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## **Law and Order Within and Beyond National Configurations**

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# Law and Order within and beyond National Configurations

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## **Abstract:**

On the backdrop of the 2008 financial crisis this paper introduces an understanding of societal crises as a reduction in the meaning production of social entities, which can either be internally or externally provoked. The emergence of constitutions and, more generally, constitutional structures, can be understood as 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, 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.

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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 2008 financial crisis 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 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 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.<sup>1</sup>

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<sup>1</sup> 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*

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.<sup>2</sup> 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*)<sup>3</sup> 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

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*Time*, (Baltimore MD: Johns Hopkins University Press, 2004). For a systems theory perspective, see N. Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1997), p. 997.

<sup>2</sup> 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).

<sup>3</sup> C. Schmitt, *Der Nomos der Erde. Im Völkerrecht des Jus Publicum Europaeum*, (Berlin: Duncker & Humblot, [1950] 1997), especially, p. 200 *et seq.*

the modern state system.<sup>4</sup> 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 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.<sup>5</sup> The crossing of system boundaries is a form of operation which requires time.<sup>6</sup> 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 being entirely eradicated in

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<sup>4</sup> 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).

<sup>5</sup> 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.

<sup>6</sup> 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.*

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.<sup>7</sup> 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.

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.

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<sup>7</sup> 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.

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, where each one is contained in the following one. Second, although the tasks which the political systems reproduces 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.<sup>8</sup> 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.<sup>9</sup> 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,<sup>10</sup> illustrates, the political system is, under certain conditions, capable of taking unexpected evolutionary leaps through sudden 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.<sup>11</sup> 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

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<sup>8</sup> We are here following Chris Thornhill, “Towards a Historical Sociology of Constitutional Legitimacy”, (2008) 2 *Theory and Society*, p. 161.

<sup>9</sup> 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.*

<sup>10</sup> 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.

<sup>11</sup> J.M. Lotman, *Kultur und Explosion*, (Frankfurt aM: Suhrkamp Verlag, [Russian original 2000] 2010).

states tend to be capable of exercising sufficient self-restraint.<sup>12</sup> 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 remain 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.<sup>13</sup> 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, on 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 operations. On the other, the legal elements tend to have a

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<sup>12</sup> The same argument can be found in Chris Thornhill; see, for example, “Towards a Historical Sociology of Constitutional Legitimacy”, note 8 *supra*, p. 161.

<sup>13</sup> 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 1, Handlungsrationalität und gesellschaftliche Rationalisierung*, (Frankfurt aM: Suhrkamp Verlag, 1981), p. 447 *et seq.*

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 misapprehension 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 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.<sup>14</sup> 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 moves 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

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<sup>14</sup> 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.*

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 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.<sup>15</sup> 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

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<sup>15</sup> 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).

aspiration is expressed in well intentioned attempts to maintain “cosiness and ... rurality” (*Nestwärme und ... Ländlichkeit*).<sup>16</sup> Such substantialist ideologies are, however, semantic fictions, in the sense that they are constructions which reflect the “second nature” (*zweite Natur*) of modernity.<sup>17</sup> 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.<sup>18</sup> The failure of substantialist forms of the political does not, however, mean, as liberalist ideology 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 remains 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

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<sup>16</sup> Luhmann commenting on Ferdinand Tönnies’ concept of *Gemeinschaft*; see N. Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1997), p. 1068.

<sup>17</sup> See G.W.F. Hegel, note 7 *supra*, § 4.

<sup>18</sup> 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).

within specific settings.<sup>19</sup> The constitutional structures of modern states can, therefore, only be understood as dis-embedded structures.<sup>20</sup> 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.<sup>21</sup> 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 concerned with the delineation of the meaning spheres, with none of the spheres in question possessing any particular substantialist superiority.<sup>22</sup>

Whereas staunch defenders of the welfare state fail to acknowledge the dis-embeddedness of the state,<sup>23</sup> 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.<sup>24</sup> The right-Luhmannians, on the other

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<sup>19</sup> 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.*

<sup>20</sup> 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.

<sup>21</sup> 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.

<sup>22</sup> Kjaer, note 18 *supra*.

<sup>23</sup> See, for example, W. Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy*, (Oxford, Oxford University Press, 2009).

