

Sociology of Law and the challenge of the current financial crisis

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Summary: The current crisis is, to a significant extent, a cognitive crisis. What is at stake is to develop a thorough understanding of what is going on, and to find ways to make the results of this analytical effort accessible to as many people involved as possible. Sociology of Law has an obvious role to play in these efforts. Issues such as, on the one hand, the relationship between economy, politics, and law, and, on the other hand, the way people construct practically relevant knowledge in complex societies, have a long tradition in our domain. The crisis also has a severe impact on the conditions under which we carry out our research business. So our work on these topics should also be conceived as part of a broader effort in the defense of science in the culture of world society, which corresponds exactly to the initial vocation of RCSL.

Key words: conflict, functional differentiation, financial crisis, globalization, state

I understand the topic of the panel to which this paper aims at contributing – Sociology of Law in Progress – as an invitation to discuss our research agenda. One topic this agenda cannot ignore is the social process that most severely hits our life conditions, in particular in Southern Europe: the current financial crisis and its social and political consequences. Indeed an increasing number of publications are devoted to this topic (see e. g. Herkenrath & Suter 2011, Kjaer et al. 2011, Baccaro and Heeb 2012). My argument is that sociology of law should explicitly engage in this broader cognitive effort. I would like here to shortly present some specific reasons why this has to be (I) and some reflections on how research on this topic should be designed and carried out (II).

I Why does sociology of law have a special role to play in research concerning the financial crisis?

The fact that sociology of law has a special role to play here might be illustrated by the following quotation:

“This cannot work as long as one trusts only the markets, which is what many people defend in Germany. We also need a strict set of rules, to be rigorously implemented.” (Klaus Regling, Head of the European Stability Mechanism, in *Die Zeit*, October 11, 2012, p. 25).

No one of us would deny that effectiveness of rules is one of our domains of expertise. This is just one of many aspects of the crisis worth being tackled by socio-legal research. However, beyond such particular issues, the main reason for sociology of law to engage in this research domain is the following. Arguably, the current crisis is a drastic development of processes that started a long time ago, processes that in particular sociology of law has followed up and to which interpretation it has contributed over a long period of time. I would like here to develop this argument, obviously without having the ambition to offer an evidence based demonstration of all relationships and trends mentioned. Such demonstration, and in the first place the drawing of a more detailed picture of today’s moving social reality, is exactly our task for the next future, in close cooperation with all discipline concerned with collective human action.

First of all, the current crisis is said to be linked to the growing autonomy of global financial markets. This process is a recent step of a much older and broader evolution, well known to sociologists: the functional differentiation of modern societies. Max Weber, who was among the first authors who gave central relevance to it, gathered

many of the data he used in its discussion precisely in the legal field (Weber [1911-13] 2010). Since then, we witness the continuation of this evolution, observing the internal differentiation of this field, and its troublesome relationship to other domains of social activity (Bourdieu [1986] 1987; Luhmann [1993] 2004; Touraine 2010: 34, 43), under headings such as “Juridification of Social Spheres” (Teubner 1987), or, the other way round, “Managerialization of Law” (Edelmann, 2001). Definitely, current processes deserve to be qualified as processes of functional differentiation – revealing its “dark side”? (Kjaer et al. 2011) – and we, sociologists of law, are rather well equipped to analyse them.

An intriguing gap that characterizes the current societal processes, and which is also a result of functional differentiation, is the one between, on the one hand, the discussion on the regulation and maintenance of financial markets, as well as on the institutional arrangements necessary for an appropriate design and implementation of such regulation and maintenance, and, on the other hand, the discussion of the impact that measures concerning in the first place the financial markets have on the living conditions of people. Bridges between these two levels of discussion have urgently to be established. As a matter of fact, it is crucial to better understand possible causal relationships between these two levels, firstly for the evaluation of the real social impact of the measures currently discussed and implemented; secondly for the appreciation of how fair the real costs of these measures are distributed. Socio-legal research addresses both the level of organized actors, playing the game of markets, or pursuing political strategies (Dezaley & Garth 1995), as well as the level of individuals, claiming for their personal rights (Ewick & Silbey 1998). Even if it is a more recent debate in sociology of law, the question of the connections between these two levels is already on our agenda. The study of the crisis gives us a splendid opportunity to go further on this issue.

