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978-1-107-09590-8 - Reshaping Markets: Economic Governance, the Global Financial Crisis and Liberal Utopia

Edited by Bertram Lomfeld, Alessandro Somma and Peer Zumbansen

Excerpt

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Introduction: reshaping markets and the question of agency

Peer Zumbansen

The global financial crisis (GFC) could be said to provide the context, the dominant background story for the chapters included in this book. Then again, the GFC is many things at the same time. It has been seen as an instantiation of ‘regulatory’ as much as one of ‘market failure’. It is an event that occurs within a complex set of developments that we need to study in historical, ideological and political context if we are to draw any lessons from it at all (Mirowski 2013). Such lessons will come in the form of interpretations and attempts to understand regulatory histories as well as discursive framings, which are themselves embedded within and products of the larger context of their signs and times. As such, even if we work on different parts of the story, we like many contemporary scholars of ‘crisis’ are finding ourselves to be tracing the intellectual origins of neoliberalism back through history (Mirowski & Plehwe 2009). This attempt of situating an event in a series of comparable events, drawing out the commonalities as well as the distinct differences between them (Cassidy 2009; Reinhart & Rogoff 2009) is part of any effort to understand trajectories, landmark decisions and turning points, roads taken and not taken.

A remarkable feature of analyzing the GFC is the plurality of its many *local* origins. As political economists have long insisted on national idiosyncrasies, path dependencies and historically evolving regulatory patterns of market governance (Hall & Soskice 2001; Shonfield 1965) and as sociologists have emphasized the urgency to lay bare the – different – national facilitations of globalized markets (Sassen 2002), we can draw on productive and insightful studies of how global capitalism has originated in localized regulatory contexts (e.g., Krippner 2011; Streeck 2014). The recent Greek sovereign debt disaster offers a valuable paradigm for such a critical narrative (Michos – in this volume). Analysis of the historical origins of financialization suggest that there is hope yet for seeing the ‘bigger picture’ of the GFC in midst of the current struggle over the consequences of ‘austerity’ (Blyth 2013; Schäfer & Streeck 2013). Yet, at the same time, predictions over what is likely to happen next have become as difficult as prescriptions as to what ought to be done.

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This constellation offers less guidance or direction, either conceptually or politically, than an urgent call for what is without doubt a long-term project of analysis and critique. The jury is literally still out. The chapters in this volume originated in a series of conversations that began in late 2012 with cooperation between the Comparative Research in Law & Political Economy (CLPE) Network at Osgoode Hall Law School (Toronto), the mostly European-based Private Law Theory (PLT) Network and the Faculty of Law at the University of Ferrara in Italy. The contributors are legal scholars in corporate, banking, commercial and contract law, and in comparative law as well as comparative political economy, legal sociology and anthropology. The initiation and continuation of a thought exchange among scholars from these disciplines and subfields seemed to the organizers of the original event both obvious and necessary, and we are today even more convinced of its value.

The intellectual collaboration that gave birth to this book aims to contextualize the particulars of a field's or a debate's developments: in other words, to place one's own topic of analysis, as well as the larger area of research of which it is part, in the environment of a diverse, scholarly and practical political debate. Such a 'contextual' approach appears to us to have been more common and widespread in the past than we find today. Just looking at current doctoral dissertations in law, one finds numerous examples of detailed studies that focus either on a novel act of legislation, on a certain angle of interpretation allegedly determining a line of cases from a particular court or on specific arguments that are made (for the *n*th time) within already specialized and increasingly abstract debates. Legal academia seemingly occurs in ever more world-removed spaces of rhetorical dispute. On the other hand, institutional managers at the top of law schools and bar examination boards underline an allegedly market-imposed, and thus undeniable, need, above all, to prepare future graduates for 'practice'. That seems to imply a training of future lawyers in skills as well as in technical, even managerial and mediatory competences (Arthurs 2013), ignoring a strong century-old tradition of critical legal thought for which the connection between classroom instruction and real-world lawyering is not one of just opening the window to see what's out there (Holmes 1897; Llewellyn 1935; Zumbansen 2015). Times in legal academia do not seem to be the best for urgently needed, comprehensive, comparative and critical analysis.