<sup>24</sup> 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*

hand, advocate the self-organising network society upon the basis of Hayekian insights.<sup>25</sup> 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.<sup>26</sup> 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. The question of the concrete organisational model which they wish to advocate remains unanswered by the left-Luhmannians.<sup>27</sup> 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 change needs to be transformed into generalised bureaucratic measures if pensions are to be paid, treatments carried out in hospitals and 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

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*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).

<sup>25</sup> See, for example, K.-H. Ladeur, *Der Staat gegen die Gesellschaft. Zur Verteidigung der Rationalität der Privatrechtsgesellschaft*, (Tübingen: Mohr Siebeck Verlag, 2006).

<sup>26</sup> 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.

<sup>27</sup> See, S. Buckel, note 24 *supra*, p. 316 *et seq.*

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*) is ultimately elevated into an end in itself (*Selbstzweck*).

In more general terms, emancipative social theory tends to ignore the fact that modern society is, above all, an “organisational society” (*Organisationsgesellschaft*).<sup>28</sup> 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,<sup>29</sup> which provided the basis for the political and economic revolutions which unfolded in the late Eighteenth century and throughout the Nineteenth century.<sup>30</sup> State bureaucracies and private firms have traditionally relied upon the same Hegelian and Weberian models of formal organisation.<sup>31</sup> Thus, the economy *versus* politics dichotomy 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

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<sup>28</sup> 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).

<sup>29</sup> 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).

<sup>30</sup> 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*.

<sup>31</sup> Hegel, note 7 *supra*, § 277 *et seq.*; Max Weber, “Bureaucracy”, in: H. Gerth & C.W. Mills, note 13 *supra*.

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.<sup>32</sup> 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 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,<sup>33</sup> as is also illustrated by the performative contradiction which one can observe in many

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<sup>32</sup> 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).

<sup>33</sup> 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).

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 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.<sup>34</sup>

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.<sup>35</sup>

#### **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

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<sup>34</sup> 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.

<sup>35</sup> For example, <http://www.solidarische-moderne.de>.

always been merely one of several dimensions. The phenomenon which, in mainstream language, is denoted as nation states should, instead, be understood as 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 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*).<sup>36</sup> 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 the 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

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N. Luhmann, *Recht der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1993), p. 429.

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 complete 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.<sup>37</sup>

Thus, a configurational web does not constitute unity in a substantialist sense and no singular state-embedded national culture exists.<sup>38</sup> Instead, it is possible to observe a multitude of mutually re-inforcing, overlapping and thus intertwined cultures in the form of, for 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”,<sup>39</sup> which, nonetheless, remain “real”, in the sense that they have

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<sup>37</sup> For a reconstruction of such sovereignist thinking drawing on Jean Bodin, see U.K. Preuss, note 19 *supra*, p. 35 *et seq.*

<sup>38</sup> For the opposite perspective, see U. Haltern, *Was bedeutet Souveränität?*, (Tübingen: Mohr Siebeck, 2007).

<sup>39</sup> G.W.F. Hegel, note 7 *supra*, § 4.

real effects in terms of which forms of communications are selected.<sup>40</sup> 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.

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

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<sup>40</sup> 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).

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*),<sup>41</sup> partnerships<sup>42</sup> and networks<sup>43</sup> 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.<sup>44</sup>

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

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<sup>41</sup> H. Wilke, *Systemtheorie III: Steuerungstheorie*, (Stuttgart: Lucius & Lucius, 1998), p. 109.

<sup>42</sup> N.Å. Andersen, *Partnerships. Machines of Possibility*, (Bristol: The Policy Press, 2008).

<sup>43</sup> Kjaer, note 32 *supra*.

<sup>44</sup> H. Rabault, “La réception de l’œuvre de Niklas Luhmann en France: difficultés, analyse et prospective”, (2007) 13 *Soziale Systeme. Zeitschrift für Soziologische Theorie*.

stabilisation which are specifically oriented towards enabling and limiting such forms of the political in the same operation, thereby reducing the chances that political 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.<sup>45</sup> 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 (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

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<sup>45</sup> 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*.

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.

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 which they are oriented against. 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.<sup>46</sup> Constitutional bonding is the real *Wunderwaffe* with which internally and externally induced crises are confronted.

