

Built to last: the role of political architectures

I. Collective addiction?

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

I want to focus on something rather different. Social processes, as such, exhibit the properties of addictive behaviour quite independently of the dependence syndromes of individual human beings. Josef Ackermann is clearly not an addict, and yet Deutsche Bank is in urgent need of detoxification therapy. This would amount to collective addiction in the strict sense. For Alan Greenspan, its discovery was a shock: "those of us who have looked to the self-interest of lending institutions to protect shareholder's equity, myself included, are in a state of shocked disbelief." He would never have believed that banks would have acted against their own interests by high-risk "gambling" practices to the point of self-destruction, that rational organisations could act so irrationally, against their own interests.

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

What does this fascinating phenomenon have to do with constitutionalising polycontexturality? My intention is to draw a bow from the self-harming growth compulsions of social systems, over the moment of near-

catastrophe, to potentially new orientations, which cannot be effected from the outside but, rather, only through the transformation of their “inner constitution”. With Derrida, we might talk of the “extremely capillary constitutions of the discourses”, at which the transformation must direct itself; since it is they – and not the “capital constitutions” of the world of states – that regulate the inner life of the social body, down to the very finest blood vessel. Thus: constitutionalising polycontextuality results in political architectures that are built to last.

These are my theses:

1. In order to understand social crises, among them the recent global financial crisis, we should go beyond factor analysis and look for underlying self-destructive growth compulsions of information flows – in other words, for phenomena of collective addiction.

2. “Hitting the bottom” refers to the constitutional moment when either a catastrophe occurs, or societal forces for change are mobilised of such intensity that the “capillary constitution” of the economy or another social system transforms under their pressure.

3. Politicising consumer preferences, changes in the corporate constitution and plain money reform – these are three examples that illustrate a capillary constitutionalisation of the global economy, the effects of which could not be achieved through either national or transnational interventions of the world of states.

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

II. First thesis: Self-destructive growth-dynamics in communication

A variety of regulations have been proposed in reaction to the global financial crisis: the abolition of banker bonuses, enhanced equity funds for the banks, a Tobin tax, quality control of financial products, tightened national and international state supervision of financial institutions, particularly hedge

funds, tightened control of capital flows and stock market transactions, and improved rules of accounting and risk-assessment. They do have one problem in common: *fatta la legge, trovato l'inganno*. No sooner has a law been passed than the loophole appears.

A deeper understanding of the crisis is offered by an analysis which attempts to discover the underlying dynamic. This dynamic, which fuels ever newly developing avoidance strategies, should be broken through transforming the "capillary constitution" of the global financial economy.

One among several instructive examples of this is provided by the so-called plain money reform currently recommended by a number of finance experts. This reform goes right to the heart of the economic constitution – the creation of money. In a nutshell: Money creation ceased to be the prerogative of central banks, which acted to generate a money supply through paper money not tied to the gold standard. The widespread circulation of non-cash money in current accounts, the circulation of moneyless payment transactions, the new communication technologies, and – of particular importance – the globalisation of money and capital transactions, have prised the money-creating monopoly from the hands of the national central banks. By virtue of these developments, it is now the globally active commercial banks, which have assumed *de facto* the capacity to create money – in principle, independently of the central banks. And this is the case even if non-cash money is euphemistically referred to only as quasi-money. In Europe, the ratio of non-cash money to cash money is 4:1. In the UK, non-cash money accounts for 92% of the total. What is happening here is *creatio ex nihilo*. It is this massive creation of money by private banks that is responsible for the current excesses of the compulsion to growth in the global financial sector.

The point of the theory, however, is as follows: the alternative cannot lie with zero growth, but instead with attacking the excesses of the compulsion to increase. "Stability and zero growth are impossible in today's monetary system." A functioning monetised economy is reliant on a certain compulsion to grow. That said, it is not the compulsion to growth, as such, which occupies

the centre-stage, but rather the difference between necessary growth and self-destructive growth-excesses.

