for example, the constitutions of companies and associations). Configurations are thus characterised by very complex constitutional-conglomerates, in which state constitutions only provide one (albeit very important) element. Constitutions can be understood as structures which establish and maintain generalised principles for the production of norms and the resolution of conflicts between such norms upon the basis of their own sources of authority while relying upon a legal framework. Another central characteristic of constitutions is that they are characterised by a time discrepancy, in the sense that they change over time, but generally at a slower pace than the societal structures against which they are oriented. They are societal anchors which frame societal developments, in the sense that they, at the same time, limit the number of potential operations which can be selected, and provide principles which aim to facilitate the selection of actual operations. As such, they can also be understood as forms of ordering, in the sense that they constitute the form of reproduction of the selfsame social structures against which they are oriented.

⁴⁵ For somewhat similar insights, see G. Teubner, “The ‘State’ of Private Networks: The Emerging Legal Regimes of Polycorporatism in Germany”, (1993) 2 *Brigham Young University Law Review*.

The framing of the social order is achieved through a double movement, in the sense that constitutions simultaneously constitute internal order within their respective functional areas and establish the possibility of stabilised linkages with other fields through the invoking of rights. They are simultaneously oriented towards the reduction of internal volatility and the safeguarding of autonomy *vis-à-vis* the outside world through targeted measures which aim to reduce asymmetries and crowding-out effects; a safeguarding of autonomy which, however, not only takes the form of a negative delineation, but also takes the form of stable, but narrow, links which enable co-evolutionary processes to take place through the institutionalisation of inter-systemic transfers of meaning components.

Constitutions are circular constructions, in the sense that they are particular dense forms of the selfsame structures against which they are oriented. This is also expressed in their reliance on formal organisation. In *praxis*, they are, therefore, not societal constitutions, in the sense that a political or an economic constitution constitutionalises political or economic forms of communication as such. A constitution does not reach out to the extra-parliamentary opposition (*Außerparlamentarische Opposition*) or to the black economy, or if it does, it does so only partially. Instead, they merely constitutionalise the parts which rely on formal organisation, thereby introducing automatic limitations. This, again, highlights the importance of second-order politics within non-state based spheres of society. The transfer of meaning components through an institutionalised and legally-framed linking of functional systems remains conditioned by the existence of internal translation mechanisms which take the form of second-order politics. Second-order politics serve as the addresses of constitutionally-framed communication. In their external functions, constitutions respond to the double problem of ensuring linkages and overlaps at the same time as the ever-present threat of coalescence is being curtailed. They are evolutionary counter-measures (*Gegensteuerungsmechanismen*) which serve as forms which aim to curtail structural drifts towards coalescence, in the sense that they seek to counter asymmetric relations and the entanglement of functional cultures through the formalisation of authority, competences and decisional procedures just as they more generally consolidate the functionally-differentiated character of society through their underpinning of the organisational set-up upon which functional systems rely.⁴⁶ Constitutional bonding is the real *Wunderwaffe* with which internally- and externally-induced crises are confronted.

⁴⁶ For a somewhat similar view, see D. Sciulli, *Theory of societal Constitutionalism. Foundations of a non-*

V. THE GLOBALISATION OF NATIONAL CONFIGURATIONAL WEBS THROUGH CRISIS

The kind of configurational webs normally associated with nation states can also be understood as conglomerates of *Eigenstructures* (*Eigenstrukturen*).⁴⁷ The emergence of such configurations in Europe took place *within* the framework of already existing feudal structures. The evolution of modern forms of organisation, territory, law, the economy, politics and so forth came about through a metamorphosis of feudal structures.⁴⁸ Modern configurations emerged through century-long processes in which the pre-modern structures were only gradually reduced to more or less empty shells, or were completely eradicated. Thus, modern configurational structures can also be understood as parasitoids (parasites which end up killing their hosts), in the sense that the new and increasingly autonomous structures of modern society were dependent on - and, to a large extent, created by - the previously existing structures, but nonetheless ended up marginalising these selfsame structures over time.

Although relics of the feudal structures continue to exist in European settings (for example, constitutional monarchies and nobility networks), they no longer occupy a central position in society. However, a variant of the conflictual relationship between pre-modern and modern structures continues to have central importance in large parts of the world today. This is the case because, through imperialism, the specific western form of societal organisation was exported throughout the entire globe. The consequence is that large parts of the world - most notably in Africa, Asia and Latin America - continue to be characterised by multiple layers, in the sense that modern forms of organisation that are essentially of European origin - such as codified legal systems and generalised bureaucratic structures - have been imposed “on top” of (in the Western sense) traditional forms of societal organisation, without achieving a complete marginalisation of traditional forms of societal organisation. Thus, the different logics that they represent continue to operate simultaneously, either in a separate, but entangled, manner, or through the formation of hybrid structures

Marxist critical theory, note 28 *supra*.

⁴⁷ R. Stichweh, “Structure Formation in World Society. The Eigenstructures of World Society and the Regional Cultures of the World”, available at: <http://www.unilu.ch/files/5stworldsociety.eigenstructures.1.pdf>.

⁴⁸ For the metamorphosis leading to legal revolutions, see H. Brunkhorst, “Machbarkeitsillusionen, feierliche Erklärungen und Gesänge. Zum Verhältnis von Evolution und Revolution im Recht”, in: G.-P. Calliess *et al.*, note 24 *supra*.

which combine elements from the two dimensions.⁴⁹ The basic institutional features of modern society, such as constitutions, contract law, property rights and so forth, might be in place at the same time as pre-modern forms of differentiation, in different degrees and variations, continue to define the form of social operations “beneath” modern structures, and often in a manner which short-circuits the operative practices of the modern structures.⁵⁰ In most places in the world, not only the state, but also the kind of configurational webs described above, remain a fairly new phenomenon, in the sense that the globalisation of such structures first unfolded in the wake of the de-colonialisation processes of the mid-Twentieth century. Thus, modern forms of societal organisation have become globalised, but, at the same time, within large sections of the world, they only provide a thin layer which has not (yet) acquired a degree of depth which enables them to be the dominating form of structural pattern-reproduction.

