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Series: The banks and the “too big to jail” doctrine
(Part 1)

Banks and the New “Too Big to Jail” Doctrine

- Features -

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We all know the saying, “Too big to fail”. The way governments have managed the crisis caused by the banks has given rise to, “Too big to jail,” which is equally poetic! Although the US government let Lehman Bros. go to the wall in September 2008, no other bank has been closed or broken-up, no directors have been condemned to prison. The only exception in the western world is Iceland, where the courts have put three bank directors in prison. Larus Welding, the CEO of Glitnir, Iceland's third biggest bank at the time, which went bankrupt in 2008, was condemned, in December 2012, to nine months in prison. Sigurdur Einarsson and Hreidar Mar Sigurdsson, the two principal directors of Kaupthing were condemned to five years and five and a half years in prison in December 2013.

Yet, the US and European justice systems are faced with very serious wrongdoing by the biggest banks: the organised fraud committed against its customers, small shareholders, and public shareholders, money laundering from organised crime, high level tax evasion, plotting to manipulate interest rates (Euribor, Libor), exchange rates, and financial markets (CDS and Commodities), fraud and document forgery, insider trading, destroying evidence, embezzlement, complicity in war crimes, [6] and the list goes on.

Eric Holder, United States Attorney General, when interrogated by a Senate Committee clearly defined the foundations of the “Too Big to Jail” doctrine, “I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if you do prosecute, if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy. [7]

The outcome is clear. The fact that speculation and financial crime has caused the worst economic crisis for nearly a century is of little concern for justice. Even if such excesses are closely associated with large scale fraud, [8] at all levels of US banking activities, these institutions have *de facto* authorisation to continue their operations and settle their infringements “out of court.”

Imagine if after a long investigation the police arrested a criminal who stole €1 million. Then during the preliminary proceedings the criminal says, “Listen, you guys! Here's what we'll do; I'll pay a €2000 fine, then you'll let me off the hook and we'll forget about everything! OK?” Then the court replies, “No problem! Sorry for the hassle, please try not to be caught again, that would be a bummer.” This imaginary conversation corresponds to the special treatment the banks get. Bertold Brecht hit the nail on the head when he asked, “What's breaking into a bank compared with founding a bank ?” [9]

The direct consequences of the banks' nefarious activities are extremely serious: 14 million families in the US have been ejected from their homes between 2007 and 2013 (see chart below), this includes nearly half a million illegal expulsions, [10] millions have lost their jobs, and some of these families have fallen below the poverty line, suicides have increased among the victims, public debt has exploded, and pension funds in the developed countries have lost \$4.5 trillion. [11]

Home repossessions in the US and Spain		
Year	United States	Spain
2005	532,833	
2006	717,522	

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2007	1,285,873	
2008	2,330,483	49,848
2009	2,824,674	59,632
2010	2,871,891	81,747
2011	1,887,777	94,825
2012	1,836,634	76,724
Total	14,287,687	362,776

Source: [United States](#), [Spain](#)

As from the moment the justice system shies away from the crimes and infractions committed by banks and their directors to avoid them passing even a single day behind bars, the private banking system is recognised as playing such an important role in the capitalist system that it transcends the legal and constitutional functioning of modern societies. When all is said and done, we cannot legally accuse the directors of banking institutions for “doing God's work,” [12] as Lloyd Blankfein, the boss of Goldman Sachs, put it.

This would be laughable if the relations between banks and legal or controlling authorities did not so often confirm the practice of the “Too big to jail” principle on both sides of the Atlantic. The law applies small fines that are only fractions of the profits from illegal activities, and then it is “business as usual”, without the culprits worrying any more. Some scapegoats, like Jerome Kerviel, do get sentenced, but never the bosses who pushed them to maximise company profits using all the slyest possible and imaginable tricks.

Six examples are sufficient to describe the current situation: 1. The agreements between US banks and different authorities to avoid judicial condemnations in the affairs concerning subprime mortgages, foreclosures, and illegal expulsions; 2. HSBC (the biggest British bank) fined in the US for laundering money for Mexican and Colombian drug cartels; 3. manipulation of the interbank markets and derivatives rates as in the LIBOR affair; 4. the “Toxic Loans” scandal in France; 5. the illegal activities of the Dexia bank in Israel; 6. the international tax evasion network organised by the major Swiss bank UBS.

This series will examine each of these six examples

Conclusion

It is clear that the banks and other world-class financial institutions, often acting in organised cartels, have brought cynicism and abuse of power to new levels rarely seen before. Today, after the governments have bailed-out these entities that are guilty of speculative gambling with public money, the judges in charge of applying the law protect the guilty and justify, *a posteriori*, their illegal or criminal activities.

Such a context, in which impunity is the norm, encourages the directors of financial corporations to commit more abuses and to be indifferent to the risks involved. The banks as institutions, are not only never condemned, they are never even called to appear in court.

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These banks have traders such as Jerome Kerviel, and a few others, condemned for damages to the banks that employed them.