A second feature of the current historical moment is the weakening of the states. The role of non governmental players in the global arena is increasing. International organizations and supranational entities more and more condition the definition of states' policies (among many others: Habermas [1998] 2001; Giddens 2006). This is a serious cognitive challenge for social sciences since they originally developed as parts of the nation states' action devices. They now have to take as an object what formerly was their main support, and to reconstruct their research scope beyond nationally defined societies (Wallerstein 1996). On this level too, sociology of law has a long tradition of research and discussion. The sociological approach to the law, since its early steps – remember Eugen Ehrlich ([1913] 1936) –, was motivated by the will of re-discovering legalities beyond state's legality. The centrality of this topic explains the relevance, throughout the whole history of the discipline, of the concept of legal pluralism (Santos [1977] 2002; Tamanaha 2008). This concept, actually, has recently been used with new meanings. Over decades, it was used to grasp social normativity beneath, and in the gaps of, national states' rules. It has recently been used to give an account of the growing relevance, in the practice of the legal professions, of standards and rationalities different from state's legal rationality, standards and rationalities to a significant extent linked to the functioning of large organizations operating partly beyond the reach of state's supervision (Teubner 1997; Belley 2011). In other words, the sociological approach of the state's contested position in pre-modern and post-modern societal settings is already on the research agenda of sociology of law. This research stream has now to join the efforts of understanding how the relationship of states and other global players evolves in the context of the current crisis.

At least since “critical legal studies” challenged the agenda of more conventional post-war sociology of law (Trubek 1984; Unger 1986), law ceased to be approached

mainly as a differentiated social sphere. Taking up former critical works, researches tackled the law as a resource creating social inequalities, or even as a weapon used in social conflicts. According to this approach, social reality is analysed as a field where forces emerge and confront each other. The conceptual framework used for this approach of law's social reality did not benefit conceptual efforts comparable to those concerning law as a social system. But a significant part of the empirical work carried out in the meanwhile addresses this agency aspect of law's social reality: let us remember topics as the alternative uses of the law (Blankenburg et al. 1981), or cause lawyering (Sarat & Scheingold 2001). The recently re-awakening interest in the relationship between law and politics could be interpreted as one more sign of the same trend¹. Thus sociology of law has accumulated research expertise in the study of the formation and impact of social forces. Conceptual frameworks in this domain require further improvement, and theoretical consolidation is needed, in dialogue with other recent research streams in social sciences (on agency, creativity, emotions, and so on). Nevertheless, intellectual tools are available to cognitively tackle the phenomenon of social force. And we need precisely this kind of tool for the analysis of the current crisis. Here we witness the formation and the impact of financial markets' forces on political systems, on other components of the economic system – the “domination of the financial sector over the real economy” (Lopes 2012: § 13) –, on individuals involved (Ho 2009); the evolution of power relations between large political actors on a global scene; changes in the power relations between European states², and so on. Here we have effective strategies of powerful organized actors defending their interests³. Here

¹ See e.g. the topic of the 2013 RCSL Congress in Toulouse: *Law and Political Action*.

² See the press comments on the visits of the German Chancellor Angela Merkel to Greece and Portugal in Autumn 2012. In some opinion papers recently published in Portugal, the country is described as a “protectorate”.

³ See, as a specific example, the discussion of the role of IIF Institute of International Finance in Durand & Keucheyan (2012). For a broader interpretation relating recent evolution to the strategies of organized

we have, most visibly in southern Europe, tensions between social categories, part of them more directly hit by the austerity measures currently being implemented, other experiencing the potentialities of new markets opened thanks to the privatizations carried out as a means to solve the current crisis. So there is an intensification of social conflicts. At the same time, we also experience the formation of new actors or collective beings. This is obviously the case of the new social movements such as the “indignados”, or “occupy wall street”. One could speak about a growing concern for the world wide economic stability and development⁴, which could be interpreted as steps in a process of the formation of an effective world society. In other words, the analysis of the current crisis challenges us to revisit our notions of social conflict. Sociology always had it difficult to deal with this topic (among others Coser 1956: 23; Dahrendorf [1958] 1968). Sociology of law, on the other hand, never could ignore it, having as its central object the devices created for the institutionalized treatment of social conflicts. Time for our discipline to take full advantage of its research experience in this field.