Having said that, the history of the Twentieth century can be understood as having been characterised by a movement towards a gradual, but steady, increase in the relative importance of functionally-differentiated structures, and, with it, modern forms of state-based territorial differentiation and configurational webs. One of the many consequences of this is a reduction in global centre/periphery differentiation as an independent form of pattern reproduction. The first major indication of this movement unfolded through a breakdown of the distinction between “Europe and the rest” in the first half of the Twentieth century, and thereby of the kind of European “configuration of national configurations” which, with increasing strength, had characterised Europe from the Sixteenth century onwards. Although the cause for the military, economic and other catastrophic events which followed was undoubtedly triggered by a very complex constellation of factors, including the breakdown of the constitutional stabilisation-mechanisms within national configurations,⁵¹ the overriding structural reason seems to be a failure of functional systems and (inter-) national configurational webs to adapt internally to increases in the globalisation of the selfsame systems through adequate internal re-configurations. For example, the changes brought about by the relative increase in the centrality of the United States for the economic system from

⁴⁹ See, for example, L. Avritzer, “Culture, Democracy and the Formation of the Public Space in Brazil”, in: J. Souza & V. Sinder (eds), *Imagining Brazil*, (New York: Lexington Books, 2005); M. Neves, *Verfassung und Positivität des Rechts in der Peripheren Moderne*, (Berlin: Duncker & Humblot, 1992), p. 7.

⁵⁰ As pointed out by Luhmann, Southern Italy is an excellent place to observe this. See N. Luhmann, “Kausalität im Süden”, (1995) 1 *Soziale Systeme. Zeitschrift für Soziologische Theorie*; see, also, P.F. Kjaer, note 26 *supra*, p. 483.

⁵¹ For further reading on this point, see the contribution of Chris Thornhill to this volume.

the late Nineteenth century onwards was not reflected in a concordant shift in the institutional set-up. The British Pound remained the global anchor currency long after the basis for that role had disappeared. In a similar manner, the rising importance of the United States was not reflected in an increased role of the US political system within the globalising political system in the inter-war period, thereby creating a discrepancy between the form and the location of economic and political reproduction-processes and the institutional architecture which aimed to stabilise these processes. Only after the catastrophe did sufficient learning processes unfold through the establishment of the Bretton-Woods system, the institutionalisation of the US Dollar as the global anchor currency, and the internal re-configuration of the global political system through the handover of the hegemonic credentials from the UK to the US.

The re-stabilising constitutional architecture of the “Westphalian-Keynesian frame”,⁵² as outlined in the Bretton-Woods architecture, however, only maintained itself for a few decades, just as it essentially remained a structure which had the North Atlantic space as its core.⁵³ As embodied by the collapse of the Bretton-Woods arrangement, a gradual breakdown of the distinction between the “West and the rest” started in the 1970s, with the increased (re-) inclusion of Japan and, later on, through the increased weight of other parts of the East Asian region in the world economy. Future historical studies might, therefore, come to the conclusion that the financial crisis of 2008 can only be adequately understood when it is seen as a culmination of a far bigger transformational shift which has been unfolding from the 1970s onwards; a shift which was contemporarily concealed through the kind of super-bubble, compromising a whole range of sub-bubbles within financial markets, private consumption, housing, government spending and so forth,⁵⁴ which had characterised large parts of the global economy in the last three decades.⁵⁵ Thus, the full magnitude of this development first became apparent with the financial crisis of 2008. For the first time since global society emerged some 500 years ago, the majority of the world is likely to belong to

⁵² N. Walker, “Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders”, (2008) 6 *International Journal of Constitutional Law*, p. 373.

⁵³ For the argument that the North Atlantic space remains the core of the global economy also today, see P. Hirst & G. Thompson, *Globalization in Question. The International Economy and the Possibilities of Governance*, 2nd ed. (Cambridge: Polity Press, 2001).

⁵⁴ For the concept of bubbles, see, also, the contribution of Dirk Baecker in this volume.

⁵⁵ G. Soros, *The New Paradigm for Financial Markets: The Credit Crisis of 2008 and What It Means*, (New York: Public Affairs, 2008), p. 81 *et seq.*

the centre by the time the crisis is over, in the sense that the parts of world society associated with states such as Brazil, China, India and Russia will no longer be confined to a peripheral role, thereby making the centre/periphery distinction increasingly obsolete. The transformation of G8 into G20 is the first institutional indication of this development.

