FEW CERTAINTIES AND MANY DOUBTS: LAW AFTER THE FINANCIAL CRISIS[1]

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ABSTRACT

This text aims to evaluate the impact of financial crisis on the functional architecture of law, the institutional framework of markets and the legal structure of world economic order. The text presents five possible scenarios and concludes that the most plausible one, far from the return of interventionist and regulative state, is the permanence – with minor changes in subject of regulation – of the current model of normative systems which operate under different spatial demarcations, where none of them is dominant or collide with the legal state order. It is a model of law which, substituting the idea of hierarchy for the idea of heterarchy and the concept of government for the concept of governance makes functional bonds and links between labor market, goods and credits in multiple levels, from local to supranational.

KEYWORDS

Law; financial crisis; legal structure of world economic order

Bankers were invented, so to speak, to have superior knowledge of the likelihood that contractual payment will not be forthcoming than an ordinary businessman or investor, so that they can better judge the likelihood of repayment and superior wealth so that they can fulfill their pledges to the owners of their liabilities, even when the assets they own fail to perform as the contract they own specified. Furthermore, by owning and owning to many, bankers can explore a "banker's law" which holds that only a small set of debtors will fail to live up to their commitments and only a small set of creditors will want to move their money from bank during any short time period (Hyman P. Minsky)

"Between the cup and the lip there are several mishaps," Lord J. Maynard Keynes would say, an aristocrat educated at Eton, King's College, Cambridge, with a fine irony that characterized

him. "Most of the creations of the intellect or fantasy fade after a period ranging between one dessert and one generation; others survive and return, sometimes after a temporary eclipse", said an equally aristocratic, refined and ironic professor and banker, Joseph A. Schumpeter. In tones of corrosive sarcasm towards intellectual fads, these two statements deal with the same subject matter and have the same meaning, although its authors, entirely different both in behavior and in taste and lifestyle, have always shown little affection for one another and rivaled in the European debate in the first half of the 20th century.

Keynes, for whom the unregulated financial markets tend to be dominated by speculative forces that convert them into casinos, advocated the State intervention in the economy to ensure full employment; drew attention to the importance of aggregate demand to the levels of production and employment; warned of the need to expand government spending to foster private demand in times of recession; and recommended fiscal and monetary policies that would be conducive to the propensity to consume, with more public and private investments.

Schumpeter, who advocates that entrepreneurs are the agents of those innovations that create and destroy competitive positions of companies, markets and even fields of activity, would tread another path. He underscored the development as a dynamic phenomenon that depends on technological innovations introduced in the economy by an elite of entrepreneurs who took risks while creating the monopolistic production conditions that ensured windfall profits for some time.

While Keynes was interested in balance and economic stability, Schumpeter was concerned with growth, believing that the free game played within the market would produce well-being, despite going through stages of turbulence and creative destruction. Instability is inherent in capitalism, rather than an exception, he said. Capitalism generates innovations that break established norms, boost competitive pressures and give rise to new norms, he concluded. In Weberian terms, Keynes' thinking underlies an ideal type of State that appreciates planning, economic regulation, full employment policies and intergenerational social security funding. Schumpeter's thinking underlies an ideal type of State that stimulates economic openness, competitiveness, permanent scientific innovation, organizational flexibility and social security self-financing. It is a kind of State that replaces the tripod "government / national industry / social integration", which is common to the Keynesian State, with a process of deregulation and de-juridification, as well as strategies designed to integrate national economies with the global economy. The idea is not to have governments acting only through direct controls, but also through indirect controls and incentives for cooperation among different production agents.

The economic crisis of 2008, the largest since the Great Depression of the decade starting in 1920 and the collapse of the New York Stock Exchange in 1929, placed Keynes and Schumpeter once again in the political and economic debate. On the one hand, it shows that the thinking of both overcame the troubles between the cup and the lip, exceeded the time spent on a dessert and went far beyond one generation. On the other hand, Keynesian and Schumpeterian ideas and theories have been presented and incorporated more ideologically than analytically, converting the old conflict between the State and the market into a biblical struggle between good and evil, just like the struggle between St. George and the dragon. The

same problem — simplification, bias and Manichaeism — can also be identified in the legal debate, strongly marked by a bitter controversy between those who call for more State intervention in the market, seen as the only "safe harbor", and those stating that the State should limit its action to guaranteeing the conditions for macroeconomic stability and clearing the obstacles to free competition, using, preferably, the legal instruments of indirect control.