## 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*).<sup>47</sup> 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.<sup>48</sup> 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 -

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<sup>46</sup> For a somewhat similar view, see D. Sciulli, *Theory of societal Constitutionalism. Foundations of a non-Marxist critical theory*, note 28 *supra*.

<sup>47</sup> 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>.

<sup>48</sup> 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*.

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 which combine elements from the two dimensions.<sup>49</sup> 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.<sup>50</sup> 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,

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<sup>49</sup> 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.

<sup>50</sup> 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.

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,<sup>51</sup> 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 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

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<sup>51</sup> For further reading on this point see Chris Thornhill, “The Future of the State” in Poul F. Kjaer, Gunther Teubner and Alberto Febbrajo (eds.): *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart Publishing, forthcoming 2011).

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”,<sup>52</sup> 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.<sup>53</sup> 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 2008 financial crisis 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,<sup>54</sup> which had characterised large parts of the global economy in the last three decades.<sup>55</sup> Thus, the full magnitude of this development first became apparent with the 2008 financial crisis. For the first time since global society emerged some 500 years ago, the majority of

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<sup>52</sup> N. Walker, “Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders”, (2008) 6 *International Journal of Constitutional Law*, p. 373.

<sup>53</sup> 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).

<sup>54</sup> For the concept of bubbles, see, also Dirk Baecker, “The Culture Form of a Crisis” in Poul F. Kjaer, Gunther Teubner and Alberto Febbrajo (eds.): *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart Publishing, forthcoming 2011).

<sup>55</sup> 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 world is likely to belong to 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.<sup>56</sup> 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 for developing replacements which correspond to the new structural realities. As such, the 2008 crisis 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

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<sup>56</sup> 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.

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 2008 crisis 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.

## VI. Crisis through Coalescence

Not surprisingly, the process leading to the 2008 financial crisis 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.<sup>57</sup> 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-

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<sup>57</sup> 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.*

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.<sup>58</sup>

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 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

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<sup>58</sup> Chris Thornhill, “The Future of the State” in Poul F. Kjaer, Gunther Teubner and Alberto Febbrajo (eds.): *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart Publishing, forthcoming 2011).

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 constitutionalism<sup>59</sup> 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 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

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<sup>59</sup> David Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory*, note 28 *supra*.

needed.<sup>60</sup> 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% or 40% 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 differentiation<sup>61</sup> 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 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

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<sup>60</sup> See also, Gunther Teubner “A Constitutional Moment? The Logics of Hitting the Bottom” ” in Poul F. Kjaer, Gunther Teubner and Alberto Febbrajo (eds.): *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart Publishing, forthcoming 2011).

<sup>61</sup> N. Luhmann, *Die Wirtschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1989), p. 264.

the ambition to achieve the submission of society in its entirety is not covered up, but is, instead, deliberately highlighted and re-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 Webs**<sup>62</sup>

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

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<sup>62</sup> 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*.

transnational processes.<sup>63</sup> 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 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.<sup>64</sup> 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.<sup>65</sup> 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

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<sup>63</sup> 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*.

<sup>64</sup> 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.

<sup>65</sup> J. Cohen & C.F. Sabel, “Global Democracy?” (2005) 37 *NYU Journal of International Law and Politics*, p. 763.

public and private international law formations.<sup>66</sup> 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 discussed by scholars such as Amstutz, Koskenniemi and Teubner, among others, while emphasising characteristics such as inter-contextuality,<sup>67</sup> gradualisation,<sup>68</sup> cognitivisation,<sup>69</sup> hybridity,<sup>70</sup> fragmentation<sup>71</sup>

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<sup>66</sup> A. Fischer-Lescano & G. Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts*, (Frankfurt aM: Suhrkamp Verlag, 2006).

<sup>67</sup> 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*.

<sup>68</sup> 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.

<sup>69</sup> M. Amstutz & V. Karavas, “Weltrecht: Ein Derridasches Monster”, in: G.-P. Calliess *et al.*, note 24 *supra*.

<sup>70</sup> I.-J. Sand, “Hybrid Law – Law in a Global Society of Differentiation and Change”, in: G.-P. Calliess *et al.*, note 24 *supra*.