Thus, what we have come to understand with the term *globalisation* in the last decades is probably better understood as a transitional phase which implies a relative change in the weight and centrality of different national configurations.⁵⁶ Crude Seventeenth century-inspired perspectives which assume that states are holistic entities encompassing society as whole are likely to see such transformations as merely reflecting a change in the balance of power between states. The relative weight and importance of states are certainly affected by such transformations, but, in practice, we are dealing with far more fundamental changes in the relative weight of *different*, but mutually-dependent, dimensions of national configurations which have been caused by a fundamental change in the deeper structures (*Tiefenstrukturen*) of society through an increased reliance on functional differentiation. As such, the current transitional phase merely implies yet another expansion of the primacy of functional differentiation into ever larger parts of the globe; an expansion which has led to the breakdown of the existing stabilising regimes within different functional areas, and the urgent need to develop replacements which correspond to the new structural realities. As such, the crisis of 2008 reflects a discrepancy between the structural composition of the world economy and the (inter-) national regulatory architecture which aims to stabilise it. In this sense, the current crisis, and also the crisis of the 1930s, can be understood as a form of globalisation crisis. This does not mean that globalisation, as such, is the problem, but it does mean that a striking inability to respond to structural transformations can be observed, in the sense that the increased globalisation of functional systems is not reflected in the corresponding adaptations and re-configurations of the institutional, and, indeed, constitutional, framing of economic processes, as well as other social processes. Both the Great Depression and the crisis of 2008 indicate that an orderly “hand-over” of the role of the anchor of the world economy in the wake of structural transformations seems impossible to achieve.

⁵⁶ For similar insights, albeit upon the basis of reductionist view which reduces such transformation processes to a question of an expansion of a pure economic logic, see I. Wallerstein, “Globalization or the age of transition?”, (2000) 2 *International Sociology*, p. 249.

VI. CRISIS THROUGH COALESCENCE

Not surprisingly, the process leading to the financial crisis of 2008 has certain structural affinities with the kind of processes which unfolded in the transitional phases which led to a replacement of the European with the North Atlantic space. The breakdown of the European space which began to unfold in the late Nineteenth century, and which manifested itself in the two World Wars in the first half of the Twentieth century, implied a radical breakdown of the boundaries between functional systems, in the sense that the political system in the state form radically expanded its reach. The need to mobilise resources for the war effort during the First World War implied a radical expansion of the incursions of states into other societal spheres. The economy became a war economy (*Kriegsökonomie*), science was transformed into an instrument for the development of military technology, the education system was transformed into an instrument for the reproduction of patriotism, and so forth.⁵⁷ However, in practice, the expansion of the state was a two-way street because the expansion of the public realm through an incorporation of private structures, over time, undermined the inner constitution of the political system, in the sense that the privatistic logic guiding the incorporated special interests increasingly came to dominate the state. Thus, the central consequence which emerges from the first half of the European catastrophe was coalescence in the sense that the functionally-differentiated infrastructure of modernity as provided by organisational systems was exposed to immense pressure, and, in some parts of world society, it completely collapsed, thereby providing the basis for the kind of totalitarian politics which came to dominate in the second half of the European implosion process.⁵⁸

The “cheap money” regime which the expansion of the global economy, with the US economy as its anchor, has relied upon in the last three decades can be described with a similar vocabulary. The introduction of a new financial regime upon the basis of monetarist ideology represented an unviable compensatory reaction to structural changes, which led to a partial breakdown of the functional separation between the political and the economic system. The relative weakening of the position of the United States as the “engine” and institutional anchor of the world economy over the last four decades created immense pressure for increasing growth levels in order to maintain a dominating position. Although such processes are far too complex to be reduced to the outcome of formalised political

⁵⁷ See, for example, B.D. Porter, *War and the Rise of the State. The Military Foundations of Modern Politics*, (New York: The Free Press, 1994), p. 195 *et seq.*

⁵⁸ For this view, see, also, Chris Thornhill in this volume.

decisions, the introduction of “Reaganomics” as a vehicle for winning the Cold War and, more generally, to maintain the standing of the United States in the world, is a case in point. The so-called neo-liberal ideological framework which was developed in order to underpin this development was, in principle, based upon the idea of a retrenchment of the state in order to let the market reign upon the basis of self-correcting processes. The consequence was, however, not so much a cut-back of the state, as a re-configuration of the state and the tax regime upon which it relied. The result of the latter was an increase in economic social inequality. But, from a long-term perspective, the re-configuration of the state was far more important, in so far as it led to a capture of the *raison d'État* by privatistic interests, thereby undermining the distinction between political and economic rationality. This was not only the case in relation to the privatisation of natural monopolies (water supply, railways, *etc.*), which have always operated on the borderline between the private and the public sphere. Instead, a far more profound capture took place through the introduction of New Public Management instruments throughout the state, thereby subsuming political operations to economic rationality.

In addition, the regulatory function of the political system in the state form *vis-à-vis* the economic system was broken down through the move towards the de-regulation of the financial markets, a move which, however, was not so much about the degree of public control as a move implying capture, in the sense that public regulators influenced by monetarist ideology were transformed from being the guardians of the public interest into being the servants of the financial industry, with the result that the relationship between operators and regulators increasingly became characterised by coalescence. This effectively 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. Thus, apart from a general re-inforcement of publicly-sanctioned regulation, a case can be made for a new form of societal constitutionalism⁵⁹ within finance. A form of societal constitutionalism which has functional separation (the *Volker* Rule) as its core element, in the sense that it is oriented towards

⁵⁹ David Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory*, note 28 *supra*.

maintaining a separation between different segments of the finance industry, and thereby reducing the risk of exposure which low-risk activities, such as traditional banking, are confronted with from high-risk activities such as hedge funding. A complex re-configuration of the overall logic guiding the financial system based upon a double-movement of public measures and private self-regulation is needed.⁶⁰ Measures which are internally intended to establish firewalls between different sectors of the financial system and which are externally aimed at curtailing coalescence through the maintenance of functional separation between the economic system and other social spheres, such as the political system, which, at the same time, function as channels for their *simultaneous* back coupling (*Rückkopplung*), are established through constitutionalised, and thus limited, structural couplings which rely on formal organisation and a formalised legal framing.