All of our chapters are written in an inclusive, contextual spirit of critical legal thought. They offer perspectives on alternative ways of thinking about regulatory change in the aftermath of the GFC from a range of disciplines including law, political economy and anthropology. While the authors assume quite differing positions in addressing the questions around the means and directions of regulatory 'responses', one common thread running through all chapters is a critical interest in the historically evolving and embedded dynamics of market governance. All contributors to the present volume are

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thus in agreement as regards the need to widen one's own and one's discipline's and subfield's conceptual and analytical perspective in order to allow for a meaningful reflection on the challenges that arise for the way we 'do things'. One might have 'expected to find that the GFC had resulted in major changes in policy thinking and political strategy' (Grant & Wilson 2012, 6). But we find ourselves in a current, troublingly elusive constellation of seemingly perennial continuation, 'non-death' (Crouch 2011), *déjà-vu* and the absence of tangible change and transformation. In contrast, this book is an attempt to identify leverage points to intervene in the market structure itself.

Our counter-narratives focus on 'the market' as the primary site of critical investigation. The tradition of such a research angle is as long as its results appear frustratingly open-ended and inconclusive. But, similarly, perhaps, to the way in which we are obviously asked to overcome any remnant irritation with the lack of a clear definition of 'globalization', we continue to be prompted to take 'markets' seriously. The trajectories of such serious engagement are prominent and promising – but only if, in fact, we allow them to be and if we join in the investigations already underway in an active and critical manner (see, e.g., Frerichs 2013; Kotiswaran 2013). Our book can be seen against this background, as its authors intervene in important, sensitive regulatory areas and policy discourses, ranging from debt and credit regulation (Michos, Somma, Renner & Leidinger), corporate liability and banking regulation (Engert, Tröger, Conley & Williams, Catá Backer), contractualization of corporate regulation and banking (Zumbansen, Varellas), contract governance itself (Lomfeld, Haberl, Caruso) to national and transnational economic governance policy making and strategic choices (Campbell, Ferrarese).

The critical conversation about economic governance highlighted in our book is ongoing. It overlaps and interacts with important investigations in related areas such as investment arbitration (Sornarajah 2015; Van Harten 2007), trade and development (Perry-Kessaris 2011) or labour law (Arthurs 2012; Standing 2011; Supiot 1994). With that in mind, the aim of our book is not to map current and emerging critical discourses in the ambiguous aftermath of the GFC. Rather, we intend to stake out certain sites of engagement that we understand, above all, as opportunities for a historically informed as well as comparatively and transnationally oriented analysis of the role of law and lawyers, of the state and its permuted agencies with regard to setting the ground rules of economic governance as well as of the interaction between different social and economic sciences in producing a clearer picture of the institutional and normative stakes of the present constellation. We offer only minuscule observations of what is, no doubt deserving of a much more comprehensive and long-term analysis. We present our current research and proposals, however, to critical response and comment in the belief that such engagement never occurs in a vacuum.

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Still, after the Enron collapse and the shut-down of Lehman Brothers ‘the market is once again the primary institution shaping history from East to West, and it is assumed that market freedom can be reconciled with individual choice and political pluralism. This tension between market liberalism and a revolutionized society is always problematic and, in the end, unmanageable. The deeper reality of market-driven change is that the continuing drive for maximizing accumulation, whether for the few or in the name of national development, leads step by step to a crippling of social dependency for the many. Liberal society has no way to redress the fundamental inequality in the transfer of power and wealth that results when private property is made sovereign (Drache & Gertler 1991, preface, xv). What emerges at the present time is, however, a growing awareness of the importance of taking stock and of revisiting earlier attempts to push socio-legal and historical investigations into the operation of law and regulatory governance. It might be a trite observation to state that the background, now, seems as important as the foreground. But, considering the intricate layers of contemporary market governance, such critical revisiting of conceptual approaches in a comparative-transnational context might hold the promise of more adequate insights into the fast-evolving patterns of public and private authority and agency and the correlation between ‘hard’ and ‘soft’ modes of norm-production and dissemination.