The situation of the top bank directors is quite different. The amount of their bonuses increase as their bank's revenues increase, and may also increase if the bank's revenues fall, regardless of the origin of the revenues, whether illegal or from highly speculative operations. If the worst comes to the worst, they leave the bank (taking their golden parachute), they are not called to justice and keep all of their personal gains on their bank accounts.

For as long as this perverted system continues, the abuse and pillage of public resources, by the financial system, will also continue.

It is not only the banks' directors that are not bothered by the authorities, but also the banks themselves to whom the “too big to jail” doctrine is applied. This is the demonstration of the complicity and the mutually vested interests that exist between Banks, their big shareholders, high authorities, and vital State institutions.

In the case of serious breaches, we must root out the evil: withdraw the banking licence from the establishments guilty of criminal activities, prohibit some activities definitively, prosecute directors and big shareholders. Damages must be awarded against directors and big shareholders.

Finally, it is urgent to break up big banks into smaller units so as to limit the risks, socialise these banks and put them under citizens' control, so as to create a public banking service that will give priority to satisfying social needs and protecting the environment.

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[13]

<http://cadtm.org/Banks-and-the-New-Too-Big-to-Jail>

[1] The author thanks Daniel Munevar, economist at the CADTM, who produced a very useful and concise preliminary study on the subject and authorised the easy use of his work. I have built on his research. See the original article by Daniel Munevar, “La doctrine “trop grandes pour être condamnées” ou comment les banques sont au-dessus des lois”, 20 September 2013, www.cadtm.org/La-doctrine-trop-grandes-pour-etre (in French or Spanish)

[2] The English-speaking media have been using this phrase for about two years : see for exemple: Abc News, "Once Again, Is JPMorgan Chase Too Big to Jail?", 7 January 2014, <http://abcnews.go.com/Blotter/madoff-ponzi-scheme-prosecutors-find-jpmorgan-chase-big/story?id=21448264> or Forbes, "Why DOJ Deemed Bank Execs Too Big To Jail", 29 July 2013, <http://www.forbes.com/sites/tedkaufman/2013/07/29/why-doj-deemed-bank-execs-too-big-to-jail/>

[3] Another way of saying that no bank has had its obligatory licence for banking activities revoked.

[4] The failure of its “Icesave” subsidiary in the UK and the Netherlands caused a diplomatic crisis between these two countries and Iceland. This crisis is still ongoing since the two countries are attempting to bring the case before Icelandic courts in spite of the judgement, without possible appeal, by the AELE court that ruled in favour of Iceland in January 2013. See *Financial Times*, “Iceland premier repels Icesave lawsuit”, 12 February 2014.

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[5] The *Financial Times* said 13 December 2013, “Iceland, almost uniquely in the western world, has launched criminal cases against the men who used to lead its three main banks that collapsed after the global financial crisis in 2008 after collectively becoming 10 times the size of the island’s economy.” See: <http://www.ft.com/intl/cms/s/0/eab58f7e-6345-11e3-a87d-00144feabdc0.html#axzz2thdbsViQ>

[6] See further on concerning the presence of *Dexia* in the Palestinian territories occupied by Israel.

[7] *Huffington post*, “Holder admits some Banks too big to jail”, see:

http://www.huffingtonpost.com/2013/03/06/eric-holder-banks-too-big_n_2821741.html see the part of Holder’s testimony saying the banks are “Too Big to Jail” here: 57 secondes that are worth the trouble”

[8] A recent study of banking practises in the US showed that, in spite of their heterogeneity, irregularities and fraud are current at many levels of activity in all the institutions studied. See “Asset Quality Misrepresentation by Financial Intermediaries: Evidence from RMBS Market”:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2215422

[9] Bertold Brecht, *The Threepenny Opera*.

[10] *The New York Times*, “Banks to pay \$8.5 billion to speed up housing relief”, 7 January 2013,

http://dealbook.nytimes.com/2013/01/07/banks-to-pay-8-5-billion-to-speed-up-housing-relief/?_php=true&_type=blogs&_php=true&_type=blogs&_r=1

[11] OCDE (2010) “The Impact of the Financial Crisis on Defined Benefit Plans and the Need for Counter-Cyclical Funding Regulations”,

<http://www.oecd.org/pensions/private-pensions/45694491.pdf>

[12] *Wall Street Journal*, “Goldman Sachs Blankfein: Doing God’s work”, 9 November 2009,

<http://blogs.wsj.com/marketbeat/2009/11/09/goldman-sachs-blankfein-on-banking-doing-gods-work/>

[13] Other parts of this series can be found at [Bank abuses in the real estate sector and illegal foreclosures in the United States](#), [Drug and Bank Lords](#), [HSBC: the bank with a shameful past and scandalous present](#), [Big banks’ tampering with interest rates](#), [The Big Banks Organise Massive Tax Evasion on an International Scale](#), [Complicity of Dexia in very serious Human Rights violations in the Israeli occupied territories](#) and [The Impunity Enjoyed by the Banks must Stop](#). Part 6 only exists in French: here <http://cadtm.org/L-Etat-au-service-...>