It follows from the above that the real problem exposed by the financial crisis is not, first and foremost, a question of the *size* of the state. Although it remains a legitimate and important field of political contestation, the question of whether the state should occupy 30%, 40% or 50% of GDP is not the real issue. The real danger is, instead, the breakdown of the operative distinction between political and other forms of social rationality, such as economic rationality. All the different variants of political fundamentalism share the characteristic that they seek to overcome the “original sin” (*Sündenfall*) of functional differentiation⁶¹ through the submission of society in its entirety to a single form of rationality. Fundamentalist ideologies are ideologies of coalescence. As such, neo-liberalism is, in its logical composition, also to be understood as a fundamentalist ideology, in so far as it seeks to impose a one-dimensional economic logic on society in its entirety. The difference - apart, of course, from the radically different degrees of societal “damage” which the different fundamentalist ideologies have actually coursed - is that extreme cases, such as Communism, Fascism and National Socialism, sought to submit society in its entirety to an immediate form of the political without relying on an external semantic universe as a medium. These totalitarian ideologies share the view that the political system in the totalitarian form should transpose itself into all others spheres of society upon the basis of an unmediated political logic. They advocate a naked form of power in which the ambition to achieve the submission of society in its entirety is not covered up, but is, instead, deliberately highlighted and re-

⁶⁰ See, also, the contribution of Gunther Teubner in this volume.

⁶¹ N. Luhmann, *Die Wirtschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1989), p. 264.

inforced as a purpose in itself. In contrast, neo-liberalism and fundamentalist forms of ecology, nationalism, religious fundamentalism and socialism, share the feature that they 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. In contrast to radical totalitarian ideologies, they rely upon an “inter-mediating variable” in their relation to other parts of society, and it is this single inter-mediating variable which they seek to transpose to society in its entirety. Thus, paradoxically, 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 remains guided by political, rather than economic, rationality, in the sense that the intention to submit society in its entirety to an economic logic remains foremost a political objective, and only secondarily an economic one.

VII. CONSTITUTIONALISING TRANSNATIONAL CONFIGURATIONAL WEBS⁶²

The current crisis is, however, different from earlier crises in one central aspect because the globalisation of statehood and national configurational webs has gone hand in hand with a profound structural transformation of the transnational layer of world society. The core structural components of this transformation is a steady decrease in the relevance of centre/periphery differentiation and a radical increase in the reliance on functional differentiation as the organisational principle of transnational processes.⁶³ A double-movement is unfolding, in the sense that the globalisation of statehood and the re-configuration of transnational structures away from centre/periphery differentiation and towards functional differentiation have developed in a co-evolutionary manner. The move from the form of the colonial company to the multinational firm, and the emergence of a whole range of functionally-delineated regulatory institutions, such as the WTO, the IMF and

⁶² This section to a large extent rely on the more extensive analysis of transnational structures in, P.F. Kjaer, “The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law and the Political in the Transnational Space”, (2010) 2 *Wisconsin Law Review*.

⁶³ The transnational layer of structural pattern reproduction has existed for just as long as modern statehood has existed, in the sense that the emergence of modern statehood in Europe unfolded in conjunction with the progressive expansion of transnational structures in the colonial centre/periphery form. Thus, the kind of constitutional orders which characterise modern states and configurational webs was always only one (very important) dimension of far more complex conglomerates of transnational constitutional structures. See, also, J. Tully, “The Imperialism of Modern Constitutional Democracy”, in: N. Walker & M. Loughlin, note 20 *supra*.

the World Bank, in relation to economic processes and similar, though often more embryonic, structures within other societal spheres, represented a profound shift which came about in the wake of de-colonialisation. Such structures were deeply entangled with national configurations and, at the same time, they also contained a specific transnational dimension. Multinational firms remain closely-embedded in the legal culture and the *praxis* of doing business, which characterises the configuration of their origin at the same time as they tend to develop an additional transnational dimension which enables them to operate on a global scale.⁶⁴ They develop forms of internal ordering and mechanisms which aim to ensure their ability to transplant meaning components, such as products, capital and human resources into a whole range of different configurational settings. In a similar manner, public international organisations tend to remain “state-based”, in the sense that they operate upon the basis of delegation at the same time as they develop an additional transnational dimension which operates on a logic which is not captured by the logic of delegation.⁶⁵ A metamorphosis is taking place, in the sense that a multiplicity of new structures, which increasingly acquire a life of their own, emerges from traditional public and private international law formations.⁶⁶ So far, the relationship between national and transnational structures has been characterised by a relationship of mutual increase. Thus, the extent to which transnational *Eigenstructures* increasingly possess the potential to marginalise the institutional structures which characterise national configurations remains to be seen. When Zhou Enlai, the first Premier of Communist China, was asked in the mid-Twentieth century for his opinion on the historical significance of the 1789 French Revolution, he is said to have replied: “It’s too soon to tell.” The same is probably the case in relation to the relationship between national and the emerging transnational configurations.

The consequence of the transformation of the transnational layer of world society is not only the gradual emergence of new organisational forms, such as multinational companies within the economic sphere in the course of the Twentieth century, but also the emergence of new forms of law and politics, which aim to stabilise these organisational forms. Within legal discourses, the emergence of transnational law has been intensely

⁶⁴ L.C. Backer, “Economic Globalization and the Rise of Efficient Systems of Global Private lawmaking: Wal-Mart as Global Legislator”, (2007) 37 *University of Connecticut Law Review*, p. 1739.

⁶⁵ J. Cohen & C.F. Sabel, “Global Democracy?” (2005) 37 *NYU Journal of International Law and Politics*, p. 763.

