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Constitutions as Communication

1. Introduction

How can we adapt our conceptions of constitutions to an increasingly globalised world and a fragmented national polity? This is particularly important in the context of economic management, given that globalisation is primarily (though not exclusively) a matter of the organisation of international and national economies. One response is through constitutional pluralism, positing the existence of a plurality of constitutions at international, national and sectoral levels. The result might, of course, be greatly increased conflict between different levels and forms of constitution, thus making policy coordination impossible, and perhaps ceding organisational responsibility to the market rather than to law or politics. An alternative, however, is that we can see this proliferation of different constitutional forms as providing opportunities for new means of coordination and communication between different types and levels of constitution and government and between law and other social systems. This article will examine some possibilities for this approach by examining the potential role of social theory in suggesting structured institutional and procedural means to achieve communicative goals in the area of economic management, illustrating this with four brief case studies.

2. Constitutional pluralism

Constitutional pluralism may take a number of forms. In the area of economic management, at a minimum we need to add to the national constitution the different, and contested, European constitutions, and also other forms of international constitutions which have a major effect on national economies. These give us our first sense of constitutional pluralism, concerned with multi-level constitutional governance at the domestic and international levels.

Apart from the EU, the most well-known example is that of the World Trade Organisation.[4] Even trade treaties may have major effects in constituting national governments' ability to engage in economic management and regulation; the current negotiations between the EU and the USA on a Transatlantic Trade and Investment Partnership provide a particularly important example. In order to recognise effectively the role of such international constitutional regimes, the concept of legal pluralism has been particularly fruitful, most notably in the work of Neil Walker, which deals in a sophisticated way with the interaction of national and trans-national, especially EU, constitutional models.[5]

However, the plurality of constitutions in economic management is not limited to those of an international or transnational character, for it is possible also to detect competing constitutional models within national constitutions. For example, in the UK there has been much discussion of the relationship between the 'legal' and the 'political' constitutions; although it is an old debate, it has been given particular force by the passing of the Human Rights Act and the resulting high profile decisions of the courts applying it.[7] This debate,

[4] For discussion of its constitutional status see e.g. the essays in CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND INTERNATIONAL ECONOMIC LAW (Christian Joerges and Ernst-Ulrich Petersmann eds, 2011); cf DEBORAH CASS, THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM esp. 32-8, 132, 143-4, 22-4 (2005).

[5] See e.g. Neil Walker, The Idea of Constitutional Pluralism, 65 MODERN LAW REVIEW, 317 (2002); *Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe* in CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY (Gràinne de Búrca and Joanne Scott eds, 2000), 9-30; Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 373 (2008).

[7] For an overview see Graham Gee and Grégoire Webber, What is a Political Constitution?, 30 OXFORD JOURNAL OF LEGAL STUDIES, 273 (2010).

however, is already somewhat *passé* and it is heartening that any such bipolar view of the UK constitution is now rejected by recent commentators. For example, Gee and Webber consider that 'Britain's constitution is no longer – and likely never was – premised on any one constitutional model, whether this be a political or a legal or some other model. Rather, we are now better placed to recognize that Britain's constitution today embraces, perhaps in uncertain ways and to an uncertain extent, *both* a political model *and* a legal model.'[8]
At best, the ideas of the 'political' and the 'legal' constitution can be used as ideal types, or models, for comparative constitutional analysis, or, as is the case in much of the literature, as indicators of changes over time.

In fact, the mix of different constitutional models is far more complex than the 'political' and 'legal' models allow. Another, which will be of great importance for later discussion, is that of the 'administrative constitution' operating through informal and internal rules and controls, identified by Daintith and Page as a central constitutional feature of the UK specifically in areas of economic management and the control of public expenditure.[10] The interactions of these different types of constitutional organisation and supervision give us our second sense of legal pluralism.

More radically, Gunther Teubner has pointed to the development of sub-constitutions within different sectors of the welfare state; these 'sectoral constitutions' 'allow different areas of society a constitutionalization of their own, creating a precarious balance between their constitutional autonomy and the political constitutional interventions.'[11] This gives us a

[8] Ibid 292.

[10] TERENCE DAINTITH & ALAN PAGE, THE EXECUTIVE IN THE CONSTITUTION: STRUCTURE, AUTONOMY AND INTERNAL CONTROL 17-19, 392-8 (1999).

[11] GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETY CONSTITUTIONALISM AND GLOBALIZATION, 30 (2012), 30.

third sense of constitutional pluralism, in which it makes sense to talk of, and to contrast, different sectoral constitutions. Examples would be the fiscal constitution, the constitution of monetary policy and the constitution of markets through competition law.

The profusion of normative arrangements associated with constitutional pluralism, however, creates both practical and theoretical difficulties.[12] In practical terms, it might appear a recipe for chaos and mutually contradictory norms based on constitutional arrangements which guard their own autonomy and lack reflexivity and coordination. As an approach to legal theory, it has been criticised as a misreading of the essence of a constitution, confusing the sociology of how power is exercised in practice with the legal issue of authority.[13] In this article I shall suggest social theory can provide the basis for organised forms of communication as a constitutional technique for overcoming the problems of constitutional pluralism, and shall illustrate successful and unsuccessful attempts to do so. First I shall clear the ground by discussing some other potential constitutional solutions to the issues I have raised, and in doing so clarify and distinguish my own arguments.

3. Precommitments and experimentalism

Constitutions will have a dual role in dealing with the complexity caused by the profusion of normative systems under constitutional pluralism; they will act both as constraints and facilitators. Constitutions may be a means of precommitment by limiting the range of

[12] See Gunther Teubner, *Altera Pars Audiatur: Law in the Collision of Discourses* in LAW, SOCIETY AND ECONOMY: CENTENARY ESSAYS FOR THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE 1885 – 1995 (Richard Rawlings ed., 1997), 149, esp. at 157.

[13] See Martin Loughlin's critique of constitutional pluralism; Constitutional Pluralism: An Oxymoron?, 3 GLOBAL CONSTITUTIONALISM 9 (2014).

different policy choices available to a majority and putting some questions beyond debate. For example, this may be intended to ensure that the interests of future generations are taken into account; what is termed by Elster 'constitutions as constraints'.[20] The key issue will be the balance between such precommitments and those questions left open to ordinary politics. Some precommitments may be substantive, and of course are a common feature of many constitutions in order to protect fundamental rights; one thinks immediately of the unalterable fundamental rights under the German Basic Law.[21] These rights may include those necessary for the operation of an economic system, for example qualified rights to property and to freedom of contract. However, such substantive precommitments are much less appropriate in relation to the substance of economic management, a point acknowledged by Elster himself, because of their inflexibility and the especially intense conflict between precommitment and democratic choice in this area, particularly where constitutional amendment is difficult or involves lengthy and cumbersome procedures.[22] Nevertheless, there have been those who advocate the use of constitutional rules of substance here, for example in ordoliberalism or constitutional economics.[23] The latter has been strongly

[20] See in particular JOHN ELSTER, ULYSSES UNBOUND, Ch. II (2000); for a succinct summary of the arguments see also Stephen Holmes, *Precommitment and the Paradox of Democracy* in CONSTITUTIONALISM AND DEMOCRACY (John Elster & Rune Slagsted eds, 1988), 195.

[21] ULYSSES UNBOUND, 102.

[22] ULYSSES UNBOUND, 162-7.

[23] For a critique see TEUBNER, CONSTITUIONAL FRAGMENTS, n 11 above, 30-34.

associated with the advocacy of a balanced budget rule.[24] In my first case study below I shall suggest that this approach suffers from two major defects; that it artificially narrows political choice, and neglects difficulties of communication between legal, political and economic systems. That case study will also show the difficulty of enforcing such a rule at a trans-national level.

The alternative would be to adopt an approach based on procedural precommitments. There are many variants of this; one model for an appropriate balance between precommitment and openness comes from liberal theory drawing inspiration from Rawls, in which a constitution is based on the principle of equal participation through fair rivalry for political office and authority.[25] It represents a rejection of a view of constitutions as implementing a comprehensive programme of substantive justice but instead sees them as creating the rights necessary for political participation.[26] Such an approach would seem to avoid the difficulties of the substantive precommitments discussed above through retaining the essential openness of choice in how the economy is managed. It has, however, faced criticism from writers associated with Republican theory, exemplified by Michael Sandel's

[24] JAMES BUCHANAN AND RICHARD E. WAGNER, DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES (1977): JAMES BUCHANAN, The Balanced Budget Amendment: Clarifying the Arguments, 90 PUBLIC CHOICE, 117 (1997).