If growth-inducing mechanisms cause social processes that are not, themselves, pathological to be excessively actuated, then an analogy with individual addiction-phenomena is appropriate. As stated before, however, the common perception of addiction syndromes as psychological problems leads us up a blind alley. To identify genuine social equivalents of individual addictive behaviour becomes crucial. Systems-theoretical analysis finds the clue in the strict separation of psychological from social processes, both of which are accountable for the creation of meaning in their own right. Luhmann's greatest achievement was to set beside the Husserlian phenomenology of consciousness an independent phenomenology of communication. This made visible the typical doubling of phenomena, which hitherto had been understood only psychologically. Memory, for example, is not only a psychological dynamic, but also a purely socially-institutionalised communicative process. Even for complexes that were understood exclusively as individual consciousness-phenomena – such as intention, strategy, interest, preference, or understanding – a distinction must be made according to whether they occur in the consciousness of the individual, or proceed as communication processes independent of consciousness.

The definition of individual addiction – compulsive engagement in an activity despite lasting negative consequences – must be re-thought for social systems if one wants to understand the recent financial crisis. Such a dynamic raises a fundamental question for social theory: Is there an affinity between the self-reproduction of social systems and their implacable compulsion to growth? And, particularly relevant to our discussion, does the recursivity of autopoiesis have inherent tendencies, over and above such normal growth, towards a socially harmful compulsion to repeat and grow? And by what means is such a “turbo-autopoiesis” triggered? Might the infamous expansion tendencies of the function systems – the tendencies towards a comprehensive economisation, politicisation, juridification, medialisation, or medicalisation of the world – indicate such a compulsive growth-dynamics?

There is, I submit, an inherent compulsion to ever higher production not only in the economy but also in other function systems – an inherent compulsion which, on the one hand, is a necessary condition of self-reproduction, but, on the other, can be propelled by growth-inducing mechanisms to the point of transition into destructive tendencies. In the case of law, it is quite clear that law does not simply resolve conflicts and then rests in peace. Law itself creates conflict through its own regulations, which, in turn, require more regulation. Law itself produces situations that provoke conflicts. Is the price of the autonomy of law the fact that it necessarily contributes to an increase in conflict? What is critical is a type of addiction syndrome of the law in which norm production exhibits a dependency syndrome on external stimuli – political legislation and economic contractual mechanisms – producing, at national and transnational level, the much criticised pathologies of the excessive juridification of the world. Would these be the “legal excesses” of late modernity? In politics, the excessive compulsions to grow of the welfare state to grow are the obvious candidate. In science, research creates ever-deeper uncertainties, which can only be dispelled by further research, which, again, causes new uncertainties. In each of these contexts, we need to differentiate between a compulsion to growth that is necessary for continuation, and increase-excesses which threaten the normal state of things.

III. Second Thesis: The constitutional moment - Hitting the bottom

With these inherent growth accelerations the function systems burden themselves, society and the environment with serious “consequences of their own differentiation, specialisation and high-achievement orientation”. Three collision fields can be identified: (1) the collision of the growth imperative of one system with the integrity of other social sub-systems; (2) collision with a comprehensive rationality of world society; and (3) the collision of the growth acceleration of a system with its own self-reproduction. The evolutionary dynamics of these three collisions certainly have the potential to blur into social catastrophes. But there is nothing necessary about the collapse, as Karl Marx postulated, and nothing necessary about Max Weber’s “iron cage” of modernity. In this light, Niklas Luhmann is more plausible: the occurrence

of catastrophe is contingent. It depends on whether growth-inhibiting countervailing structures emerge to prevent the positive feed-back catastrophe within the growth-dynamic.

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

In functional differentiation, the experiment is risked of renouncing the unity of society and unleashing a variety of fragmented social energies – each of which, since it is not limited by any in-built counter-principles, causes a massive internal growth-dynamic. The great achievements of modernity in art, science, medicine, economy, politics and law only became possible by virtue of this process. But in late modernity the dark side of these increase-dynamics potentially comes to the fore which makes systemic energies running amok and leads to catastrophe moments, but at the same time to constitutional moments which may open up collective learning experiences of self-limitation.

In the dynamics of functional differentiation, all sub-systems develop immense growth-energies, which, due to their productivity as well as to their destructivity, are highly ambivalent. In late modernity, in the most recent

phase of functional differentiation, the dark side becomes the central problem of societal constitutionalism. No longer is the constitutional question, what are the institutional pre-conditions of their autonomy? The new constitutional question is, where are the limits of the expansion of the function systems? The economy is paradigmatic here, celebrating its triumphs and defeats in global turbo-capitalism.