⁶⁶ A. Fischer-Lescano & G. Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts*, (Frankfurt aM: Suhrkamp Verlag, 2006).

discussed by scholars such as Amstutz, Koskeniemi and Teubner, among others, while emphasising characteristics such as inter-contextuality,⁶⁷ gradualisation,⁶⁸ cognitivisation,⁶⁹ hybridity,⁷⁰ fragmentation⁷¹ and heterarchy.⁷² The central structural transformation which looms behind these developments can, however, be traced back to the insight contained in Luhmann's "speculative hypothesis" of the law's future transformation away from a reliance on territorial boundaries and towards an increased reliance on functional differentiation upon the basis of a relative shift away from normative expectations towards cognitive expectations.⁷³

While accepting the basic premises, one might argue that this perspective falls a bit too short in relation to one important aspect. The modern legal system evolved in a close co-evolutionary relationship with the political system, and the advocates of transnational or world law (*Weltrecht*) - implicitly or explicitly - work on the assumption that this tight co-evolutionary relationship is being weakened through globalisation.⁷⁴ This is, indeed, the case if one maintains a classical and *de facto* (inter-) state-based concept of the political as the point of reference. But what if the political system has also undergone a metamorphosis? Indeed, it can be argued that similar structural transformations as those associated with the concepts of inter-contextuality, cognitivisation, hybridity, fragmentation and heterarchy

⁶⁷ M. Amstutz, "In Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning", (2005) 6 *European Law Journal*, p. 766; *idem* & V. Karavas, "Weltrecht: Ein Derridasches Monster", in: G.-P. Calliess *et al.*, note 24 *supra*.

⁶⁸ D.M. Trubek, P. Cottrell & M. Nance, "'Soft Law', 'Hard Law' and EU Integration", in: G. de Búrca & J. Scott (eds), *New Governance and Constitutionalism*, (Oxford: Hart Publishing, 2005); D.M. Trubek & L.G. Trubek, "The Open Method of Co-ordination and the Debate over 'Hard' and 'Soft' Law", in: J. Zeitlin & P. Pochet (eds), *The Open Method of Co-ordination in Action. The European Employment and Social Inclusion Strategies*, (Brussels: Peter Lang, 2005); J. Scott & D.M. Trubek, "Mind the Gap: Law and New Approaches to Governance in the European Union", (2002) 1 *European Law Journal*, p. 1.

⁶⁹ M. Amstutz & V. Karavas, "Weltrecht: Ein Derridasches Monster", in: G.-P. Calliess *et al.*, note 24 *supra*.

⁷⁰ I.-J. Sand, "Hybrid Law – Law in a Global Society of Differentiation and Change", in: G.-P. Calliess *et al.*, note 24 *supra*.

⁷¹ M. Koskeniemi, "Formalismus, Fragmentierung, Freiheit – Kantische Themen im heutigen Völkerrecht", in: R. Kreide & A. Niederberger (eds), *Transnationale Verrechtlichung. Nationale Demokratien im Kontext globaler Politik*, (Frankfurt aM: Campus Verlag, 2008); M. Koskeniemi & P. Leino, "Fragmentation of International Law? Postmodern Anxieties", (2002) 15 *Leiden Journal of International Law*, p. 553.

⁷² G. Teubner & A. Fischer-Lescano, note 66 *supra*; A. Fischer-Lescano & G. Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", (2004) 25 *Michigan Journal of International Law*, p. 999.

⁷³ N. Luhmann, "Die Weltgesellschaft", (1971) 57 *Archiv für Rechts- und Sozialphilosophie*, p. 1.

⁷⁴ For example, G. Teubner, "Self-Constitutionalizing TNCs? On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct", in: G.-P. Calliess (ed) "Governing Transnational Corporations - Public and Private Perspectives", (2010) 17 *Indiana Journal of Global Legal Studies*.

within law can also be detected within the political system. Thus, the functional synthesis of law and the political might not have disappeared at all but only be taking a different form in the transnational layer of world society, a form which remains unobservable when viewed through the classical conceptual apparatus of the political. Instead, a new context and function-specific concept of the political are needed in the same manner as the ongoing developments within the global legal sphere require a new concept of transnational law.

Today, configurative structures organised along functionally-, rather than territorial-, delineated lines exist in a whole range of settings. First, genuine political organisations, such as the WTO, the WHO, the FAO and so forth, have emerged.⁷⁵ Although these structures deal with different substance matters, they remain political organisations, in the sense that their operations are subordinated to political rationality, just as they, to different degrees, rely on forceful compliance mechanisms. Second, (increasingly) autonomous structures, such as multinational firms and globally-operating NGOs, are faced with the question of how to maintain internal order while operating in a multi-contextual environment. Multinational companies are complex conglomerates which typically comprise a multitude of subsidiaries, which, for example, makes the question of the degree of (de-) centralisation of authority a recurrent issue. Thus, no multinational can operate without refined hierarchical control mechanisms in terms of decision-making procedures, evaluation schemes and auditing systems, which are closely linked to the ability to impose negative sanctions on lower levels and to the production of a densely-defined set of norms to guide the deployment of these control mechanisms. Private transnational structures are also faced with the Hobbesian question of how social order is maintained. Third, transnationally-operating organisations are engaged in permanent endeavours to stabilise relations to their social environments. However, a distinction can be made here between intra- and extra-systemic relations. When multinational companies engage with sub-contractors and supplier networks, this is a process which unfolds within the economic field. Relations with research institutions, public authorities and NGOs, on the other hand, fall markedly outside the economic field. Despite the difference in the character of the relations, similar institutional forms oriented towards the structuring of such interaction tend to emerge. But, whereas the functional dimension (*Sachdimension*) is likely to be central to the first dimension because the actors are operating within the same sphere, the social dimension (*Sozialdimension*) is likely to be

⁷⁵ This development has been underway for a long time as the first functional international organisations go back to the Nineteenth century.

stronger within the second dimension. When the issue in question implies a need to bridge a gap between different spheres of society, the need for negotiation or dialogue schemes, from which common ground can be found, tends to be greater.