At the end of the day, the political stakes of global market regulation are too high to believe in the merits of ‘muddling through’ in the vain hope that it all might just go well. We thus find encouragement in earlier ‘bigger picture’ sketches which take issue with the problematic isolation of law – we might add current pre-occupations with ‘social norms’ (Posner 2000) and politics (Horwitz 1992, 270) – or which critique the seemingly inevitable rise of a new paradigm of *market sovereignty*. ‘For us, living in the immediate slipstream of these intellectual events, in the ragged turbulence of argument and conviction they left behind, the question historians have asked for other, more distant times and places takes on a closer importance: how it was that a vocabulary of social thought unexpectedly became outmoded and passé, and another way of thinking, for an era, made claim to its place’ (Rodgers 2011, 14). In this spirit we understand our research and practical proposals collected in this book as tools for ‘reshaping markets’.

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Part I

Crisis and normality in transnational market
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1 The central problems of Marx's economics and the nature of market regulation

*David Campbell**

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1.1 Introduction

It is a matter of grave concern that the explanation of the 2007–8 financial markets crash which continues to exert the largest political influence upon the attempts being made to reform the financial system is based on the concept of deregulation. The crash was a disaster the groundwork for which was laid by the highly aggressive and utterly incompetent government restructuring of the financial sector called in the UK the 'Big Bang'. It took place whilst that sector was under the supervision of multiple regulatory agencies, against a background of legal and economic policies which gave every inducement to reckless (and much inducement to fraudulent) trade. It is by no means to exonerate private actors from their responsibility for the disaster to say that to regard the appalling government failure as an episode of deregulation is a major obstacle to the explanation of the crash and the formulation of an adequate policy for relief of the ensuing depression. I have argued this elsewhere on numerous occasions (most recently in criticism of Richard Posner's version of the concept of deregulation (Campbell 2010a; 2012)), and do not propose to do so again.

Despite the bleak account I have just given of its influence on policy formulation, I do not think sophisticated regulatory theorists find the concept of deregulation plausible (though, of course, one has to guard against making

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what seems to be an accurate statement by means of mere tautology). In this chapter I wish to address a problem which I think besets such sophisticated theorists, and so those who continue to find great value in the concept of deregulation, who cannot even encounter, much less solve, this problem, must part company with me. The sophisticated theorists I have in mind regard deregulation, and the idea of an in some way wholly unregulated free market that lies behind it, as the illusions at the root of the shortcomings of the neoclassical economics of market allocation. I believe these sophisticated theorists are right in this. But this dismissal of deregulation and the free market very often is taken to imply that the defining welfare claim of neoclassical economics – that market allocation is the best form of general economy – is wrong. By analysis of the theoretical implications of some divergent concepts of regulation, I hope to show that this implication by no means follows from dismissal of the concepts of deregulation and the free market. And this is as well, for I believe that market allocation, were its conditions of existence made actual, is the best form of general economy.

In my opinion, the only truly non-market concept of economic action that demands our continued attention is that of Karl Marx. By discussion of the central problems of Marx's economics, I hope to support the claim that the market economy is the best form of general economy. One of the results of this will, paradoxically enough, be to restate the kernel of sense in the concept of deregulation, which evidently makes it so attractive to the theoretically vulgar. The claim that market allocation is the best form of general economy is right, but only if the market is put on a sound regulatory foundation; precisely what is ignored in the concept of deregulation. But such regulation must be regulation of what must be regarded as, in a sense which will emerge, spontaneous economic action if the regulatory effort may possibly maximise freedom of such action.

1.2 The meaning of 'regulation'

It now seems clear that regulation is a concept of sufficient significance that it must be regarded as, in Gallie's (1956) famous term, 'essentially contested'. What we try to denote by regulation is so important that it is inevitable that divergent views, ultimately reflecting different fundamental political values, will always be taken of it. Bearing this in mind, two overall concepts of regulation of application to industrialised economies may be distinguished. First, there is a very general concept of 'economic' regulation as 'the establishment of the legal framework within which [legitimate] economic activity is carried out' (Coase 1977: 5). This concept embraces, but should be distinguished from, the concept, theoretically much more restricted in scope, of 'social' regulation as the patterning of economic activity by state intervention. The distinction between the