[25] JOHN RAWLS, A THEORY OF JUSTICE, 194-206 (revised ed., 1999). See also Roberto Garganella, *The Constitution and Justice* in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Michel Rosenfeld and András Sajó, eds, 2012).

[26] *The Constitution and Justice*, ibid, 338.

critique of what he terms 'the constitution of the procedural republic'. This procedural account of the constitution maintains that 'government should not affirm in law any particular version of the good life. Instead it should provide a framework of rights that respects persons as free and independent selves, capable of choosing their own values and ends'.[27] This neutrality, Sandel argues, has the cost that, instead of a culture based on learning and the cultivation of civic virtue, there is an unprincipled economic pluralism in which those problems which cannot be solved by the operation of markets supplying given consumer preferences are treated as susceptible to technical rather than political or moral resolution; an 'evacuation of the public sphere'.[28] If the use of strong substantive constraints is an example of economic imperialism,[29] the liberal model sets up too rigid a division between the realm of constitutional procedure and civil society.

This critique would suggest that it is desirable to have a different relationship between normative precommitment and democratic openness in our approach to constitutions and economic management. Whilst rejecting substantive precommitments on economic choices, we should accept that the pluralism of the economic and political marketplace will not be enough to found effective social learning. To facilitate this we should adopt a different form of precommitment, one which specifies the conditions by which communication can be

[27] MICHAEL SANDEL, DEMOCRACY'S DISCONTENT, 4; see also The Constitution of the Procedural Republic: Liberal Rights and Civil Virtues, 66 FORDHAM L. REV. 1 (1997-1998).

[28] The Constitution of the Procedural Republic, ibid, 10-11, 13.

[29] TEUBNER, CONSTITUITONAL FRAGMENTS, n 11 above, 33.

channelled and shaped; in this sense we need procedures which are both liberating and constraining.

At the opposite end of the spectrum from precommitment, an influential approach for dealing with complexity in administrative law has been that of the 'democratic experimentalism' and 'directly deliberative polyarchy' associated with Charles Sabel and his collaborators, and applied, for example, to US constitutional arrangements and the emerging architecture of EU rule-making.[30] The underlying philosophy is derived from Dewey's pragmatism, and advocates a constitution in which 'power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances, but in which regional and national coordinating bodies require actors to share their knowledge with others facing similar problems'. [31] The decentralisation is both fragmenting and destabilizing.[32] The emphasis on novel forms of institutional communication as a source of learning in this work is attractive, but such a wholesale programme of decentralisation and increased institutional fragmentation or destabilisation would not resolve the problems of integration characteristic of constitutional pluralism and

[30] See e.g. Michael C. Dorf and Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 COLUMBIA LAW REVIEW, 267 (1998); Charles F. Sabel and Jonathan Zeitlin, Learning from Difference: The New Architecture of Experimentalist Governance in the EU, 14 EUROPEAN LAW JOURNAL, 271 (2008).

[31] A Constitution of Democratic Experimentalism, ibid., 267.

[32] A Constitution of Democratic Experimentalism, ibid., 340; Learning from Difference n 30 above, 313.

noted above; nor would it necessarily meet the criticisms made by Republican theory through promoting learning processes and civic debate. As Black has argued in her seminal critique of proceduralisation in regulation, it is possible to go beyond a 'thin' conception of proceduralisation aimed at bargaining and compromise; instead, as the Republicans advocated, procedures can facilitate 'the mutuality, consensus and inter-subjective understanding of deliberative democracy'; a 'thick' conception. This requires not simply open procedures to accept inputs, but demanding conditions relating to the channelling and shaping of information in line with broader constitutional values and integrating it with inputs from other sources.[33] As a sympathetic critic of experimentalism has put it, '[o]nly because it is possible for the various actors to understand themselves as partners in a shared enterprise, which is grounded in and constrained by reference to shared constitutional principles, is it possible to establish the presupposition-rich processes that experimentalism describes.'[34]

I shall suggest that such a communicative approach does preserve the openness of economic management required by democratic ideals, whilst at the same time providing a response to the Republican critiques of liberal theory by setting demanding conditions for

[33] Julia Black, Proceduralizing Regulation, Part I 20 OXFORD J. OF LEGAL STUDIES 597-614 (2000) and Part II 21 OXFORD J. OF LEGAL STUDIES 33-58 (2001), esp. at 599, and for the need for 'translation' and other aspects of institutionalisation, 47-57; for a similar critique see J. Lenoble and M. Maesschalck, *Reviewing the Theory of Public Interest: The Quest for a Reflexive and Learning-based Approach to Governance* in LENOBLE AND MAESSCHALK, eds, REFLEXIVE GOVERNANCE: REDEFINING THE PUBLIC INTEREST IN A PLURALISTIC WORLD, 3 (2010).

[34] Mattias Kumm, 'Constitutionalism and Experimentalist Governance, 6 REGULATION AND GOVERNANCE 402 (2012).

testing normative and empirical claims through discourse. Its philosophical base does not come from 'the pragmatist account of thought and action as problem solving in a world, familiar to our time, that is bereft of first principles and beset by unintended consequences, ambiguities and difference'.[35] Instead, it adopts a Habermasian concern with the necessary conditions for social discourse. This means that alongside the openness it provides constraint, not through rules outlawing particular options but through specifying strong conditions for identifying the most appropriate outcomes from conflicting demands and values. On this approach, it is not particular substantive choices which are put beyond debate, but those influences and pressures which may distort communication itself. These conditions are will be discussed in the first part of the next section, and my third case study will illustrate one means by which they can be judicially enforced.

I shall also try to counter a further criticism of procedural approaches; that they assume too easily that there is a common language of inputs from different social systems which can simply be aggregated in procedural fora. As has been pointed out in systems theory, especially in the work on autopoiesis, there may be elemental blocks in communication between different systems such as law, politics and economics, which makes the direct drawing of common conclusions from a mix of systems impossible. The second of my case studies will illustrate precisely this from the management of financial crisis in the UK. I shall however, suggest that, rather than treating communication between legal,

[35] A Constitution of Democratic Experimentalism, n. 30 above, 284.

political and economic systems as impossible, institutional arrangements may be designed to facilitate it, a point also made in depth by Black.[36] This can be done through the careful design of a pluralistic set of institutions with countervailing powers, as I shall describe in my final case study.

The essence of the communication I describe in this article is thus that it does not attempt directly to outlaw particular politico-economic outcomes by substantive rules, but imposes demanding conditions for seeking collaborative solutions, and remains open to the incorporation and translation (to use Black's phrase) of inputs from different social systems. In doing so it enriches procedural processes through shaping and channelling these inputs so as to enhance both legitimacy and effectiveness. This can take place both through the design of procedures themselves and of the institutions within which they operate. I shall now turn to two bodies of thought in social theory which can provide a basis for such a communicative approach.

4. Social theory and constitutional communication

An emphasis on constitutions as communication can be grounded in several schools of social theory. An account of them will also provide the opportunity to clarify the different senses in which the concept of communication may be used. The two theoretical approaches addressed here each provide different support for the idea of communication. One is through reference to the highly normative concept of democratic participation. The other is more concerned

[36] Proceduralizing Regulation, n 33 above, 46-58

with communication as a means of coordination between different systems to ensure that governance works effectively, though evidently this also raises normative concerns about the criteria to be used in assessing effectiveness.

4.1. Discourse theory

The first, and most obvious, body of theory is the discursive theory of democracy associated in particular with the work of Jürgen Habermas.[37] This highly complex theory can only be summarised in outline here.[38] It is based on a concept of communicative reason derived from the essential conditions required for human communication.[39] This 'discourse principle' is based on the claim that 'the only regulations and ways of acting that can claim legitimacy are those to which all who are possibly affected could assent as participants in rational discourses.'[40]

For our purposes, two implications of this theory are of particular importance. The first is that it produces a theory of rights, rights which are necessary to make political communication possible. The interest of the theory here is that, rather than inherent natural rights preceding political arrangements and political communication, they are required in order to make such communication effective through providing the conditions for discourse

[37] The fullest statement of this theory is to be found in BETWEEN FACTS AND NORMS (1996). A similar, and rather more accessible, statement of the theory of deliberative democracy can be found in IRIS MARION. YOUNG, INCLUSION AND DEMOCRACY (2000).