In addition, it is possible to observe the emergence of overarching regimes which bind together a whole range of public and private elements within a given functionally-delineated field. What is common for regulatory organisations, as well as multinationals, is the fact that they tend to become parts of larger conglomerates, in the sense that a multiplicity of observers, in the form of producers, consumers, regulators and so forth, become part of functionally-delineated configurative processes which tend to produce a convergence of expectations between the actors in question upon the basis of a (more or less well-developed) set of principles, norms and rules, which together constitutes a “higher order”.⁷⁶ Moreover, such developments imply the development of independent sources of authority. A key example here is the function of “scientific knowledge” within risk regulation (for example, within the Comitology structures of the EU, and the Sanitary and Phytosanitary committee of the WTO and private self-regulation bodies). In other cases, the backbone of functional regimes tends to be constituted through the emergence of specialised institutions which develop globally-deployed ranking instruments. This, for instance, is the case in relation to capital markets,⁷⁷ sports,⁷⁸ freedom of the press,⁷⁹ and higher education.⁸⁰ Such ranking instruments serve as forms through which the operations of actors within the area in question are benchmarked, thereby producing a global cognitive space. Ranking and benchmarks instruments are used to establish foundational structures which other actors within the functional area in question have to position themselves in relation to.⁸¹ They provide the constitutive basis for functionally-delineated universes with a global reach. In some cases, the

⁷⁶ S.D. Krasner, “Structural causes and regime consequences: regimes as intervening variables”, in: *idem* (ed), *International Regimes*, (Ithaca NY: Cornell University Press, 1983).

⁷⁷ In relation to rating agencies, see T.J. Sinclair, “Global Monitor: Bond Rating Agencies”, (2003) 1 *New Political Economy*, p. 147.

⁷⁸ T. Werron, *Der Weltsport und sein Publikum. Zur Autonomie und Entstehung des modernen Sports*, (Weilerswist: Velbrueck Verlag, 2009).

⁷⁹ For example, see the Global Press Freedom Index made by Reporters without Borders; available at: http://www.rsf.org/index.php?page=rubrique&id_rubrique=2.

⁸⁰ For example, the Shanghai Ranking available at: <http://www.arwu.org>; and *The Times Higher Education Ranking* available at: <http://www.timeshighereducation.co.uk>.

⁸¹ On the constitutive role of rating agencies in relation to the global financial system, see T.J. Sinclair, “The Problems of Growing up and getting rich: How the truly obscure became very important in global financial market and to us all” (Typescript, on file with author).

rankings are, moreover, supplemented by certification instruments, such as those developed by ISO (product standards) and FLO-CERT (Independent International Certification Agency for Fairtrade Production Processes and Products), which even more proactively seek to transform the way in which actors operate within a given area.

Delving somewhat deeper, it is, moreover, possible to observe that transnational structures have adopted a number of concepts which serve as functional equivalents to concepts which provide the constitutive infrastructure of the political in the nation-state form. The concepts of “nation”, “the public sphere”, “representation” and “delegation” are being substituted by the concepts of “stakeholders”, “transparency”, “self-representation” and “accountability”. The transnational concepts have a far higher cognitive component than their nation-state counterparts, thereby illustrating that not only transnational law, but also transnational politics, is characterised by a high degree of cognitivisation.

Stakeholders: The political system in the nation-state form relies on the nation (or “the people”), understood as a generalised and abstract legal construction, in order (1) to delineate the reach of their power; (2) to act as a form through which power is transposed into other parts of society; and (3) as a form through which social complexity is reduced, in the sense that the concept of the nation is used to delineate the part of the world which a given political sub-system takes account of in its decision-making. The latter form is closely associated with the concept of democracy. Democracy can be understood as a specific form through which the political system observes its own environment - a form that is characterised by a duality between stability and change, in the sense that the people, through the conception of the nation, is defined as a (relatively) stable entity, at the same time as the “nature of the people”, in terms of preferences, interests, and norms are dynamic, thereby allowing the political system to increase its level of reflexivity and thereby its ability to adapt when changes occur in its environment. Thus, the specificity of democracy (when compared to other forms of rule, such as feudalism and totalitarianism) is that, within the framework of the nation, it remains open to the future, in the sense that what counts as a politically-relevant problem, or how it should be dealt with, is not prescribed.⁸² In this specific sense, democracy is characterised by a high level of adaptability and this is probably the reason why it has proved

⁸² M. Foucault, *Il faut défendre la Société. Cours au Collège de France, 1975-76*, (Paris: Gallimard, 1997), p. 24 *et seq*; N. Luhmann, “Die Zukunft der Demokratie”, in: *idem, Soziologische Aufklärung, Band 4. Beiträge zur Funktionalen Differenzierung der Gesellschaft*, (Opladen: Westdeutscher Verlag, 1994).

to be “evolutionary superior” when measured against the other forms of rule which have existed to date.