For its reductionist character, the opposition between the State and the market tends to obscure the enormous and complex analytical field that the 2008 downturn and its effects on the global economy provide to social scientists and lawyers. The crisis stems from unprecedented factors, such as the uncontrolled growth of derivatives, multiplication of nonstandard operations out of regulated markets, arbitration at interest rates and exchange rates, the opacity of many investment funds, high levels of leveraging, conflicts of interest within risk classification agencies, compensation policies, which encourage financial executives to excessive financial risk exposure, and coexistence of a set of transactions between regulated institutions and other institutions in markets without any regulation, as well as other problems faced in past events of banking turmoil since the Great Depression. Two and a half decades ago, for example, while being awarded honoris causa *from the Technical University of Lisbon, the economist Celso Furtado, after making a summary of those records, said:*

> *[…] in a world of transnationalized private banks, cash transfers between countries escape all kinds of control. Having international liquidity is a considerable source of power, for the simple transfer of these funds between agencies within the same bank, based in different countries, can threaten the stability of a given currency. Moreover, when transnationalized banks finance themselves mutually, they get empowered to create more liquidity. Hence, a new system of judgments at an international level has emerged, while national governments have a smaller freedom of action (Furtado: 1987).*

Hence, combining old and new factors, the 2008 downturn affected all markets — from the monetary to the credit market, stock exchanges and commodities to call option transactions, futures contracts and swaps, involving even non-financial institutions, such as insurers and builders. Rather than having expanded to finance production, these markets grew in the opposite direction, accumulating assets of dubious quality by multiplying speculation and short-term transactions to the detriment of production investment in the medium and long run. In 2005, the global stock of financial assets totaled US$ 140 trillion. In late 2006, interest rate swaps, currency swaps and options in the market amounted to US$ 286 trillion — about six times the world GDP — compared to US$ 3.45 trillion in 1990 (See McKynsey Global Institute, 2007). A single bank, Merrill Lynch, with a capital of US$ 40 billion, held US$ 1.1 trillion in assets in 2007 (See Carta Capital, April 15, 2009).

Today, the total debt of private financial and non-financial sectors in the United States is estimated to be around US$ 48 and US$ 50 trillion. The assets of publicly traded companies are worth half of what they were before the crisis. Commodity prices have fallen more than 40%

between 2007 and 2008. Bank lending tumbled 40% at the end of last year. In the US, due to the drop in property and stock prices was over US$ 5 trillion. About 3 million people lost their homes in 2008 in Brazil, and it is estimated that this number will exceed 10 million by 2011. From August 2007 to December 2008, the net worth of North-American households fell by about US$ 13 trillion — a loss greater than the wealth accumulated in the previous five years.

In addition to causing a sharp drop in demand for durable consumer goods, leading to global economic activity back to 1.9% in 2009, the financial crisis triggered a period of recession, of paralysis, in the international credit system, and curtailing in capital flows, leading to currency depreciation in emerging countries and therefore a crisis of balance of payments in countries with a weaker financial situation. The reduction of bank loans coincided with the decline in exports, estimated at 25% between 2008 and 2009 — reaching 40% in Russia and Chile.Within the labor market, the impact of the downturn was so dramatic that the level of unemployment increased in the main regions of the world economy, reaching 10% in the U.S. and 11.7% in Europe, thus increasing the number of defaulters and, to the same extent, generating additional risks to the banks.

Among the factors responsible for the crisis of 2008, the primary ones are: abundant credit combined with increases in property prices, the subsequent increase in the wealth of owners and the participation of financial intermediaries in this process, reallocating risk in mortgage investments through securitization. Moreover, the downturn was also influenced by disproportionate volumes of assets in derivative markets, compared to the exchange-traded contracts and real economy contracts; the unlimited use of securitization of loans to the private sector amidst weak regulatory frameworks, and the trend of little regulated or unregulated institutions to leverage volumes of financial transactions far above their net worth.With the ineptitude of both regulatory agencies and firms specializing in risk analysis and credit ratings, which were proven unable to assess the quality of assets and the payment capacity of commercial and investment banks, and require greater asset transparency from some market players, the crisis went beyond the bounds of the US sub-prime mortgages, affecting the real economy, infecting stock exchanges and leading major financial institutions to bankruptcy. One of the biggest failures of regulators and rating agencies occurred with hedge funds (which play the role of speculators and arbitrators, in contrast to the traditional long-term funds, like mutual funds, whose funds are invested in stocks or bonuses). In late 2006, more than 11,000 hedge funds were in the market (there were only 610 in 1990), managing third party assets totaling US$ 1.6 trillion, totally free to set parameters on portfolios, operational strategies, maintain derivative-leveraged positions, options and short sales, and establish policies for the compensation of investment fund managers.