[38] For a concise summary see the Postscript to BETWEEN FACTS AND NORMS, ibid 447-62.

[39] For fuller discussion of this and the 'ideal speech situation' presupposed on communication, see JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (1981) and for an accessible introduction see ROBERT ALEXY, THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION ch II (2009).

[40] BETWEEN FACTS AND NORMS, n 37 above 458.

between citizens treated as free and equal participants.[41] Secondly, constitutions should reflect the discourse principle through providing mechanisms for 'undistorted will-formation' permitting communication undistorted by power. To summarise;

> [a] legal order *is* legitimate to the extent that it equally secures the co-original private and political autonomy of its citizens; at the same time, however, it *owes* its legitimacy to the forms of communication in which alone this autonomy can express and prove itself. In the final analysis, the legitimacy of law depends on undistorted forms of public communication and indirectly on the communicational infrastructure of the private sphere as well.[42]

The obvious location for securing legitimacy through public communication would be the democratic legislature which remains open to communication from civil society. 'Discourses conducted by representatives can meet the condition of equal participation on the part of all members only if they remain porous, sensitive and receptive to the suggestions, issues and contributions, information and arguments that flow in from a discursively structured public sphere, that is, one that is pluralistic, close to the grass roots, and relatively undisturbed by the effects of power'.[43] In my third case study below I shall discuss an attempt to secure the capacity of the legislature to engage in discursive discussion of economic management more effectively. However, decisions relating to economic management have increasingly moved away from the legislature to the executive and to international organisations. Habermas has expanded the role of communicative discourse to

[41] See especially BETWEEN FACTS AND NORMS, n 37 above ch 3.

[42] BETWEEN FACTS AND NORMS, n 37 above 409 (emphasis retained).

[43] BETWEEN FACTS AND NORMS, n 37 above 182.

include the process of legal argumentation and also procedures internal to the administration.[44] Thus

> insofar as the implementation of programmatic goals requires the administration to perform organizational tasks that at least implicitly require a further development of law, the legitimation basis of traditional administrative structures no longer suffices. The logic of the separation of powers must then be realized in new structures, say, by setting up the corresponding forms of participation and communication or by introducing quasi-judicial and parliamentary procedures, procedures for compromise formation, and so on.[45]

Earlier on I mentioned the important role of the administrative constitution operating through internal rules and controls; it is here that proposals to enhance the communicative potential of the administration are most relevant. As we shall see in the final case study, this may give a particular constitutional importance to the establishment of countervailing administrative institutions and the use of new techniques and procedures associated with them.

[44] See BETWEEN FACTS AND NORMS, n 37 above ch.5 on legal argumentation and 190-2, 391, 431-6 and 440-41 on discursive procedures within the administration.

[45] BETWEEN FACTS AND NORMS, n 37 above 193; see also 391, 430-6, 440-1. A similar point is made by Young, n 37 above 45-6.

Economic management is in part characterised by processes of bargaining, especially in areas of taxation, public expenditure and debt reduction. This is distinct from value oriented or 'pure' deliberative discussion in that it is concerned with compromise between different interests rather than redefining interests on the basis of values all can accept; thus the outcome does not depend solely on the power of the better argument. As a result,

> [t]he discourse principle, which is supposed to secure an uncoerced consensus, can … be brought to bear only indirectly, though procedures that *regulate* bargaining from the standpoint of fairness. … More specifically, the negotiation of compromises should follow procedures that provide all the interested parties with an equal opportunity for pressure, that is, an equal opportunity to influence one another during the actual bargaining, so that all the affected interests can come into play and have equal chances of prevailing. To the extent that these conditions are met, there are grounds for presuming that negotiated agreements are fair.[46]

This has obvious institutional implications put well by Berman; 'although people may never reach agreement on *norms*, they may at least acquiesce in *procedural mechanisms*, *institutions*, or *practices* that take hybridity seriously, rather than ignoring it through assertions of territorially-based power or dissolving it through universalist imperatives.'[47]

The concept of communication used in Habermas's work is a highly normative one, though he would claim that its normative claims have a grounding not in *a priori* principle but in the 'universal pragmatics' inherent in all communicative acts.[49] This normative emphasis is not just based on the effectiveness of government but on its potential through

[46] BETWEEN FACTS AND NORMS, n 37 above 166-7 (emphasis retained).

[47] Paul Schiff Berman, Global Legal Pluralism, 80 SOUTHERN CALIFORNIA LAW REVIEW 1155, 1164 (2007).

[49] See notably JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY (1979).

deliberative democracy to achieve inclusion of citizens in the process of deciding common values and fairly allocating resources. As Young has put it, '[d]emocratic process is primarily a discussion of problems, conflicts, and claims of need and interest. … Participants arrive at a decision not by determining what preferences have the greatest numerical support, but by determining which proposals the collective agrees are supported by the best reasons.' [50]

However, communication may also refer to the more abstract question of communication between law and other social systems, such as the economic and the political systems. This is also central to Habermas's work, with his conception of law as a hinge between, on the one hand, systems of the economy and administration steered and co-ordinated by money and power, and, on the other, the 'lifeworld' structured through communicative interaction.[51] One can also find theoretical support for the importance of such communication from an unexpected source, that of systems theory, and it is to this that I shall now turn.

4.2. Systems theory

The choice of systems theory as a second basis for a theory of constitution and economic management may appear surprising for two reasons. The first is that theorising on communication in the social sciences is associated strongly with the work of Habermas, and he is highly critical of many of the pre-suppositions of influential aspects of systems theory, for example for marginalising the normative logic of law and the importance of the

[50] Young n 37 above 22-3.

[51] For a summary of the distinction see JÜRGEN HABERMAS, LEGITIMATION CRISIS 1-8 (1976) and in relation to law, BETWEEN FACTS AND NORMS, n 37 above 56.

communicative life-world.[52] However, I shall suggest that this is not a sound criticism of all systems theory. Secondly, some of the most influential systems-theoretical work relating to law is best characterised as theory of *non*-communication, emphasising the inherent limits on direct communication between law and other social systems; indeed, the theory of autopoiesis has been characterised as in many senses a theory of legal autonomy rather than of direct communication.[53] This may be true of earlier versions of autopoiesis, in particular the work of Luhmann, but is less the case in relation to later versions.[54] Here I shall briefly discuss selected work of Gunther Teubner on autopoiesis, and then refer to a more recent version of systems theory which gives a direct and positive role to the potential of constitutions as means of communication.

In earlier work, like Luhmann, Teubner emphasised the limits of communication between law and other social systems, including the economy.[55] He takes from Luhmann the insistence that systems are 'operatively closed' to other systems; in other words, that they cannot communicate directly but only indirectly through their 'cognitive openness' requiring communications to be translated into the codes of the receiving system. In the case of law, the code is the binary one of legal/illegal. Thus '[a]s soon as legal communications on the fundamental distinction between legal and illegal begin to be differentiated from general social communication, they inevitably become self-referential, and are forced to consider

[52] See e.g. his critique of Luhmann in BETWEEN FACTS AND NORMS, n 37 above 47-52. For a critique of Habermas by Teubner see his *Altera Pars Audiatur…*, n 12 above 162-7.

[53] See Michael King, The "Truth" About Autopoiesis, 20 JOURNAL OF LAW AND SOCIETY 218 (1993).

[54] For a critique of Luhmann's methodological approach in this context see BETWEEN FACTS AND NORMS, n 37 above 47-52.

[55] See in particular How the Law Thinks: Toward a Constructivist Epistemology of Law, 23 LAW & SOCIETY REVIEW 727 (1989); LAW AS AN AUTOPOIETIC SYSTEM (1993).

themselves in terms of legal categories. … The law is forced to describe its components using its own categories.'[56]

However, as Michael King has pointed out, Teubner's account differs from that of Luhmann in accepting a notion of partial autopoiesis.[57] First, there is an acceptance that some general communication will be internalised in each system, thus creating a bridge with the generalised life-world;

> all forms of specialized communication in any social subsystem – interaction, organization, functional subsystem – are also at the same time always forms of general societal communication. … every specialized legal communication is always at the same time an act of general social communication. … The mutual interference of systems makes it possible not only for them to observe each other but for there to be real communicative contact between the system and the life-world.[58]

In a way reminiscent of Habermas's work, this medium of general communication is located in the lifeworld constituted by the structure of meaning through ordinary language. According to Habermas, this is incompatible with the conceptualisation of law as an autopoietic system.[59]

Secondly, law may act as a procedural bridge between systems to render them more reflexive. In more recent work, this medium of general social communication is more closely linked to the function of constitutions which perform this role. Already Teubner's work had suggested a preference for procedural legal solutions; thus the role of law was not to regulate other subsystems directly but to '*further the development of reflexion structures within other*

[56] LAW AS AN AUTOPOIETIC SYSTEM, n 55 above 33.