IV. Third Thesis: Capillary constitutionalisation

When the excessive growth processes of a social sub-system spin out of control, the following alternative exists: state intervention or inner constitutionalisation. Either the administrative steering of global communication processes, or the externally compelled self-limitation of the system's options? If it is correct that the defence against the three possibilities of collision is central – the self-destruction of the system, environmental damage in the widest sense (endangering the integrity of the social, human and natural environments), and threats to world society – then the second option is to be preferred. This is the core message of a societal constitutionalism. A global constitutional order faces the task: How can external forces exert pressures on the expansive sub-systems of such a force that the self-limitations of their options for action will take effect in their internal processes?

Social constitutionalism attempts to find a path, beyond external state interventions and internal self-steering. A "hybrid constitutionalisation" is required in the sense that external social forces, which are not only state instruments of power, but also legal rules, and "civil society" countervailing powers from other contexts, media, public discussion, spontaneous protest, intellectuals, social movements, NGOs or trade union power, etc., should apply such massive pressure on the function systems that internal self-limitations are configured and become truly effective. However, to invent these limitations is only possible from within their internal logic, and not from outside. an external political determination of transnational social sub-constitutions is not feasible.

Again with Derrida, changes to the “capillary constitution” itself are necessary, down to the very arteries of the communication circulation, “where their fineness displays a microscopic form” and where they cannot be touched by the influences of the “capital constitution” of the state. It seems that Derrida was inspired here by Foucault’s reformulation of the concept of power: the problem of today’s societies lies not with the excesses of juridical power wielded by the political sovereign, but, instead, in the phenomenon of “capillary power”, achieved by the scientific disciplines and dependent on technology. This capillary power permeates the social body through to its very micro-structures. Nobody knows how such a capillary constitutionalisation could be concretely achieved. Ex-ante prognoses are, in principle, impossible. And, for this reason, there is no alternative but to experiment with constitutionalisation.

Conflictual political processes of self-reflection are required within the economy, and this needs support from constitutional norms. Historically, it was collective bargaining, co-determination, and the right to strike, which brought about new forms of societal dissensus. Societal constitutionalism sees its point of application wherever it turns the existence of a variety of “reflection-centres” within society, and, in particular, within economic institutions, into the criterion of a democratic society. Candidates for a capillary constitutionalisation exist not only in the organised sector of the global economy, in corporations and banks, but also in its spontaneous spheres.

(1) The politicisation of the consumer: Instead of being taken as given, individual and collective preferences are openly politicised through consumer activism, consumer campaigns, boycotts, product-criticism, eco-labelling, eco-investment, public interest litigation and other expressions of ecological sustainability. *De gustibus EST disputandum!* Such politicisation represents not simply an external intervention into the self-steering economy, but rather a transformation of its inner constitution, touching the most sensitive area of the circulation of money, namely, the willingness of consumers and investors to pay. And this becomes a question of constitutional importance. One problem is the political legitimation of such an “ensemble politics” within market

processes. Another problem is fundamental rights protection in the economy: how to protect the formation of social preferences against their restrictions through corporate interests. It is at this point, and for good reason, that courts developed the doctrine of the “horizontal effect of fundamental rights” – in cases of product-criticism, of the exposure to unsafe working conditions, and of ecological protests against corporate policies. These legal developments protect the fundamental rights of the economic citizen from repeated attempts by economic organisations to silence the critics of corporate policies. In the future, these constitutional rights should not be orientated one-sidedly towards market-efficiency, as is suggested by the concepts of market failure, information asymmetry or incomplete contracting, and should, instead, be orientated towards social and ecological sustainability.

(2) The ecologisation of corporate governance: What is meant, here, is not new managerial ethics, but, instead, a transformation of the internal company structure, compelled by external pressures from parliaments, governments, trade unions, social movements, NGOs, and the media; a transformation which limits the tendencies to speculation and the compulsions to grow necessarily associated with the emergence of the modern corporate structure. Such a company constitution, orientated to sustainability, would demand respect for ecological concerns in the broad sense – for nature, society, human life – accompanied by internal implementation and external controls. Arrangements against indefensible working conditions must be found, which combine...external (countervailing) pressure – be it from the state, or unions or labour rights NGOs, comprehensive and transparent monitoring systems and a variety of ‘management systems’, interventions aimed at eliminating the root causes of poor working conditions.