The stakeholder concept essentially fulfils a similar role in transnational space. Transnational structures are characterised by an absence of territorially-delineated polities, which leads to systematic uncertainty concerning what the “collective” is, and what decision-making within transnational structures is oriented against, just as it remains uncertain who exactly are affected by such decisions. It simply remains far more uncertain which segment of the social environment transnational structures should observe in order to be able to adapt to changes in their environments. The concept of stakeholders can be as seen as a response to such uncertainty. Stakeholders are an institutionalised set of “actors”, who are granted the status of “affected parties”, and thereby are granted the right to “feed into” decisional processes at the same time as they also serve as the addressees for such decisions. Thus, the stakeholder status serves as a form through which the entity in question delineates the section of its social environment, which it regards as relevant for its operationability. It is the form through which it transmits the meaning components which it produces at the same time as it serves as a frame through which changes in its social environment can be observed, thereby providing a basis for increased adaptability through increased reflexivity. When viewed from a historical perspective, nations have rarely been particularly stable in terms of their extent and composition. However, the stakeholder form is even more “fluid”. The dynamics of inclusion and exclusion operate with a far higher speed in relation to stakeholders, and, in this sense the borders of stakeholder regimes, are extremely contingent. This flexibility, on the one hand, makes them more adaptive than the form of the nation, and thereby potentially even more “evolutionary superior” than democratic structures. On the other hand, the price paid for such fluidity is a “loss of depth”, in the sense that the kind of impact which can be achieved through this form might be relatively limited.

Transparency: In the nation-state context, the public sphere is widely understood as the form through which the will-formation of the polity takes place.⁸³ However, radical increases in social complexity mean that only a very limited number of potentially-relevant issues can be processed within the public sphere. Although the mass-media system, which serves as a central component of the public sphere, has undergone profound globalisation in recent

⁸³ J. Habermas, *Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, [1962] 1990).

decades, the public sphere remains essentially limited to the nation-state form.⁸⁴ In the transnational space, organisations such as multinational firms, public and private international organisations and other transnational bodies have, instead, upon the basis of self-reflexive processes, developed principles and policies of transparency which aim to increase their *observability* by other structures. Examples of such structures include rules which permit access to documents within public international organisations and the steps towards the development of a global regime of financial accounting standards. Again, we see an increased reliance on cognitive structures, in the sense that strategies of transparency enable social entities to observe developments within other social entities and to adapt accordingly, without necessarily engaging in the demanding task of common will-formation.

Self-representation: Within continental philosophy, the notion of representation was deconstructed a long time ago. However, this has largely been ignored within legal and political theory, just as the self-understanding and institutional set-up of nation-state democracies continue to rely on a dualist concept of representation.⁸⁵ In the absence of representative structures of the kind which characterise democracies, entities operating in the transnational space have, instead, been forced to develop strategies of self-representation upon the basis of - to use a Habermasian term - dramaturgical rationality. Transnational structures *re-present* themselves towards their environments. Public organisations develop policy programmes and establish targets for their achievement just as multinationals and NGOs develop ethical charters concerning the way in which they conduct their activities. They publicly declare their intentions in the form of illocutionary acts which tend to become (more or less) self-binding.⁸⁶

⁸⁴ . However, for the European context, see K. Eder, "Zur Transformation nationalstaatlicher Öffentlichkeit in Europa. Von der Sprachgemeinschaft zur issue spezifischen Kommunikationsgemeinschaft", (2000) 10 *Berliner Journal für Soziologie*, p. 167; *idem* & H.J. Trenz, "The democratising dynamics of an European public sphere. Towards a theory of democratic functionalism", (2004) 7 *European Journal of Social Theory*, p. 5. Habermas also acknowledge the structural reliance of the public sphere on the existence of an autonomous functional system of mass media. See J. Habermas, "Hat die Demokratie noch eine epistemische Dimension? Empirische Forschung und normative Theorie", in: *idem, Ach, Europa*, (Frankfurt aM: Suhrkamp Verlag, 2008), p. 139.

⁸⁵ For a devastating critique of the concept of representation in political and legal theory, see H. Brunkhorst, "Constitutionalism and Democracy in the World Society", in: P. Dobner & M. Loughlin, note 19 *supra*, p. 195 *et seq.*

⁸⁶ For this perspective, see, in particular, the work of Martin Herberg: for example, *Globalisierung und private Selbstregulierung. Umweltschutz in multinationalen Unternehmen*, (Frankfurt aM: Campus Verlag, 2007); *idem*, "Global Legal Pluralism and Interlegality: Environmental Self-Regulation in Multinational Enterprises as Global Law-Making", in: O. Dilling, M. Herberg & G Winter (eds), *Responsible Business. Self-Governance and Law in Transnational Economic Transactions*, (Oxford: Hart Publishing, 2008).

Accountability: Closely related to the concept of representation, the concept of delegation plays an important role in the institutional set-up of states, as well as in their interaction with the transnational layer, due to the delegation of competences to international organisations. But a delegation is always more than just a delegation. Each delegation of legal competencies implies a *de facto* recognition of the autonomy of the structures to which competencies are delegated. Structures operating upon the basis of delegation tend both to exercise significant discretionary powers and to frame policy areas in a manner which produces a limited number of options for further policy development. They also tend to develop specific norms and become policy actors in their own right.⁸⁷ Delegation of competencies always implies a step into the unknown and the uncontrollable. Thus, a “gap” exists between what can be controlled through delegation, and the structures which are actually in place. It is this gap which is filled out through the emergence of different forms of accountability measures, for example, through the development of accountability charters which lay down operational standards and norms. This development can also be seen as being closely-related to the development of a “right to justification”, in the sense that the observers which are (negatively) affected by a given activity tend to develop claims that the effect must be justified.⁸⁸

All of the different dimensions of the transnational form of the political outlined above have been widely discussed and analysed by academics in the last decades. What seems to be lacking is the development of a general theory capable of linking them systematically together. When observed in isolation, the mutual supportive character of these dimensions is not clear. Only a more general conceptual framework will make it possible to observe empirically to what degree the observed phenomena constitute, or, potentially, will be capable of constituting, “higher orders” beyond national configurations.