[57] N 53 above 224.

[58] LAW AS AN AUTOPOIETIC SYSTEM, n 55 above 86, 88.

[59] See Habermas, BETWEEN FACTS AND NORMS, n 37 above 52-6,

social subsystems.'[60] For example, in the context of judicial review of codetermination in economic organisations in Germany, the Federal Constitutional Court, faced with contending arguments about the constitutionality of codetermination based on its socioeconomic effects '[r]efused to take a substantive position on these scenarios about possible consequences and resorted to a "procedural" solution. Instead of confirming or rejecting reality constructions, the court allocated risks of information and risks of prediction among the collective actors involved, including the court itself, and created a new legal duty for the legislature: to reverse its decisions if the predictions on which they were based should turn out to be wrong…'.[61] As we shall see later in this article, similar decisions by the same Court in cases concerned with the EU response to the eurozone crisis are particularly good examples of the German Constitution being treated as a medium for allocating institutional responsibilities in order to avoid blockages to communication.

This approach is more fully developed in Teubner's work *Constitutional Fragments*. Thus one role of law is to structure cooperation procedures through constitutionalization; '[c]onstitutions are everywhere in society … Law must accordingly develop a "multilateral constitutionalism" that does not bind social orders unilaterally either to the constitution of the state or to the economy, but rather models specific constitutions that do justice to the peculiarities of the various orders.'[62]

According to Teubner, the role of constitutions will not be to impose substantive limits on the economic role of the state, as the ordoliberals had suggested and, as we shall see later, has also characterised recent attempts to constitutionalise balanced budget rules. That

[60] Gunther Teubner, Substantive and Reflexive Elements in Modern Law, 17 LAW AND SOCIETY REVIEW 239, 275 (1983) (emphasis retained).

[61] How the Law Thinks, n 55 above 751

[62] N 11 above 36-7.

would amount to creating an economic constitution autonomous from politics, and resolving conflicts between the economy and politics one-sidedly in favour of the former.[63] Nor is the role of the constitution directly to implement political goals, as was that of the welfare state model of constitutionalism.

> Rather, it concentrates the role of politics on specifying constitutional models for social sub-areas so that a close co-operation of state and social actors can be achieved to keep in check the centrifugal tendencies of functional differentiation. The state itself is assigned the task of integrating conflicting sub-systems, however, not by making collective obligatory judgments, rather by co-ordinating the co-operation of public and private organizations.[64]

On this model, then, constitutional pluralism is recognised not just at different vertical levels (trans-national, national, legal, political, administrative) but in different horizontal sectors (economy, politics); one central question is that of communication between them.

This approach differs in important respects from that of Habermas, in particular through lacking the highly normative concern with communication as a means of deliberative democracy and the development of justified norms. Thus in the earlier systems theory of Luhmann, 'the problem of justice [was] removed from its old connection with truth and justifiability and rather regarded as the question of whether or not the legal system has adequate complexity'.[65] In Teubner's more recent work, the role of meta-constitutionalism is

[63] N 11 above 30-33.

[64] 40; see also Gunther Teubner, *Societal Constitutionalism: Alternatives to State-centred Constitutional Theory* in CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE (Christian. Joerges, Inger-Johanne Sand and Gunther Teubner eds, 2004) 3.

[65] ALEXY, THEORY OF LEGAL ARGUMENTATION, n 39 above 126.

to put pressure on the functional systems to develop a stronger regard for the broader social environment, with the aim of 'sustainability', in the sense of preventing systems damaging their environments (in the broad sense of other systems).[66] Thus the concern is with effectiveness and the limitation of destructive damage to different systems. This raises interesting normative questions on the meaning of effectiveness, but does not have the underlying thrust of discursive democracy found in Habermas's work.

Some important insights on the role of constitutions from a different version of systems theory have been provided in the recent work of the British social theorist Frank Vibert.[67] He discusses a number of systems for social coordination; notably the market, democratic politics, law and social norms. His entry point for discussion is through the regulatory system, which is seen as cutting across all other systems, and providing a way of pointing to the normative issues associated with different systems of authority.[68] Like Habermas, he rejects Luhmann's account of indirect communication through 'cognitive openness' as too restrictive and too far removed from the real world.[69] In the context of the relationship between regulation and the law, procedure is central, both because of the role of procedures within law and their ability to handle uncertainties.[70]

Reciprocity characterises the exchange of power and authority between different systems.[71] It is an essentially communicative process, being 'about the way in which power

[66] N 11 above 152-3, 173.

[67] THE NEW REGULATORY SPACE: REFRAMING DEMOCRATIC GOVERNANCE (2014); I also benefited considerably from the 'Author Meets Critics' session on this book at the 5th European Consortium for Political Research Regulatory Governance Conference at Universitat Pompeu-Fabra, Barcelona, 25 June 2014.

[68] Ibid 7-8.

[69] Ibid 28-9.

[70] Ibid 49.

[71] Ibid 154-60

and authority is exchanged between different systems of social coordination.'[72] Reciprocity is achieved through regulation, which 'has moved from providing specific "answers" to particular problems, instead becoming the main way in which we reframe democratic governance to meet new situations.'[73] There is a particularly important role in this for constitutions.

> A written constitution is the classic vehicle for trying to maintain the integrity of a system of government, for triggering reflection and correction and for trying to maintain an overarching coherence …. However, the changing mix of authority in modern systems of social coordination suggests that the idea of a constitution needs to be updated if it is to provide effective mechanisms for reflection and correction in a modern system of government. In a contemporary setting, maintaining the oversight of boundaries between systems and the integrity of each domain of social coordination needs a new and different type of constitution.[74]

As this suggests, Vibert's approach lacks the strongly democratic normative orientation of Habermas's work, but, characteristically for systems theory, is concerned with coping with complexity; '[i]t is through the regulatory space that modern societies can adjust each of their systems of coordination to changing circumstances and bring them into new alignments.'[75]

Systems are not self-correcting but require processes of reflection and correction most effectively triggered when they interact.[76] A key distinction, echoing the different emphases of precommitment and of experimentalism discussed above, is that of 'hard' and 'soft'

[72] Ibid 154.

[73] Ibid 160.

[74] Ibid 182.

[75] Ibid 159.

[76] Ibid 187-8.

boundaries between systems. 'Hard' boundaries are those crucial to maintain the core functions and values associated with different systems through using heavily legalised rules; an example given is that of the constitutionally-protected separation of powers in the United States. Here constitutions act as constraints on permissible public actions. 'Soft' boundaries, by contrast, provide more diffused support, for example through sentiments of what is legitimate, and may take the form of soft law. One example given by Vibert is that of the development of greater transparency as a means of fiscal discipline, rather than relying on a substantive constitutional amendment, a subject I shall discuss below. Another way of seeing the distinction is to see 'hard' constraints as basic constitutional rules to protect core functions of a system, whilst 'soft' constraints may apply where the costs to the system of a particular form of action are unclear.[77] 'Soft' boundaries will be 'drawn in large part through a process of discretionary judgements by the actors themselves – politicians, regulators and judiciaries', will 'rest heavily on the supposed advantages of flexibility', will have a highly general normative content and will rely on evolutionary and adaptive learning processes of learning and self-correction.[78]

For Vibert, constitutions perform the basic functions of providing benchmarks against which monitoring can take place and which trigger reflection; they serve a prudential purpose of identifying problems which will not be self-correcting; they serve a corrective function when actual developments veer off course, and they perform an expressive function of setting out basic rules.[79] However, traditional constitutions are characterised too much by 'hard' boundaries which do not properly address the vulnerabilities of the different systems of modern societies; there is an echo here of Teubner's criticism of ordoliberal constitutions

[77] Ibid 188-9.

[78] Ibid 189.