Apart from these three general patterns of the ongoing societal processes, there are three more specific topics which discussion requires in particular the contribution of socio-legal scholarship.

Firstly, reactions toward the crisis include the discussion, enactment, and implementation of new rules, notably concerning the supervision of banks and financial markets. What makes the discussion about this issue particularly challenging is, on the one hand, its complex global dynamics (efforts of different countries have to be

actors inspired by neoliberal economic doctrines, see Klein (2007).

⁴ See in particular statements of Brazilian politicians on the Euro-crisis; for example the interview of Guido Mantega, Brazil's Minister of Finance published by the *Neue Zürcher Zeitung* October 11th 2012.

compared; the strains in the European debate considered). On the other hand, the fact that these new norms are made necessary by practices which, themselves, have a strong normative dimension (sophisticated contracts designing new financial products, such as debt default swaps: Lacombe / Faujas in Marti 2012: 87).

Secondly, among the measures imposed in these times of public debt reduction, in order to improve the competitiveness of national economies, are reforms of the labour law, making it easier to dismiss employees, to activate unemployed people, and so on⁵. A first question raised by such reforms is their compatibility with the existing national legal and constitutional order⁶ (Ferreira 2012; see also next paragraph), or, in a broader sense, with general principles of law⁷. A second question concerns their efficacy, as well as their possible side effects. Here comparative studies could help anticipate their impact on the long term.

Thirdly, the current crisis has serious consequences on a constitutional level. Countries where austerity packages are being implemented as part of bailout programmes are obliged to adopt measures of questionable constitutionality. This means that they are obliged, in fact, to revise their constitutions under conditions rather unfavourable for a sound democratic debate⁸. On a European level, the euro crisis has re-opened the debate about a European constitution (Habermas 2012; Scicluna 2012). The question whether such a European constitution is possible and desirable deserves to be discussed from a socio-legal point of view, and has actually given rise already to

⁵ On the impact of the “ultra-liberal counterrevolution” on labour and social security law, see Supiot (2010: 29 ff.)

⁶ Addressing directly this issue Ferreira (2012). On the relationship between fundamental rights and labour, see Coutu & Murray (2010).

⁷ On the recent discussions on “vested rights” see in particular Hespanha (2012).

⁸ In Portugal, the current situation has been qualified in terms of “economic and financial state of emergency” (Nabais & Tavares da Silva 2011: 62; I thank Fernando Ribeiro and Vera Santos for having drawn my attention on this work), or of a “clandestine constitutional revision” (Teresa Beleza, law professor, quoted by José Vítor Malheiros in a opinion paper published in the daily newspaper *Público*, December 3, 2012).

debates in sociology of law (Grimm 2011, Teubner 2011a, Thornhill 2011). Both the difficulties met on a European level, and the current challenges to national constitutional practices, have led observers to revisit the role of constitutions in our functionally differentiated societies (Kjaer 2011; Teubner 2011b; Teubner 2012), an issue that is likely to open an intense debate within our specialty and beyond its borders. A more radical statement has been put forward by Touraine, who argues in favour of a new concept of human rights as a foundation for the world order (Touraine 2010: 182). This position deserves to be discussed on the basis of socio-legal research carried out over the last decades in the field of human rights.

II How should socio-legal research on the financial crisis be organised?

The financial crisis, and its societal causes and impacts, do not form a research topic in the usual sense. In the first place because of its factual complexity: it is a mix of processes of very different kind, all of them deserving a specific, to some extent separated research stream. But also because it touches, by definition, highly sensitive questions, currently object of debate, which means a high risk for research to experience pressures from the part of organized interests. Actually, the development of economics over the last decade may be interpreted as the result of an organized production of a cognitive framework appropriate for the neoliberal turn of the early 1980s (Martinelli 2011: 225).