(3) Plain money: Finally, a plain money reform would penetrate the arcanum of the global financial constitution, to combat growth-excesses: ‘The most important measure, long-term, for the prevention of speculation excesses in financial markets damaging to the public good lies with putting an end to the multiple creation of money by the commercial banks. This would prevent the pro-cyclical excessive expansion and contraction of the money supply and replace it with a sustainable policy of money supply, orientated to

the real economy.' The addictive drug, the creation of non-cash money, must be withheld from the commercial banks. This promises to be an effective detoxification therapy. Commercial banks should be prohibited from creating new money through current account credit, and should be limited, instead, to offering loans that are based upon existing credit reserves. The creation of non-cash money should be the sole prerogative of national and international central banks.

V. Fourth Thesis: The proprium of societal constitutionality?

What distinguishes these three candidates for social constitutionalization from a sheer juridification? The answer: the existence of constitutional functions, constitutional processes and constitutional structures.

1. Constitutional functions: constitutive/limitative

From the perspective of constitutional sociology, political constitutions have the constitutive function of producing the autonomy of politics, first achieved in modernity, its autonomy against "foreign" sources of power (religion, economic wealth, family, or military). They do this by formalising the power-medium. Other social sub-constitutions – the constitutions of the economy, science, the media and public health – perform the same constitutive function by securing for each sphere the relevant medial autonomy, today on a global scale. With the help of constitutive rules, each sub-constitution regulates the abstraction of a communicative medium – power, money, law or knowledge – as an autonomous social construct within the function system.

However, the limitative constitutional function may be more important still, at least today. After the recent financial crisis, placing limitations on the excesses of economic action are high on the agenda. We could even talk of a secular displacement of constitutive constitutional functions in the direction of limitative constitutional functions. Following Karl Polanyi's analysis of the transformation of modernity, we might speak here of a "double movement" of transnational constitutionalism: first, the expansion of sub-systems is supported by constitutive norms, and then it is inhibited by limitative norms. In the development of the financial constitution, too, expansion along purely

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

2. Constitutional processes: double reflexivity

Though lawyers may not like to admit it, law does not play the primary role neither in state constitutions nor in other sub-constitutions. A constitution serves, first and foremost, to self-constitute a social system. Politics, the economy, science, art, the health sector and the mass media all constitute themselves as social systems which become autonomous of one another. Constitutional processes are triggered when social systems develop a second-order closure, in addition to their operative first-order closure, by applying their operations reflexively to their operations. Science secures its autonomy when it succeeds in establishing a second level of cognition in addition to the first order operations orientated towards the binary true/false code. The first-order operations are then tested against the truth-values of the second level – the level of methodology and epistemology. Politics becomes an autonomous power-sphere of society when it directs power processes via power processes, and produces a double closure of politics through the provision of electoral procedures, modes of organisation, competences, separation of powers and fundamental rights. And what about the economy? It becomes autonomous when, in the money cycle, payment operations of the central banks are employed in order to control the money supply itself. The sub-systems define their exterior limits and interior identities by means of this double closure; this determines their autonomy in the strict sense.

It needs to be stressed that this medial reflexivity does not yet generate constitutions in the technical sense. It serves the purpose of self-constituting systems, rather than of self-constitutionalising them. We should only speak of a constitution, in the strict sense, when the internal reflexivity of a social system – be it politics, the economy, or another sector – is simultaneously supported by law, or, more precisely, by the internal reflexivity of law. Constitutions do not emerge until phenomena of such a double reflexivity appear: reflexivity of the self-constituting social system and reflexivity of the supportive legal system.

A constitution is always the connection of two real ongoing processes. From the point of view of law, it is the production of secondary legal norms, which is typically merged with the basic structures of the social systems. From the point of view of the social system, it is the generation of the basic structures of the social order, which simultaneously inform the law and are regulated by it.