[79] Ibid 194.

with hard constraints to limit government intervention in the economy. Constitutions thus need re-thinking to 'recognise the diversity of legitimate authority in the modern system of government' and 'to recognize the need for diverse means of control for monitoring and correcting systems.'[80] The result will be a more appropriate mix of 'hard' and 'soft' constraints. Vibert concludes that:

> [i]n order to ensure the integrity of different systems of authority, there is required some kind of updated mechanism for considered reflection, oversight and correction of systems of authority. … The idea of a written form of document to protect systems of social coordination seems completely archaic in this digital age. But possibly a new style of constitution is indeed the way ahead.[81]

5. Two failures of constitutional communication

The argument above, whilst not denying the background role of constitutions as substantive constraints on economic management (for example through the protection of basic rights), has emphasised the importance of institutional and procedural communication-enhancing constraints. How might these work in practice? I shall now turn to four brief case-studies; the first two will provide examples of failures in organising communicative structures and relations through the overuse of substantive constraints and the under-development of communicative structures.

5.1 Balancing the budget

[80] Ibid 195-6.

[81] Ibid 201.

It may be recalled that an alternative approach to that adopted here is that of constitutional economics, to impose substantive precommitment rules constraining the operation of politics through constitutional norms, and that a common proposal is that of a balanced budget rule.[85] In this case study I suggest that such 'hard' constraints (to use Vibert's terminology) can have seriously dysfunctional consequences, and the study also illustrates a blockage between legal, political and economic systems.

It is tempting to use the US as an illustration of the problems and unintended consequences of rules attempting to secure balanced budgets, notably the debt ceiling (not a balanced budget rule but a rule with a similar rationale). In a context of major political division, this has been a key contributor to government shutdown and to the loss of the USA's triple-A credit rating, as well as raising difficult constitutional problems.[86] However, instead I shall choose examples from Europe as part of the prevailing concern to reduce governmental deficits and debt in the new millennium by requiring a balanced budget.[87] For

[85] Buchanan suggests that a balanced budget rules is procedural rather than substantive as does not constrain the overall size of the public sector, merely how it is financed. However, does exclude major political choices, notably Keynesian demand-management, as has become increasing apparent under austerity. Thus it is best thought of as a substantive rule; The Balanced Budget Amendment: Clarifying the Arguments, n.24 above, 125-7.

[86] See Richard C. Scragger, Democracy and Debt 121 YALE LAW JOURNAL 860-886, (2011-2012), esp. 864, 872-3; Neil H. Buchanan and Michael C. Dorf, How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff 112 COLUMBIA LAW REVIEW, 1175-43 (2012); Nullifying the Debt Ceiling Once and for All: Why the President Should Embrace the Least Unconstitutional Option 112 COLUMBIA LAW REVIEW SIDEBAR (2012), 237-49.

[87] For detailed discussion see Tony Prosser, Constitutionalising Austerity in Europe, PUBLIC LAW, 111 (2016); THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS (Maurice Adams, Federico Fabbrini and Pietrre Larouch eds, 2014).

example, the German constitution was amended in 2009 to limit the scope for running a deficit after 2016; Spain amended its constitution in 2011 to include a deficit limit, a debt limit and a limit on spending (only the second constitutional amendment since the return to democracy); Italy also amended its constitution during 2012 to require a balance between revenues and expenditure.[88] The constitutional rules contain exceptions permitting public borrowing with parliamentary approval to respond to the economic cycle and to exceptional events.

The most striking example of constitutionalization of such a rule is however at the EU level, in the form of the fiscal compact contained in the Treaty on Stability, Coordination and Governance of 2012. It operates alongside Art 126 and Protocol 12 of the Treaty on the Functioning of the European Union which impose a limit of 3% GDP on the actual or planned government deficit. The Member States party to the Treaty also agreed to a fiscal compact requiring them achieve a balanced budget; this will be respected if the Stability and Growth Plan medium-term national objective is met. The rules must take effect in national law 'through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budget processes'.[89] There is, however, an exception to the fiscal rules in the case of an unusual event outside the control of the Member State, or periods of severe economic downturn, so long as this does not endanger fiscal stability in the medium term.

The UK is not party to the Treaty and its constitutional arrangements do not permit entrenchment of a balanced budget rule, but has also attempted to introduce legal limits on

[88] Constitution of the Federal Republic of Germany (Grundgesetz), arts 109-15; Constitution of the Spanish Republic, art 135; Constitution of the Italian Republic, art 81, amended by Constitutional Law n. 1/2012.

[89] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, art. Arts 3(2) and 8.

deficits. One example was that of the Fiscal Responsibility Act 2010, which imposed duties on the Treasury including that for each financial year up to 2016 public borrowing be reduced, halving by 2014, and that public sector debt be put on a downward path by the end of the financial year 2015-16. The Act was short-lived, being repealed by the incoming Coalition Government, which replaced it with the requirement under the Budget Responsibility and National Audit Act 2011 that the Treasury publish a Charter for Budget Responsibility, to be laid before Parliament.[90] The Charter includes objectives and a mandate for fiscal responsibility and for debt management and debt management reporting, and has been amended to reflect changed objectives for deficit reduction.[91] However, the Chancellor of the Exchequer repeatedly failed to meet his objectives for deficit reduction, and the target in the Charter of achieving a fiscal surplus by 2020 was unceremoniously dropped the week after the UK vote for Brexit in view of the uncertainty the vote had caused.

It is not hard to identify the purpose of these rules; it was to convince the markets that governments are serious about deficit and debt reduction and that this is not at the mercy of ordinary politics. Thus they would be a classic example of a substantive precommitment in the sense identified by Elster and discussed earlier.[92] However, they were almost completely unsuccessful in doing so. Thus in the EU the constitutional rules were in part an attempt to correct deficiencies in the Stability and Growth Pact in its original form, breached by Germany and France, which had nevertheless escaped sanctions for political reasons. However, draft budgets for 2016 submitted by a number of Member States were criticised as

[90] S 1.

[91] HM Treasury CHARTER FOR BUDGET RESPONSIBILITY: SUMMER BUDGET 2015 UPDATE (2015).

[92] See also Elster's discussion of precommitment and credibility in ULYSSES UNBOUND, n. 20 above, 149-53.

'making their disdain for the rules obvious'.[93] Fines levied by the Commission on Spain and Portugal were cancelled by the Council; the Commission has also issued an interpretative Communication emphasising the flexibility in the rules.[94] Nor did the use of the Fiscal Charter in the UK prevent changes in fiscal policy and the eventual abandonment of the balanced budget objective in light of changing political events.

What if the rules had been effective? Would this have represented a desirable substantive precommitment by the European states? The answer must be negative in this case also as they would have constrained legitimate political choices within a financial straightjacket and given one controversial and contested approach to fiscal policy a constitutionally privileged status. In the words of the Financial Times, they would have created 'a legalistic hammer to club down politics wherever it raises its unpredictable head'.[95] They would have blocked communication between constitutions and political systems by simply outlawing as illegitimate possible choices made by the latter. There would also have been a problem as regards communication with the economic systems of the states which had adopted the rules limiting deficits. As an economic commentator noted in relation to the EU rules, 'nobody knows what the "structural" or cyclically adjusted balance is. Worse, it is least knowable precisely when such knowledge is most essential, namely, when the economy is experiencing a boom …. This is one important reason why the Eurozone's new fiscal treaty, which went into effect in January 2013 and is built around achieving a balance in the estimated structural fiscal deficit, is most unlikely to work…'.[96]

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[93] Tony Barber, The eurozone's fiscally lax nations are at it again FINANCIAL TIMES, 4 November 2015.

[94] *Making the Best Use of the Flexibility Within the Existing Rules of the Stability and Growth Pact* COM (2015) 12 final, 13.1.2015.

[95] Leader, 7 March 2012.

[96] MARTIN WOLF, THE SHIFTS AND THE SHOCKS, 76-7; see also 315.

These ‘hard’ constraints represented by constitutional balanced budget rules did not contribute to communication between the legal, economic and political systems but rather the reverse. This is not to say, however, that it is not possible to use constitutional techniques to regulate and improve the management of fiscal policy. In my final case study I shall give some examples of how this can be done using techniques closer to Vibert’s ‘soft’ constraints through developing countervailing institutions to scrutinise and publicise fiscal decisions.[97]

5.2 Regulation and the financial crisis

The above example concerned the inappropriate use of substantive legal rules. My second example, by contrast, suggests that major problems can arise through unstructured procedures; it is not enough simply to have a number of different viewpoints represented in the formation of policies without the necessary underlying communicative conditions. In this case only personal relationships and unstructured political channels were available, with disastrous results. This was especially so as the conflicts extended to the legal, political and economic systems with limited arrangements for mutual learning. If the problem with the balanced budget rule was too much legal intervention through rules, in this case the problem was an absence of structuring by hard or soft law.