Not to mention the fast growth of operations centered on OTC markets, as opposed to exchange-centered markets. It was precisely the OTC markets that have increased the most diverse combinations of credit assets securitized with credit derivatives, such as collateralized debt obligations and credit default swaps, whose appeal laid in regulatory arbitration, providing banks with an option to expand their leveraging capacities. In addition to managing mechanisms for the registration, compensation and liquidity of transactions, OTC transactions

played the role of guarantor of businesses. In general, these operations tend to be bilateral, with no centralized registration, no secondary market to determine prices, no transparency in terms of reporting solvency and cash flow capacity, and at great risk for not requiring margin deposits or capital portions as collateral, as asset prices in the spot market move compared to the prices of futures markets (See Conjuntura Econômica, November 2008, pp. 17-18; and Gowan: 2009).

Market failures or government failures? Letting huge banks going bankrupt, as it happened to the Lehman Brothers? Or providing liquidity to the banking system and intervening in the most troubled institutions, ensuring capital replenishment, enabling its incorporation and increasing the security of depositors, as it happened with the mortgage lenders Fanny Mae and Freddy Mac, and with Bear Stearns, Merrill Lynch, Bank of America and Citigroup, and with Morgan Stanley and Goldman Sachs, transformed into banks? Considering that an economic system is basically a set of regulatory provisions aimed at increasing the efficient use of scarce resources, from these doubts and questions we can deepen the debate among those who defend the State through regulatory agencies and direct controls, and those who advocate indirect controls through regulatory agencies capable of increasing efficiency in the exchange of information on financial institutions and imposing stringent new criteria for executive compensation policies.

While economic officials discuss which changes should be made in the medium term and the prudential regulatory measures necessary to restore discipline on financial markets, such as designing an agency capable of playing the role of a global market maker, and creating a supranational currency reserve to mitigate the impact of dollar devaluation and reverse the asymmetry that led to macroeconomic imbalances in the short term, central banks have been forced to inject billions of dollars and Euros to try to avoid the worst, which could give longer survival to those holding assets with no liquidity in the market, but that does not encourage banks to lend in a context of uncertainty, when the risk becomes unpredictable (See Conjuntura Econômica, November 2008, pp. p.18-20). In this scenario, which leads to a broad overhaul of concepts, categories, rules and regulatory procedures, which types of legal instrument can be used effectively to rebuild the domestic demands and global demand? If the collapse of the financial system in the world highlighted the weaknesses of its functional architecture and its institutional framework, how to restore the formal and operational relationship between creditors and debtors? In the specific case of derivatives created by combining in a single contract borrowers spread across different regions, how to enforce what was agreed? How can courts ensure the enforcement of complex inter-relationships of private contracts? How is it possible to impose, by means of legal instruments and conventional regulations of the States, more quantitative leveraging control of credit transactions? Anyway, what is the effective legal basis for implementing Keynesian-inspired counter-cyclical policy aiming to control the fall in aggregate demand? Finally, which governance standards would be able to effectively cope with the increasing deterritorialization and autonomy of financial transactions?

The common denominator of these questions, which is a core assumption of this paper is the idea that the integration of financial markets on a global scale lead the national economies to sustain the consequences of the decisions made outside their territories. Showing that the

venues traditionally reserved to positive law and legislative policy no longer coincide with the territorial space, and that the national governments face increasing difficulties to counteract the effects of external factors and act as a regulator of the domestic financial system globalized through their internal mechanisms, these issues make the legal thinking geared towards some important problems. Four of them are worth highlighting:

(A) The trend towards the homogenization and unification of financial laws and regulation of securities on a global scale, as a way to fill the gap between the global performance of markets (based on real-time communication technologies) and the geographically restricted scope of monetary authorities and regulatory agencies of the States. To try to meet the increasing demands of regulation and governance brought about by the progressive "deterritorialization" and the autonomy of financial transactions, the central banks are already discussing the need to establish a global lender of last resort — a sort of world central bank, who would be responsible for providing international liquidity to increase effective demand worldwide and restrict the mobility of speculative capital. The measures suggested to frame and control the so-called shadow banking system, which consists in the articulation of several U.S. and European regulatory agencies, discussions about the need to revise the rules of Basel II so that the capital requirements become countercyclical, the controversy around the reform of IMF governance mechanisms, the proposed reassessment of requirements for structured credit products and swap operations announced in late 2008 by the Federal Reserve, in agreement with the monetary authorities of developing countries, for example, provide a measure of the steps that can be taken in this sense..[2] With global rules and procedures of regulation over financial institutions and markets, the idea is to prevent capitals from eventually "leaking" into areas of the world economy with little or weak regulation.

