

Introduction

The Global Financial Crisis and the Constitution

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There have been oppression and luxury,
There have been poverty and licence,
There has been minor injustice.
Yet we have gone on living,
Living and partly living.

T.S. Eliot, *Murder in the Cathedral*

Setting the Table

The study of constitutions in the context of the global financial crisis can be structured through two distinct questions: how can constitutions help in the crisis and what happens to constitutions during such crises? Much is expected from constitutions, perhaps more than they can achieve, and even more happens to them as they are impacted in multiple ways. How a crisis is experienced and the implications it has are bound to surface in response to the ‘what happened to you’ question.

Beyond its economic impact, the 2008 financial crisis has been producing *new constitutional stories*. If we wish to encapsulate into one single question what this book is about, that question is ‘How does the global financial crisis affect constitutions and their enforcement?’ Nonetheless, one could begin by asking the exact opposite, that is ‘Can constitutions affect the course and consequences of the financial crisis?’ The interaction between the financial crisis and constitutions differs in each legal order as it is correlated to the exact form the crisis took in each country, varying in terms of intensity and symptoms, and also because constitutions and political systems have their own safety valves in response to such challenges.

Economists often compare the current recession to the 1929 Great Depression. Nonetheless, comparing the constitutional dimensions of the two crises would be a mistake, leading to false generalizations, because much has changed since 1929. Democracy operates differently, the functions of constitutions have evolved, and so have state functions and the global economy. Still, the inevitable reminiscence of that era carries connotations of major constitutional repercussions. Looking back to the 1930s, the New Deal constitutional moment and the collapse of the Weimar Constitution are suggestive of the interaction between major financial crises and constitutions, indicating that *completely adverse reactions may occur*.

What happens depends on a combination of constitutional design and multiple external factors. The US Constitution being short and open to informal change was able to resist the crisis, while the Weimar Constitution crumbled under the interaction of inherent faulty constitutional design and external political and social conditions. Revisiting the past thus, not in search of some sort of cyclic recurrence of constitutional reactions but in order to pin down factors that underlie such reactions, indicates the importance of studying the exact correlation between state-specific internal constitutional factors and external influences in real time. Approaching constitutions from the financial crisis perspective reveals the strengths and shortcomings of constitutional design, for such crises simultaneously activate multiple constitutional mechanisms. The need for or desirability of intervention in the constitutional text may surface, while a *deeper understanding of the financial crisis viewed from a constitutional aspect* is also possible, which is important as the need to manage the crisis and its side-effects persists.

This attempt to document how constitutions responded to the 2008 global financial crisis is structured by addressing a series of questions that aim to reveal what dominated the country-specific dialogues. Constitutional revision proposals, sovereignty issues, fundamental rights protection, regulatory reforms, the augmentation of executive power and changes in the party system have different weight in each dialogue. Some countries are characterized by ground-breaking court decisions, others by constitutional reforms, changes in governance or diminishing constitutional normativity. The crisis-based dominant constitutional debate in each jurisdiction serves as a guide to discover the actual constitutional reactions. The following questions are explored:

- What is the constitutional timeline of the financial crisis in each country (that is the series of crucial moments such as the enactment of austerity measures, elections, constitutional revisions, landmark supreme or constitutional court decisions)?
- How was constitutional jurisprudence affected?
- Did issues of fundamental rights protection, including individual, socio-economic and political rights, become the object of litigation?
- Were issues touching on standing, allocation of state powers and constitutional doctrines revisited?
- Did a dialogue between law-maker and judge take place?
- Were there informal amendments to the constitution?
- Did constitutional rights provide a shield against legislative measures or were they (treated as) impediments to policies?
- Did the financial crisis translate into a political, judicial or constitutional crisis as well?
- Did constitutional moments occur?
- Did the relationship between the executive and the legislature undergo transformations?
- Was there an enhancement of technocratic governance?

- Did the financial crisis cause fragmentation or on the contrary concentration of political power?
- Has a fear of constitutional deconstruction and loss of normativity emerged?
- Did the crisis diminish faith in the ability of the constitution to offer a shield in times of crisis?

From Financial Crisis Narratives to Constitutional Narratives

Comparing how constitutions react to a global financial crisis is based on an *externalist comparability foundation*. The point of departure is the common stimulus set by the crisis and not structural commonalities between constitutional orders. Instead, commonalities and differences are revisited under the prism of *what causes, underlies or explains the varying constitutional reactions*. Numerous similarities among the reactions that can be detected in different constitutional orders seem to reverse the famous quote from the opening of Tolstoy's *Anna Karenina*, 'Happy families are all alike; every unhappy family is unhappy in its own way.' When it comes to crisis-struck constitutional orders it seems that happy families differ, but unhappy families are unhappy in similar ways.