This case is that of the collapse of the UK’s tripartite system of financial services regulation during the 2008 financial crisis.[98] Despite the political centrality of this type of

[97] For fuller discussion see Constitutionalising Austerity in Europe, n 86 above, 121-28, and for a discussion of the development of the European Semester arrangements for policy organisation in a more experimentalist direction see Jonathan Zeitlin, EU Experimentalist Governance in Times of Crisis, 39 WEST EUROPEAN POLITICS 1073, 1083-90 (2016).

[98] For background see Julia Black, *The Credit Crisis and the Constitution*, in THE REGULATORY STATE: CONSTITUTIONAL IMPLICATIONS (Dawn Oliver, Richard Rawlings and Tony Prosser eds, 2010), 92. The problems are also covered in T. PROSSER, THE ECONOMIC CONSTITUTION 34-6, 167-72 (2014).

regulation in ensuring that stability was maintained in the financial system as a whole, it provided a classic example of extended government; the key constitutional dimension lies in the allocation of responsibilities between different institutions and the structuring of relations between them. The institutions in question were the Treasury, the Bank of England and the Financial Services Authority, the then regulatory body. Their respective responsibilities were set out in a memorandum of understanding and through representation on a Standing Committee on Financial Stability chaired by the Treasury. This might appear to be a promising foundation for communication between them, though of course such a memorandum could only provide a starting point. However, the memorandum 'in fact defined the respective roles of the three bodies in terms that reinforced the separateness of their operation.'[99]

Faced with the financial crisis, the system collapsed. The problem was described vividly by the Chancellor of the time: '[t]he whole system depended on the chairman of the FSA, the Governor of the Bank and the Chancellor seeing things in exactly the same way. The problem was that, in September 2007, we simply did not see things in the same way.'[100] The Treasury Select Committee of the House of Commons made a similar point; 'the biggest failings of the Tripartite's handling of Northern Rock were that it was not clear who was in charge, and, because the Tripartite took a minimalist view of their respective responsibilities, necessary actions fell between three stools.'[101] In this case the absence of both any clear allocation of responsibilities between the different institutions, and any forum for

[99] BLACK *The Credit Crisis and the Constitution*, ibid., 97.

[100] ALISTAIR DARLING, BACK FROM THE BRINK: 1,000 DAYS AT NUMBER 11 21 (2011).

[101] 'Banking Crisis: Regulation and Supervision' HC 767, 2008-09, para. 114

collaboration, led to an over-dominance of personal relationships and a failure by the institutions involved to face up to their responsibilities.

How did this represent a failure of communication in the terms set out in this article? Two aspects of the events link directly with the theoretical arguments made here. The first is the absence of any form of institutional structuring to ensure rational debate over the management of the crisis. Under traditional UK constitutional doctrine, the ultimate means of coordination was for the political constitution through the process of ministerial responsibility to Parliament. However, direct ministerial responsibility was not applicable to the operations of the arm's length Financial Services Authority, let alone to the Bank of England. Thus the political constitution did not structure relations clearly; nor did the legal constitution. The result was that communication came down to ad hoc relations between the individual personalities involved and, as mentioned above, they did not have sufficient common understandings to found effective cooperation.

Secondly, the reaction to the crisis was an example of a serious failure of communication between the regulatory system and the financial system. As Vibert has put it,

> …the crisis constituted a failure of the financial system as a whole that is in turn a key part of the market system. The inability of the regulators and governments to prevent the crisis could be seen as a failure to understand the nature of the financial system, the way risks were transmitted and the way that the connections between individual financial enterprises could spiral out of control into a collapse or freezing of the system as a whole.[102]

[102] N 67 above 23-4.

Out of many examples illustrating this last point, one need only look at the Financial Services Authority's report on the handling of the failure of the Royal Bank of Scotland, finding that the regulator's handling of systematically important firms was inadequate, and that its overall philosophy and approach was flawed. For example, '[t]oo much reliance was placed on assessments that appropriate decision-making processes were in place, with insufficient challenge to management assumptions and judgements.' [103]

After the financial crisis, complex measures were taken to try to resolve the problem through reforms under the Financial Services Act 2012 and through other administrative measures. They represent a move away from ministerial responsibility towards a complex mixture of hard law, soft law, and procedural requirements, for example through a more developed use of memoranda of understanding, and institutional reform such as cross-membership of key committees.[104] The use of hard law is the least satisfactory of the changes. It is extremely difficult to navigate due to the Government's decision to proceed by extensive amendments to the Financial Services and Markets Act 2000 rather than the enactment of a new legislative code. There is also over-complexity in the statutory objectives of the new Financial Conduct Authority, which replaces the Financial Services Authority as the body responsible for consumer protection and markets regulation.[105]

[103] Financial Services Authority, THE FAILURE OF THE ROYAL BANK OF SCOTLAND (2011), 27. Very similar conclusions were reached by the Treasury Committee of the House of Commons in its report on the failure of HBOS; 'Review of the Reports into the Failure of HBOS', HC 582 (2016-17).

[104] For discussion see THE ECONOMIC CONSTITUTION, n 98 above 35-6, 177-81.

[105] Financial Services Act 2012, s 6, inserting new ss 1B-L into the Financial Services and Markets Act 2000. This point was made strongly by the Parliamentary Commission on Banking Standards, 'Changing Banking for Good', HL 27-II, HC 175-II (2013-14) para. 1074.

Institutional reform is more promising. The provisions go some way to clarifying the responsibilities of the different actors, including, for example, a new duty on the Bank of England to notify the Treasury of a possible need for public funds such as financial assistance to a bank, and a power of direction by the Treasury to the Bank of England to exercise its powers of financial assistance, its stabilization powers, or its powers of bank administration.[106] The Treasury is also empowered to specify to the new Financial Policy Committee of the Bank of England what the Government's economic policy is to be taken to be, in a similar form to the annual remit issued by the Chancellor to the Bank's Monetary Policy Committee, to be discussed below.[107] Thus provision is in place for the use of soft law as a key means of coordination. There are also enhanced requirements for consultation between the Bank of England and the Treasury, and a requirement for meetings with a published record between the Governor and the Chancellor after the Bank publishes its Financial Stability Report.[108] Later legislation has also introduced the power for the Treasury to issue published recommendations to the Financial Conduct Authority.[109]

These institutional reforms thus require the use of procedural approaches to clarifying and structuring the relationships between the institutions, and to that extent represent a useful way of improving communication between the different bodies involved in handling a future financial crisis. They go further than an experimentalist approach as there is an attempt to integrate and coordinate the system and to structure relations between the different bodies so

[106] Financial Services Act 2012, ss 58-63.

[107] Financial Service Act 2012, s 4, inserting new ss 9D and 9E into the Financial Services and Markets Act 2000; see also HM Treasury, REMIT AND RECOMMENDATIONS FOR THE FINANCIAL POLICY COMMITTEE (2013).

[108] Financial Services Act 2012, s 6, inserting new ss1 B-L into the Financial Services and Markets Act 2000.

[109] Bank of England and Financial Services Act 2016, s. 19.

as to provide a coherent response in future by the institutions as a whole. The system of extended government has been accepted (indeed, there are more, rather than fewer, institutions involved), but tentative steps have also been taken to structure relations through institutional design and the use of soft law, a subject to which I shall return in my final case study. However, much remains to be tested in a future financial crisis, in particular whether communication between the bodies involved will survive such a test. This brings us to the next case study, which will suggest a method through which there can be a form of outside supervision of the conditions for such communication through the legal constitution.

6. Two successes of constitutional communication

A key theme of my earlier discussion has been that the approach I am advocating goes beyond some proceduralist and experimentalist accounts through requiring strong conditions to shape the terms of participation and interaction of the different parties involved. Who will draw up and implement these conditions? There are two possible answers, corresponding to the legal and political constitutions referred to earlier. My next case study will describe a process by which the German Federal Constitutional Court required open procedures with the effect of integrating the political and legal constitutions. My final case study will look at institutional design and the mix of hard and soft law in similar forms of integration in UK monetary and fiscal policy, providing a more evolutionary process of the development of communicative institutions.