Let us start with the complexity and scope of the issue. The analysis of the current financial crisis obviously never could be the topic of a single research project. It requires the approach of different research fields: different types of markets, organizations, state agencies; political spheres at different levels; life conditions of

different categories of people, in different regions of the world, and so on. Under these conditions, the organization of research on this issue meets several challenges. To find adequate answers to these challenges will take time and has to be tackled as a learning process. But some explanatory thoughts are worth being formulated.

Firstly, there is a need of establishing somehow structured and stable relations between individual researchers, research teams, and research institutions working on topics relevant for the discussion of the crisis. Associations and similar entities – the RCSL itself – definitely have here a role to play. Giving appropriate prominence to the topic in their activities: by organizing meetings under headings allowing the discussion of, at least, some aspects of the crisis⁹; or else by creating specialized working groups. One valuable organizational formula is the creation of specialized “Observatories”¹⁰.

Structured and stable relations between researchers, research teams and research institutions are necessary for the permanent mapping of the broad research area which observation is considered to be necessary for an appropriate discussion of the societal processes making up the crisis¹¹. Such a map is required for the permanent updating of the research agenda (which means to identify which regions of social realities require special research efforts at a certain moment, and where the expertise for researching these regions is to be found). It also helps the discussion of the relationship between results gathered on the different research fields.

⁹ One example: in June 2012, the Portuguese Sociological Association held its regular congress under the heading “Society, Crisis, Reconfigurations”. The general topic of the 2013 RCSL Congress, “Sociology of Law and Political Action”, may easily be linked to topics more directly and explicitly linked to the financial crisis.

¹⁰ In Portugal, a new “Observatory on Crises and Alternatives”, an initiative of Boaventura de Sousa Santos and Manuel Carvalho da Silva, was launched in April 2012, as a project of the Centro de Estudos Sociais of the Coimbra University. See its website: <http://www.ces.uc.pt/observatorios/crisalt.php?pag=apr> (last accessed November 2012).

¹¹ For an outline of such a map, see Herkenrath & Suter (2011). The picture, however, changes rapidly, and this paper was written before the crisis of the public debt of Southern European States became acute. This recent evolution put the crisis of the Euro and the debate on public debt at the top of the public discussion agenda, while the debate on the failures of the financial markets seems to be almost forgotten (a trend already visible in Schranz & Eisenegger 2011: 250).

Presumably, these three kind of operations – mapping of the broad research field, updating of the research agenda, discussion of the relationship between results gathered in different areas – do not only require appropriate organizational arrangements. They also – secondly – require the development of terminologies¹², conceptual schemes and theories likely to help the communication between researchers and the confrontation of research results. Again, what is at stake now is not the identification of one sole conceptual scheme. Research here needs a pluralistic conceptual framework, which discussion should be one item among others in the research agenda. Some recent research contributions (Kjaer *et al.* 2011; Teubner 2012: 124 ff) suggest that systems theory could be a strong candidate for the provision of a general theoretical framework. Points 1 and 2 of the previous section I could be read as a justification of such a theoretical choice¹³. Point 3, however, refers to aspects of social reality arguably requiring another kind of conceptual tool, more appropriate for the discussion of phenomena such as the emergence of social forces and their impact within and across differentiated social fields. What the discussion of the current crisis requires is probably a mix of theoretical options. One question, under these circumstances, is if there are ways to bring in some order in such a theoretical mix, which could favour the general coherence of the objects produced by researches using it¹⁴.

Beyond the – organizational and conceptual – complexity of the research apparatus, two obvious requirements for research on the financial crisis are, on the one hand, international and comparative orientation, and, on the other hand, interdisciplinarity.

¹² For a publication aiming precisely at such a terminological development: Santos et al. (2012).

¹³ For a similar argument, see also Moeller 2012.

¹⁴ For a proposal of such a theoretical framework, see Author (336 ff).