<sup>71</sup> M. Koskenniemi, “Formalismus, Fragmentierung, Freiheit – Kantische Themen im heutigen Völkerrecht”, in: R. Kreide & A. Niederbeger (eds), *Transnationale Verrechtlichung. Nationale Demokratien im Kontext globaler Politik*, (Frankfurt aM: Campus Verlag, 2008); M. Koskenniemi & P. Leino, “Fragmentation of International Law? Postmodern Anxieties”, (2002) 15 *Leiden Journal of International Law*, p. 553.

and heterarchy.<sup>72</sup> 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.<sup>73</sup>

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.<sup>74</sup> 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 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 the as ongoing developments within the global legal sphere require a new concept of transnational law.

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<sup>72</sup> 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.

<sup>73</sup> N. Luhmann, "Die Weltgesellschaft", (1971) 57 *Archiv für Rechts- und Sozialphilosophie*, p. 1.

<sup>74</sup> 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", *Indiana Journal of Global Legal Studies*, forthcoming 2010.

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.<sup>75</sup> 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 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. 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 stronger within the second dimension. When the

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<sup>75</sup> This development has been underway for a long time as the first functional international organisations go back to the Nineteenth century.

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”.<sup>76</sup> 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 SPS 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 is, for instance, the case in relation to capital markets,<sup>77</sup> sports,<sup>78</sup> freedom of the press<sup>79</sup> and higher education.<sup>80</sup> 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

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<sup>76</sup> S.D. Krasner, “Structural causes and regime consequences: regimes as intervening variables”, in: *idem* (ed), *International Regimes*, (Ithaca NY: Cornell University Press, 1983).

<sup>77</sup> In relation to rating agencies, see T.J. Sinclair, “Global Monitor: Bond Rating Agencies”, (2003) 1 *New Political Economy*, p. 147.

<sup>78</sup> T. Werron, *Der Weltsport und sein Publikum. Zur Autonomie und Entstehung des modernen Sports*, (Weilerswist: Velbrueck Verlag, 2009).

<sup>79</sup> 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](http://www.rsf.org/index.php?page=rubrique&id_rubrique=2).

<sup>80</sup> For example, the Shanghai Ranking available at: <http://www.arwu.org>; and The Times Higher Education Ranking available at: <http://www.timeshighereducation.co.uk>.

foundational structures which other actors within the functional area in question have to position themselves in relation to.<sup>81</sup> They provide the constitutive basis for functionally-delineated universes with a global reach. In some cases, the 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 operates within a given area.

Delving a bit 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; (3) and 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

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<sup>81</sup> 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).

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.<sup>82</sup> In this specific sense, democracy is characterised by a high level of adaptability and this is probably the reason why it has proved to be “evolutionary superior” when measured against the other forms of rule which have existed so far.

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, what decision-making within transnational structures is oriented against, just as it remains uncertain who exactly are affected by such decisions. It 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

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<sup>82</sup> 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).

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.<sup>83</sup> 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 decades, the public sphere remains essentially limited to the nation-state form.<sup>84</sup> 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 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

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<sup>83</sup> J. Habermas, *Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, [1962] 1990).

<sup>84</sup> 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.

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 de-constructed 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.<sup>85</sup> 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.<sup>86</sup>

*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

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<sup>85</sup> 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 (eds), note 19 *supra*, p. 195 *et seq.*

<sup>86</sup> 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).

options for further policy development. They also tend to develop specific norms and become policy actors in their own right.<sup>87</sup> 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.<sup>88</sup>

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 such 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 mutually-beneficial (self-) binding which provides a basis for establishing a relation of mutual increase between change and stability. Due to the substantially

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<sup>87</sup> J. Cohen & C.F. Sabel, “Global Democracy?” (2005) 4 *NYU Journal of International Law and Politics*, p. 763.

<sup>88</sup> 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).

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.<sup>89</sup> 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 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

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<sup>89</sup> R. Koselleck, “Begriffsgeschichtliche Probleme der Verfassungsgeschichtsschreibung”, in: *idem, Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und Sozialen Sprache*, (Frankfurt aM: Suhrkamp Verlag, 2006).

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.

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 2008 crisis 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.

Secondly, 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.