6.1. The German Federal Constitutional Court and the legislature

This study raises two issues. First, how can communication help integrate rather than fragment the institutional arrangements? Second, how can constraints be created to secure compliance with the deliberative conditions specified earlier in this article?

The role of the Constitutional Court is dealt with explicitly by Habermas in his analysis of the role and legitimacy of constitutional adjudication and, in particular, the importance of substantive political rights as pre-requisites for a discursive political democratic process. '[T]he constitutional court must examine the contents of disputed norms primarily in connection with the communicative presuppositions and procedural conditions of the legislative process. Such a *procedural understanding of the constitution* places the problem of legitimating constitutional review in the context of a theory of democracy.'[110]

This highly normative approach can be found in recent decisions of the Federal Constitutional Court in the context of economic policy; more particularly, of the eurozone response to the financial crisis. Here the Court has, in a series of decisions, actually buttressed the political elements in the constitution through requiring effective Parliamentary scrutiny of spending decisions as a condition of their constitutionality.[111] In the first of these cases, on the Euro Rescue Package in 2011, the Court was able to build on its earlier decisions strengthening the Bundestag's powers to resist the limiting effect on its budgetary

[110] BETWEEN FACTS AND NORMS, n 37 above 240-6, 264 (emphasis retained). See also Christopher F. Zurn, Deliberative Democracy and Constitutional Review, 21 LAW AND PHILOSOPHY 467, 508-31, (2014).

[111] The two most important decisions are those on the Euro Rescue Package in 2011 and its preliminary decision on the European Stability Mechanism in 2012; BVerfG, 2BVR 987/10 vom 7.9.2011, paras 104-7, 121-9; BVerfG, 2BVR 1390/12 *et al* vom 12.9.2012, paras 194-9, 224-5. For a good account of the context see Antje von Ungern-Sternberg, Parliaments – Fig Leaf or Heartbeat of Democracy?, 8 EUROPEAN CONSTITUTIONAL LAW REVIEW, 304 (2012). The approach taken in the preliminary decision was confirmed in the Court's final decision on the European Stability Mechanism: 2BvR 1390/12 *et* al vom 18.3.2014, paras 159-75. More recently, the central importance of the principle of democratic scrutiny was also emphasised in the Court's decision on the European Central Bank's Outright Monetary Transactions programme; 2BvR 2728-31/13 vom 21.6.2016.

capacity.[112] It considered that the right to vote included not only the right to elections, but 'protection against a loss of substance of the Bundestag's powers, e.g. by transfer to international institutions.'[113] As the Court put it, '[t]he decision on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself…'[114] Thus it was constitutionally necessary that the legislature make decisions on revenue and expenditure free from the imposition of the will of other bodies and that 'sufficient parliamentary influence will continue in existence on the manner in which the funds made available are dealt with.'[115] This implies a deliberative conception of democracy: 'parliamentary decisions should be reached after the presentation of alternatives and the free deliberation of arguments. … the idea that government has to seek parliamentary approval of fundamental decisions because of the higher democratic legitimacy of parliament presupposes that the latter shows a certain degree of independence from the former, i.e., that it reaches a decision of its own after adequately assessing and discussing different options.'[116]

In its decisions on the European Financial Stability Facility and the ESM/Euro Plus Pact the Court again emphasised the necessity of the Bundestag's involvement.[117] It also decided that the Bundestag's right to decide the budget and its overall budgetary responsibility have to be 'exercised through deliberation and decision-making in the plenary

[112] Parliaments – Fig Leaf or Heartbeat of Democracy?, ibid., 307-13.

[113] Parliaments – Fig Leaf or Heartbeat of Democracy?, ibid., 313.

[114] Euro Rescue Package decision n 111 above para. 122.

[115] Euro rescue package decision n 111 above para 128.

[116] Parliaments – Fig Leaf or Heartbeat of Democracy?, n 111 above 320-1.

[117] See Susanne Schmidt, A Sense of Déja Vu? The FCC's Preliminary European Stability Mechanism Verdict, GERMAN LAW JOURNAL 1, 10-11 (2013).

sitting' rather than delegated to a committee.[118] In its preliminary decision on the European Stability Mechanism (which also considered issues arising from the fiscal compact), the Court reaffirmed that the Parliament's budgetary responsibility could not be delegated to the executive or to a supranational rescue mechanism. Moreover, the European Stability Mechanism's provisions on the inviolability of documents and on professional secrecy could not prevent comprehensive information being made available to the parliament. Thus

> [i]f … decisions of the European Stability Mechanism require to be dealt with not only at government level, to which the necessary information is always available, but also to be discussed and approved in parliamentary bodies, it is absolutely necessary for the latter to be informed as well.[119]

In essence, then Court was thus providing constitutional protection for the Bundestag's right to deliberation and information through imposing strong norms to channel and open the structures for communication between the executive, the legislature and the European Union institutions. A free flow of information and effective deliberation were prerequisites for constitutional legitimacy. This exemplifies the Habermasian concept of communication as the basis of democratic discourse; communication within the democratic legislature itself is promoted by the Court. We also see a communicative meta-constitution being developed through decisions of the Court devising a division of responsibilities between the legislature, the executive and international organisations designed precisely to maximise communication in the process of public decision-making. This exemplifies the

[118] Mattias Wendel, Judicial Restraint and the Return to Openness: the Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012, 14 GERMAN LAW JOURNAL 21, (2013), 40, referring to the Special Parliamentary Committee case; BVerfG BvE 8/11, Jan 28 2012.

[119] N 111 above para. 225; see Wendel, ibid 37-40

concept of 'soft' boundaries in Vibert's analysis, designed to set up relations between the legal and political systems, relations which are however flexible enough to cope with new outside interventions from international institutions. However, once more it differs from the experimentalist approach in that the Court imposed strong procedural constraints as a prerequisite for the legitimate handling of budgetary policy, and the effect was not to fragment but to integrate the complex polity of executive, legislature and international institutions.

The German experience is of particular importance in showing how the 'legal' and 'political' constitutions may not be rivals but may instead be mutually reinforcing. Moreover, though the decision concerned the autonomy of Parliament from international institutions, the reasoning is equally applicable to its independence from the executive. This stands in marked contrast to the UK where, in the absence of any such authoritative institution for the allocation of constitutional powers other than Parliament, budgetary responsibility has effectively been taken into the hands of the executive with only very limited powers of scrutiny in advance by Parliament.[120] This appears to reveal a weakness in the political constitution which remains subject to executive dominance. However, in my final case study I will examine UK developments which may also represent a move towards a more communicative model.

6.2 The UK: Countervailing institutions in monetary and fiscal policy

The account of constitutional pluralism set out in the first part of this article suggests that the 'political' constitution working through ministerial responsibility, the key means of integration and accountability in the UK, will be just as ineffective as substantive legal constraints in managing the complexity of plural constitutions. Ministerial responsibility is

[120] See THE ECONOMIC CONSTITUTION, n 98 above, ch 5.

essentially monolithic and does not permit the public exchange of information and ideas needed to cope with the complexity of modern economic management. Moreover, such management will take place through a wide range of different institutions at national and transnational level, many of which will be outside any effective control or even supervision by ministers.

Ministerial responsibility will thus need substantial supplementing by arrangements for integration and communication through institutions which are more transparent and deliberative and which have a degree of operational independence from government. These are what I shall refer to as countervailing institutions, by which I mean institutions not part of a central government department but having sufficient autonomy to permit independent implementation or independent scrutiny of public policies. There may be considerable overlap between the responsibilities of different bodies. These developments form part of what John Keane has termed 'monitory democracy; 'a new historical form of democracy, a variety of "post-parliamentary" politics defined by the rapid growth of many different kinds of extra-parliamentary, power-scrutinising mechanisms' and characterised by 'communicative abundance'.[121] Recently we have seen the development of such institutions in the fields of both monetary and fiscal policy.

The first example is that of the relationship between the Bank of England's Monetary Policy Committee (MPC) and the Treasury.[122] Contrary to popular belief, the Bank of England Act 1998 does not establish an 'independent' committee with sole responsibility for setting interest rates. In fact, statute sets a general framework with overall objectives for the MPC of maintaining price stability and, subject to that, supporting the government's

[121] John Keane, THE LIFE AND DEATH OF DEMOCRACY, 688, 736-42 (2009).