Researching on an international level has a long tradition in sociology of law. The perception of the need of genuinely international socio-legal studies certainly was one of the motives of the RCSL's efforts in creating an International Institute for the Sociology of Law. International research in this field is particularly important, notably as a means to mitigate the pressures likely to be exercised on researchers by mighty organized actors playing a crucial role in the production of national law (state agencies, professional organizations). It also favours a distant view on an object – national law – which, on a national level, invades almost all spheres of social activity, therefore always strongly conditioning the perceptions of researchers as well as of people surveyed.

In the research on the financial crisis, there is one more crucial reason for working on an international level: the fact that the same processes do have very different consequences according to the place of observation; more than that: the fact that the same processes may be experienced and publicly discussed in very different ways according to the geographical location. This is in particular the case if we compare, on the one hand, southern European countries currently submitted to adjustment programmes dictated by the European Commission, the European Central Bank, and the International Monetary Fund as a condition for the financial support given under the auspices of these entities, and, on the other hand, the remaining European countries. Indeed, in this domain, international research could contribute to the development of an international public space urgently needed for the discussion of the measures to be taken in reaction to the crisis.

Research on the financial crisis also has to be interdisciplinary. This has to be defended in particular against the presumption according to which it would be an essentially economic issue. The involvement of political sciences is obviously required for the analysis of the political processes that did possibly contribute to launch and to

reinforce the current dynamics. Among such processes are the decision making processes concerning the construction and the deregulation of the global financial market, or housing policies favouring the acquisition of real estate by the means of mortgage credits. One major issue of research at the borderline of economics and political sciences is the establishment of a common European currency. The interplay of large organizational actors and governments in the efforts to control such processes, and the functioning of these complex collective actors definitely requires the contribution of sociology, in particular sociology of organizations. Moreover, sociology, anthropology, social psychology, cognitive sciences are required to understand the behaviour of individuals involved, be they members of the referred organizations, or citizens hit by the measures taken as a reaction to the crisis. Since the contexts in which these individuals act are to a significant extent legalized, sociology of law is called to contribute too.

Researchers trained in sociology of law as a differentiated scientific field, and participating in socio-legal discussions taking place within that field are fairly well equipped to embark in such an interdisciplinary undertaking. The complexity of the issue, however, challenges them to intensify the links with the two “mother” disciplines: sociology and jurisprudence. Because other specialized branches of sociology are required for an adequate understanding of the societal setting of the crisis. And because specialized branches of jurisprudence, such as banking, competition, or fiscal law (Casalta Nabais & Tavares da Silva 2011), are heavily contributing to the framing of the activities that have led to the crisis, as well as of the measures attempting at reacting toward the crisis. And particular attention should be devoted to the dialogue with economics. Bridges should be developed between “law and society” and “law and economics”. But connections to economists not engaged in this specific field should

also be strengthened, in particular with those who recently displayed explicit will to contribute to a constructive analysis of what is going on¹⁵.

The relevance of interdisciplinarity in the approach of the current crisis leads us to question the very accuracy of our disciplinary options. Indeed, over the last years, we were frequently encouraged to switch to transdisciplinary options, to define our work with reference to topics and not to disciplines anymore¹⁶. I would argue that the disciplinary division of cognitive labour has contributed to the strength of the scientific field over the last two centuries. Disciplines, actually, provided they are adequately practiced, warrant the necessary conditions of genuinely interdisciplinary work. If they are conceived as constituting strongly identified scientific positions, they supply the ground for productive relationship with other positions, with different scientific identities. Now that the financial crisis threatens the material conditions of scientific work, it could be unwise to abandon what has been a factor of strength. The motto should be: intense interdisciplinarity between strong disciplines.

A pluralistic research device, gathering different disciplines and research entities from different countries, also offers better conditions to resist – or better to say to ensure some equilibrium between – possible influences on science from the part of organized actors external to the scientific business.

One last point on the way research on the financial crisis should be carried out deserves a special mention. More, perhaps, than in the discussion of other issues, we scientists should here pay attention to what is published in the press. Or, better to say, science should develop a partnership with the press. As researchers observing the recent

¹⁵ Among other initiative in this sense, see the European Progressive Economists Network: <http://www.anotherroadforeurope.org/index.php/en/home/8-eng/24-european-progressive-economists-network> (last accessed November 2012).