But what is the reason behind this double reflexivity? Law enters the process of self-constituting a social system at the point where the above-mentioned closure of the social system through its own first and second order operations no longer suffices; where reflexive social processes cannot stabilise themselves; and, in particular, where they threaten to become paralysed by paradoxes. Where this is the case, the self-constituting social autonomy needs to be supported by additional closure mechanisms. Law is one of them – though not the only one. Coping with paradoxes by means of a constitution is precarious: the danger of the re-appearance of paradoxes always remains.

To return to one of our three candidates for constitutionalization, plain-money reform addresses this paradox directly with double reflexivity. Plain-money reform transforms economic reflexivity by restricting the secondary payment operations of money creation, generated by non-cash money, to central banks. The secondary payment operations of the central banks – their money supply decisions, their creation of cash and non-cash money, their payments to the state, to citizens, or to the banks – are applied reflexively to the primary payment operations (buying and lending). Plain-money reform transforms juridical reflexivity, by prohibiting financial banks, via secondary rules, from creating money through credit account money, and by establishing a monopoly over the money creation of the central banks.

3. Constitutional structures: a binary meta-code

The endpoint of constitutionalisation – be it in politics, science or other social sectors – is not reached until an independent constitutional code – a hybrid binary meta-code – develops within the very structural coupling of law and the relevant social system. The constitutional code is binary. It oscillates

between the values “constitutional/unconstitutional”. And it functions at the meta-level, for the reason that it subjects decisions that have already been tested as legal/illegal, to an additional test, namely, whether they correspond to constitutional requirements. What emerges here is the hierarchy between simple law and constitutional law, “the law of laws”, typical of all constitutions – for the constitutions of states, of other function systems, of organisations and of networks. The constitutional code (constitutional/unconstitutional) is ranked above the legal code (legal/illegal). The point of the meta-code lies, however, in its hybridity: it is not only ranked above the legal code, but, at the same time, also above the binary code of the relevant social system. It exposes its binary-encoded operations to the additional test of whether or not they conform to the principles of public responsibility of the social system.

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

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

VI. Final Remark: The political in societal constitutionalism

But does social constitutionalism aiming at extensive autonomy of the social sub-systems not imply an extensive de-politicisation of society? Societal constitutions are paradoxical phenomena. They are not part of the constitution of institutionalized politics, but, at the same time, they are highly politicized processes. The paradox can be approached with the help of a double conception of the political. First, by "the political" is meant institutionalised politics: the political system of the world of states. In relation to this notion, the social sub-constitutions "go the distance"; they require extensive autonomy against the political constitution in the narrow sense. Second, the concept can also indicate the political in society outside institutionalised politics. In other words, it can indicate the profound politicisation of the economy itself and of other social spheres; the politics of reflection, thematising the social identity of the social system involved. In this respect, the particular social constitutions are highly political, but they are beyond the state.

The politicisation of the economy itself is high on the agenda of societal constitutionalism. The political dynamic are released in the market by the politicisation of consumer preferences, by the ecologisation of corporate governance and by plain money reform. Politicising the economy means intense reflections on the social consequences of the extension or limitation of the money supply, undertaken by the general public, consumers and corporations, central banks. Here, it is fiercely discussed and finally decided whether, in a concrete situation, the growth compulsions released by the creation of money are excessive or not. The political decision of whether to submit the financial system to withdrawal therapy cannot be allowed to depend on private profit motives. It can only be decided by a public debate orientating themselves with exclusive reference to the monetary system and its compatibility with the whole society.

The dynamics of external political impulses and the internal politics of the "capillary constitution" is not an automatic consequence of functional imperatives. It develops only in crisis phases, and these are themselves caused by excessive growth compulsions. These are the constitutional moments, when social energies will be activated of such intensity that

catastrophe may be averted. From a historical point of view, it is clear that the Great Depression in 1929 was such a moment. Then, the nation states were faced with a constitutional decision: to abolish the autonomy of the economy via totalitarian politics of either a socialist or fascist inclination, or to inaugurate the "New Deal" and the welfare state as a limitative constitutionalisation of the national economies. And today? Was the banking crisis of 2008 system-relevant? Was it so threatening that it amounted to a new constitutional moment, now of the global economy, raising its self-limitation through a global financial constitution within the realm of the possible? Or had "the bottom" not yet been reached? Will the fading of the crisis herald the global return of the old addictive behaviour?