[122] For discussion THE ECONOMIC CONSTITUTION, n 98 above ch. 6.

economic policy, including its objectives for growth and employment.[123] Most important in practice is the remit issued annually by the Chancellor, under powers to specify what price stability and the Government's economic policy are to be.[124] This remit, which must be published, specifies the inflation target, and, especially since 2013, has given advice to the Bank on handling trade-offs involved in setting monetary policy, in particular in attempting to meet the target whilst supporting growth and attempting to avoid financial imbalances.[125] It is coupled with a system of open letters under which the Governor of the Bank must send a letter to the Chancellor, which is published, when the inflation target is missed by more than 1% (as has been the case recently) explaining the reasons and what action will be taken by the Bank. A fresh letter must be sent every three months; the Chancellor normally responds to the open letter with a published letter of his own.[126]

Crucially, this allocation of responsibilities is associated with highly developed transparency of the system through the early publication of minutes of the MPC's meetings, and detailed regular scrutiny by the Treasury Select Committee. This has enabled far more developed Parliamentary consideration to take place than was the case before the establishment of the MPC when the main responsibility for interest rates rested with the Chancellor. Thus the Treasury Committee has undertaken regular examinations of the MPC's performance which have been broadly supportive of the arrangements.[127] It also

[123] Bank of England Act 1998 s. 11.

[124] Bank of England Act 1998 s. 12.

[125] HM Treasury, REMIT FOR THE MONETARY POLICY COMMITTEE (2015).

[126] See e.g. Bank of England, LETTER FROM THE GOVERNOR TO THE CHANCELLOR, 12 February 2015.

[127] See e.g. Treasury Committee, 'The Monetary Policy Committee of the Bank of England: Ten Years On', HC 299 (2006-07).

holds pre-appointment hearings in which it examines the professional competence and personal independence of proposed appointees to the MPC.

Of course, the setting of interest rates is a highly specialised area of policy and it could be argued that such arrangements are only possible because of this and because of its technical nature which does not have a great political or policy content. However, it has increasingly become clear that monetary policy does in practice involve complex and controversial trade-offs between different values, notably supporting growth, controlling inflation and maintaining financial stability, trade-offs which are now becoming explicitly recognised, for example in the Chancellor's remits from 2013 onwards. Secondly, it follows from this that monetary policy decisions cannot be taken in isolation; they interact closely with measures to support growth and to secure financial stability, for example through their influence on the mortgage market. As discussed above, steps have been taken through the Financial Services Act 2012 and through administrative changes in the various committees of the Bank of England to increase coordination; it remains to be seen how these will cope with a future financial crisis.

Fiscal policy is, of course, highly political and not appropriate for delegation to an independent committee.[128] However, institutional developments here have also been important in facilitating publicity and communication through the creation and development of countervailing institutions to scrutinise key elements of fiscal policy, including the success or otherwise of deficit reduction. This is commonplace elsewhere; for example, in France the Cour des Comptes, and now the Haut Conseil des Finances Publiques created within it, have played a major role in the budgetary process and in advising on matters of public expenditure

[128] There have however been suggestions for partial delegation; see Charles Wyplosz, Fiscal Policy: Institutions versus Rules, 191 NATIONAL INSTITUTE ECONOMIC REVIEW 64 (2005).

An important UK example is that of the Office for Budget Responsibility, created by the Coalition shortly after the 2010 election and responsible for making independent assessments of public finances and of the economy. Its functions are; preparing and publishing the official five-year forecasts for the economy that accompany each budget and Autumn Statement which were previously issued by the Treasury; assessing whether the Government has more than a 50% chance of meeting its fiscal targets; scrutinising and reporting on the Treasury's assessment of the amount that particular tax and spending measures will raise or cost; and analysing and reporting on the health of the public sector balance sheet and the long term sustainability of public finances. The Office was given statutory support by the Budget Responsibility and National Audit Act 2011; very unusually, appointments are subject to veto by the Treasury Committee of Parliament.[129] The Office has not hesitated to be highly critical of government claims on deficit reduction; it has also gained cross-party support with the opposition Labour Party proposing that it audit the Party's fiscal policies before the 2015 general election. Such an institution offers an alternative means to that of substantive balanced budget rules for opening up fiscal policy to scrutiny and ensuring that it is taken seriously.

There are, however, two dangers in the use of institutions of this kind. The first is that of a failure of integration, indeed a further fragmentation of the state, making policy coordination impossible and so failing to meet the problems of constitutional pluralism outlined in the first part of this article. This has been in part met though developments in the 'administrative constitution' through the use of soft law; a good example referred to earlier is the use of open letters and related procedures to structure relations between the Chancellor

[129] Budget Responsibility and National Audit Act 2011, Sched 1 para 1. For a good summary of its work see Robert Chote, BRITAIN'S FISCAL WATCHDOG: A VIEW FROM THE KENNEL (2013).

and the MPC. In relation to fiscal policy, examples using both hard and soft law were those of the so-called 'Alignment Project' attempting to align budgets, estimates and accounts and the timing of financial reporting, and the move to resource accounting and budgeting in government.[130] A further, very important, example is that of the Spending Review process, which was designed to allocate funds across government in a way which would facilitate achievement of the Government's deficit reduction objectives through an allocation lasting a number of years ahead.[131] Soft law may also avoid the problems associated with the binary legal/illegal code which is, according to autopoiesis, characteristic of hard law; soft law as guidance is not characterised by such a stark dichotomy.

The second potential danger is the related one of failure to optimise the level of independence from central government of such institutions. On the one hand, too great a level of independence could threaten the integration of institutions just referred to; however, a lack of independence could both limit their role in acting as a means of communication between different social systems, and could also limit the achievement of credible commitment by them.[132] The system adopted in the UK meets both these objections through a basic specification of the extent of independence and of key objectives through statute with a structuring of the discretion by soft law requiring justification through explanation and debate.

Of all the developments discussed in this article, it is the growth of such countervailing institutions which comes closest to the experimentalist paradigm referred to

[130] HM Treasury, ALIGNMENT (CLEAR LINE OF SIGHT) PROJECT Cm 7567 (2009) and the Constitutional Reform and Governance Act 2010, ss 43-44; Government Resources and Accounts Act 2000 ss 5-11.

[131] See Tony Prosser, "An Opportunity to Take a More Fundamental Look at the Role of Government in Society": The Spending Review as Regulation PUBLIC LAW, 596, [2011].

[132] For commitment in this context see ULYSSES UNBOUND, n. 20 above, 149-53.

above. However, it would be inaccurate to see them as either fragmenting or destabilising, but rather as offering communicative opportunities which may result in a more coherent and open body of monetary and fiscal policy decisions. Indeed, devices such as memoranda of responsibility setting out respective spheres of decision-making and cross-membership of committees may lead to a greater integration of policy-making and application. By these means it should be possible to move towards the specification of procedures to maximise the forms of discourse discussed earlier, and to facilitate communication between law, politics and the economy.

7. Conclusion

The social theory discussed in this article suggested that communication is a centrally important constitutional value for two reasons. The first is based on democratic grounds, and seeks to provide a highly normative commitment to communication as part of inclusive and participatory democracy. The second is more concerned with the design of 'soft' boundaries between systems so as to permit effective coordination between them and to facilitate coping with complexity. It follows that structured communication, whether between different constitutional systems within a pluralist framework or between constitutional and other social and economic systems, can offer us a central critical tool for the assessment of our socially complex and plural constitutional arrangements. This is particularly true for economic management, which inevitably involves the use of extended government and of multi-level government at national and several trans-national levels. In economic management, the role of substantive constraints is likely to be limited (though they will be important in providing background rights); instead the most important role will be the creation of communicative institutions and procedures through a mix of hard law, soft law and institutional design.

Both the theories and the case studies suggest that best approach to constitutional design is through a combination of demanding communicative preconditions and flexible and pluralist institutions. This implies that any future study of the constitution and the degree to which it meets the communicative demands set out in this article will need to be sociological as well as purely legal. First, I hope to have shown that social theory is useful in setting out the basic preconditions for communication, and that these can be applied at a metaconstitutional level. Secondly, it is likely to be the 'administrative constitution' which moves towards a greater degree of coordination in economic management and, in doing so, may start to compensate for the lack of a more authoritative constitutional allocation of powers. Understanding it will involve study of the informal norms of soft law and practice, and also the procedural and practical interactions of public institutions. Though the role of the 'administrative constitution' is likely to be particularly important in the UK given the absence of entrenched constitutional norms, it will also be relevant to other national and trans-national systems where economic management involves the myriad interactions of dispersed institutions.