In addition, the relationship between the transnational form of the political and transnational forms of law will have to be systematically clarified. The most promising instrument for this kind of bridging is the constitutional concept. In relation to national configurations, the linking of law and politics through constitutions serves as a form of

⁸⁷ J. Cohen & C.F. Sabel, “Global Democracy?” (2005) 4 *NYU Journal of International Law and Politics*, p. 763.

⁸⁸ J. Neyer, “The Justice Deficit of the European Union and other International Organisations”, in: Ch. Joerges & P.F. Kjaer (eds), *Transnational Standards of Social Protection: Contrasting European and International Governance*, (Oslo: Arena Report Series, 2008); More general and purely analytical, see R. Forst, *Das Recht auf Rechtfertigung - Elemente einer konstruktivistischen Theorie der Gerechtigkeit*, (Frankfurt aM: Suhrkamp Verlag, 2007).

mutually-beneficial (self-) binding, which provides a basis for establishing a relation of mutual increase between change and stability. Due to the substantially-different function and form of transnational law and politics, when compared to nation-state law and politics, a constitutional binding would, however, have to look very different. Although the tensions between change and stability, and contingency and certainty, are very similar, the institutional structures involved are very different. But, as already indicated, the constitutional concept has always been used in relation to a *plurality* of institutional structures.⁸⁹ Beside state constitutions, the concept has been used in relation to church constitutions, company constitutions (*Unternehmensverfassungen*), labour constitutions and economic constitutions. In all these cases, constitutions can be understood as an instrument which, in its political function, frames the body of rules and norms which establishes the formal structure, decisional competences and a hierarchically-based *locus* of authority within a given social entity at the same time as it, in its legal function, lays down the principles for the structuring of conflicts between the norms within such an entity. Constitutions are, in this sense, laying down the enabling and the limitative rules which guide social entities.

When transposed to the transnational space, this definition makes it possible to argue that a multitude of constitutions already exists in the transnational sphere, in the sense that companies, private and public international organisations and NGOs can all be said to have, more or less developed, constitutional structures. However, following the definition above, such constitutions are “internal constitutions”, in the sense that they are very much linked to the question of internal order. The external dimension, in terms of how such institutions relate to their social environments and, more specifically, how asymmetries, crowding-out effects and negative externalities are dealt with, possesses a different set of problems. As the kind of heterarchical governance structures which, in the form of regimes, tend to emerge in-between hierarchical structures are structures in their own right, in the sense that they produce independent societal effects, a different set of enabling and limiting rules tends to emerge in relation to these structures. One might argue that such non-hierarchical co-ordination processes are subject to constitutionalisation processes, to the extent that they rely on legally-ramified principles which determine the inclusion of actors as well as well-developed procedures of decision-making.

⁸⁹ R. Koselleck, “Begriffsgeschichtliche Probleme der Verfassungsgeschichtsschreibung”, in: *idem*, *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und Sozialen Sprache*, (Frankfurt aM: Suhrkamp Verlag, 2006).

A third dimension relates to the kind of overarching configurations which emerges when a multiplicity of actors, organisations and the interlocking governance structures are bound together within a principle-based and legally-ramified overall framework. The term constitutionalism, although it has traditionally been understood as referring to a theory of constitutions, might be a useful term to describe such elements. Such configurations are closely-connected to an agenda concerned with the establishment of an overarching order in the transnational space which has only been partially realised to date. Thus, in the transnational context, the term constitutionalism can, at the same time, serve as a regulatory idea and as the basis for the description of the embryonic features of a new order capable of curtailing coalescence under changed structural conditions.

VIII. CONCLUSION

The crisis of 2008 is a reflection of a double movement which took the form of increased globalisation of national configurations, and thus dislocations in the relationship between national configurations, and a transformation of the structural composition of the transnational layer of world society. Changes occurred, which were not adequately reflected in the accordant adaptations of the stabilising structures which economic and other forms of societal reproduction rely upon, thereby creating the basis for the kind of over-expansion through acceleration, asymmetric relations and coalescence, which led to overstretching, de-differentiation and subsequent collapse. The response, therefore, needs to rely on two equally important and inter-related dimensions: first, an establishment of a new public constitutional order of the world economy (Bretton Woods II), which should adequately reflect the present degree of globalisation of the world economy and the relative weight of national configurations. The rise of Asia needs to be reflected in the institutional set-up which guides the world economy. This move should also imply the establishment of a global currency unit, whose aim is to avoid the kind of transformation processes with the disastrous effects which tend to unfold every time structural transformations necessitate a shift in the global anchor currency. However, such a new global regulatory architecture will imply more - not less - transnationality, thereby also actualising the need for additional constitutional measures in order to stabilise and control the transnational dimension of public international structures.

Second, the already existing, but highly disperse, forms of private constitutional arrangements in relation to firms, trade associations, self-regulatory frameworks, collegial institutions and so forth would need to be strengthened and systematised, thereby increasing the double reflexivity emerging from such processes in order to create a dense net of

mutually re-inforcing intra- and inter-systemic webs; that is to say, *both* in relation to the internal stabilisation of the economic system *and* in relation to the external impact of economic reproduction. In practice, the self-constitution of societal sectors through the increased establishment of internal mechanisms of ordering implies an institutionalisation of a transnational variant of the kind of second order politics within the non-state social structures which characterise national configurations and the legal underpinning of such structures through a hierarchy of norms.