Financial unhappiness, which began to develop following the sub-prime mortgage market meltdown and the burst of the housing bubble in the United States, showed its potential effects after the collapse of Lehman Brothers in 2008. The USA, where it all began, is not only the strongest economy in the world, but also has the oldest constitution, which plays a central role in American culture. Iceland's collapse came soon afterwards and it was the first country to seek aid from the International Monetary Fund (IMF), followed by Hungary and Latvia. The eurozone sovereign debt crisis marked the entrance into the game of the Troika, composed of the European Central Bank, the European Commission and the IMF, as Greece, Ireland and Portugal entered the support mechanism. Spain and Italy are currently faced with the possibility of also seeking bailout, and the UK has been profoundly struck in terms of GDP per capita, while it also has the highest gross foreign debt of any European country. These countries, selected for this volume's comparative analysis, diversely impacted in terms of their economy and at different moments, have constitutions that although they fulfil comparability prerequisites differ in terms of age, flexibility and design. Yet, the financial crisis narrative was everywhere *translated into a constitutional narrative*, and striking constitutional developments soon followed.

Ever since the financial crisis broke out, fleeting images of constitutional activity have kept surfacing, to be overshadowed by financial commentary. Discussions on the US debt-ceiling crisis, Iceland's 'crowd-sourced' constitution, the constitutional enshrinement of fiscal discipline clauses in Italy and Spain, the annulled Greek referendum plan, Hungary's notorious new constitution, the emblematic decisions of the Latvian Constitutional Court, the Irish referenda, the UK's financial regulation, the Portuguese inability to reach consensus on

amending the constitution and so forth were taking place parallel to the main recession theme. How such stories connect to the financial crisis and what their constitutional implications are is explored in the following chapters.

Many scenarios exist: the financial crisis may *ignite constitutional developments* or perhaps provide the pretext for them to be induced. Conversely, constitutional design may have caused or underpinned the financial crisis. Constitutional change could simply coincide with the financial crisis or it may be the *crisis-plus-other-factors* that carves out new constitutional routes. The distinction between interpreting the financial crisis *as a result, cause or pretext of constitutional change* is not always *prima facie* clear. The extent to which constitutions successfully provide the arena for political conflicts and demonstrate self-preservation skills or are sacrificed and lose their legitimacy, allowing the political class to survive at their expense, may determine that. What sometimes turns out to be difficult to discern where constitutions are concerned is whether the financial crisis simply *unveils what already exists or creates something new*.

Paths of Constitutional Reaction

The financial crisis has been setting continuous challenges to the functioning and interpretation of constitutions, leaving behind conspicuous marks. The range of changes taking place within the crisis-struck constitutional orders encompasses multiple areas that have been affected in different ways and in varying degrees. Sweeping legislative responses to the crisis have been constantly creating constitutionality issues. Shifts in constitutional interpretation are employed by both law-makers and judges. Changes in the constitutional capabilities of state organs, along with changes in their relationship and the allocation of powers among them, are clearly detectable. Decision-making processes are revisited along with rule production. The relation between state and economy has become different, directly impacting regulation. Party systems have been undergoing multilevel transformations. Sovereignty issues have acquired novel aspects through the interaction of international lenders, supranational entities and financial markets. The functions of constitutions have evolved in new directions. Constitutional texts have changed by way of revision, and some constitutions have reached the end of their journey and have been replaced or are under total reconstruction.

An overview of the constitutional landscape since the financial crisis broke out provides a record of multifarious changes. Among the different paths followed by constitutions since the financial turmoil began, the birth of new constitutions has been the only conspicuous assault on constitutional durability. More subtle facets of the unfolding changes are vast informal amendments, visibility of faulty design that could not be repaired due to stringent amendment formulas or lack of consensus, the chilling effect of the financial crisis on the functions of constitutions, constitutional adjustments hastily adopted without clear impact assessment that

are bound to have unpredictable future side-effects on constitutional practice and jurisprudence, and erosion of state sovereignty.

How long constitutional reactions last and how deep are the imprints they make on the fabric of constitutions relate to the possibility of the occurrence of constitutional crises, constitutional hardballs, changes of constitutional order and even constitutional moments, or consist of more subtle changes. Disagreement or synergy between constitutional actors may make the difference, since unresolved judicial and political crises may culminate in constitutional crises. What is ultimately tested is the capability of constitutions to provide guidance to state organs and constitutional actors, and to convey the impression that no impasses exist blocking the way to financial crisis management.

The attempt to grasp how constitutions have been reacting to the financial crisis, while it still unfolds, equally entails privileges and risks. Only in real time can the immediate responses and their importance be captured before they are set aside because of new developments and reinterpreted from a distance. Yet reversals may happen, and the end is neither fixed nor foreseeable, so the attempt to make predictions is best abandoned and focus placed on comprehending and explaining how the financial crisis connects to constitutions so far.

Four years have passed since the outbreak of the crisis, and by now (September 2012) distinct paths of constitutional reaction can be discerned under the rationale of interrelated shifts in the functions of constitutions and the relationship of state organs: *adjustment, submission, breakdown and stamina*. Constitutions adjusted to the requirements of the financial crisis, became submissive, succumbing to its demands, broke down under the pressure or remained intact, demonstrating stamina. Part I of this book presents these reactions analytically, and the parameters that determine how constitutions react. Structured along these four paths, the four sections that follow offer a full account of the interaction between the financial crisis and national constitutions, revealing the overall constitutional landscape and the concomitant perspectives in each country. How and why constitutions took each path and formed their reaction in the face of the financial crisis becomes apparent through the course of each chapter.