¹⁶ Interestingly, not all scientific domains are facing such strong appeals in the sense of transdisciplinarity. In the field of psychology, for instance, there is a strong feeling of the usefulness of disciplinary work, while interdisciplinarity is considered as a risk for the quality of research.

economic and political evolution, we obviously have to take into consideration the news published by the media. Firstly, the events that make the reality of the current crisis are closely followed up by the media: figures revealing the state of global financial markets; figures revealing the state of domestic economies (unemployment, bankruptcies, share of the population living under the poverty line, and so on); decision making processes preparing public reactions to the economic consequences of the crisis (measures taken by international organization, negotiations within organs of the European Union, Parliamentary debates on national level, and so on). Part of these events actually does take place in the media: statements of politicians and representatives of institutions involved; confrontation between these statements¹⁷, comments on these statements by opinion makers, and so on). But the media also offer interpretations, constantly updated, of the news they report, usually focusing on the most recent events, but also, actually in line with the editorial programmes of quality newspapers, taking into account the evolution over a longer period of time (as an example: Marti 2012). Such interpretations have to be observed as steps in the process of the social construction of reality (Schranz & Eisenegger 2011). But they also deserve to be taken into account as contributions to a public debate in which social sciences also have to participate. In this sense they may offer sophisticated hypotheses which are worth being taken up by academic research, which is in position to gather additional evidence for the verification or falsification of such hypotheses¹⁸.

¹⁷ One example among many others: the debate between Mario Draghi, head of the European Central Bank and Jens Weidmann, head of the Deutsche Bundesbank, which gave rise, in particular, to an interview with Jens Weidmann published in the German news magazine *Der Spiegel* (available on line in English: <http://www.spiegel.de/international/europe/spiegel-interview-with-bundesbank-president-jens-weidmann-a-852285.html>, accessed November 2012) and to a paper of Mario Draghi in the German weekly newspaper *Die Zeit*, August 29 2012 (available on line in English: <http://www.ecb.int/press/key/date/2012/html/sp120829.en.html>, accessed November 2012).

¹⁸ The present paper, to a large extent based on press material, understands itself as a tentative step in the practice of such a relationship between science and the media.

Due consideration, by scientific research, of the media's contribution to the construction of social knowledge could, conversely, favour the coverage by the media of the academic work's results. This could help scientists in the accomplishment of one additional task. To develop and circulate presentations of their finding likely to be understood and re-used by non specialized citizens in their efforts of dealing with the current situation. Not in the sense of supplying authorized interpretations citizens would be supposed to simply accept, but offering them alternative interpretations to be confronted with their own views.

Conclusion

Sociology of law, as a scientific discipline, has to contribute to the analysis of the present financial crisis. Because this crisis has highly relevant socio-legal aspects: the regulation of financial markets is at stake in the effort of preventing future crises; responses to the current crisis impact on labour and social security law, as well as on constitutional law. And because some of the most lively debates in sociology of law – on functional differentiation, on the relationship between organizations and individuals, on the changing role of the state, on law as used by, or giving rise to, social forces – have already shaped conceptual schemes useful for this analysis.

Entities set up for the organization of research in sociology of law and for the networking between researchers and between research centres – among them the RCSL – have to contribute to the development of a multi-polar, pluralistic but integrated research effort, bringing together at an international scale the findings of researches focusing on all the very different levels and aspects of the societal processes intermingled in what we call “crisis”. Which is, definitely, not a “research object” in the usual sense of the term. These entities also should contribute, in addition to the efforts

of individual researchers, to connect socio-legal research to other scientific specialties, as well as to the public debate that takes place in the media. Science, by definition international, could actually help this debate to become genuinely international, as it is indispensable for the discussion of problems that are global in their essence, and require international measures of response. By playing such a role, the RCSL would excellently correspond to the ambitions of the founding fathers we celebrated at the Warsaw Jubilee Meeting.

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