(B) The depletion of the operationality and effectiveness of conventional legal mechanisms of the States — especially the legal instruments to regulate and control economic and financial matters, which did not follow the speed at which the world has become globalized. Given the increasing difference among functionally specialized systems that make up the banking and financial markets, operating in an increasingly deterritorialized fashion, the Constitutions, in the capacity of "laws of social totality", end up losing their regulatory strength and their capacity to absorb changes and economic innovations, such as those that underpinned the 2008 crisis. Also, as financial frameworks are transnational and financial transactions are global, codes and laws — that is, the national regulatory system — are neither longer able to control and frame the economic agents, nor offering a single unit of responses minimally endowed with logic rationality and programmatic coherence. Finally, even the law enforcement officers proven no cognitive and functional ability to catch up with the dynamism and innovations in the financial markets. Because of their "general" background, they found it quite hard to work with issues and transactions on which they have no specific expertise. Thus, the conventional legal system of the national State wit-

nessed a steady erosion of its intention to exercise supremacy and universality over economic and financial systems.

(C) The clash between the political and financial capital, including economic self-regulation and state regulation, among transnationalized markets and procedures of popular representation designed to provide a common course of public action, is changing scales and moving up levels, given the overwhelming transfer and centralization of wealth and power that the financial downturn provides. Democracy and capitalism, as widely known, has always maintained a strong, permanent and indissoluble relationship of tension. On the one hand, capitalist accumulation has to be kept as free as possible of legal and fiscal restrictions determined by political and ideological criteria; on the other hand, as it responds to concerns and interests defined on the basis of universal suffrage and the majority rule, the representative democracy allows for the imposition of limits on the financial game, in order to ensure some balance between private enrichment and distributive justice; and allows the formulation and implementation of public policies to increase equality of opportunity — necessary to ensure morality to the free game of the market (Belluzzo: 2005). Until the late 20th century, especially amidst social democratic governments of the postwar, Keynesian policies of full employment and the Constitutions established after the authoritarian periods, the political power was invincibly imposed on financial capitals. From the 20th to the 21st century, with the deterritorialization of the markets, the advent of large conglomerates and the unification of the world economy, the national State lost some of its strength as a political mediator and regulator, which is part of its role as a mechanism for the determination of collective directions. Precisely at a time when the democratic values reach an unprecedented reputation in history, the conditions for its accomplishment paradoxically seem exhausted. The more the economic decisions get internationalized and the greater the interconnectivity of financial markets and integration of goods and services markets on a global scale, the least the democratic decisions affect them. The more companies can re-settle in cities, states, countries and continents where they can gain comparative advantages in terms of wages and taxes, the weaker is the State in promoting social justice through fiscal ways, for instance.

(D) In an increasingly interconnected world, where financiers outweigh producers and the integration of financial markets tends to dilute the responsibilities of the agents and make them more diffuse, the unification of banking and financial legislation and the discussions on the setup of a global monetary authority capable of imposing on national monetary authorities a common program to restore the systemic balance occur alongside the increasing difficulties faced by the national State — as an apparatus designed to provide institutional and legal security — to cope with the problems of social disintegration caused by the recession, suspension of production investment and massive unemployment. In other words, the more the State loses the capacity to of economic coordination and auton-

omy in formulating new regulatory strategies, since they are traded, defined and sorted within multilateral bodies, the more it faces the responsibility of dealing with the local consequences of the economic downturn. Finally, the greater is the so-called "social crisis", the smaller is the State's ability to secure financing to meet the demands of the poorer; and fewer are the chances to design compensatory strategies like those implemented at the time of the social democratic governments after the war, as the economic agents are unwilling to use fiscal transfers and due to increasing restrictions on the public sector's ability to take on new debts. National governments are not unaware of social expectations, but lack the means and tools to meet them, leaving the local governments sentenced to a parish-like management, while the excluded ones and their demands increase more and more.

All these problems are somehow related to the economic and political changes that have occurred in recent decades from the liberalization of capital accounts, the decoupling of the dollar from the gold, the flexibility of exchange rates and the expansion of communication and information technologies. Due to its complexity and scale, changing occupational and production structures, enabling the interpenetration of business structures, breaking down the socioeconomic foundations of the national State and building up monetary and fiscal tensions, many problems caused by these changes have largely remained out of reach and control of traditional legal and political bodies, such as the Legislative and Judiciary branches, and the Public Attorneys' Office (Boyer: 2005). The expansion of derivatives, which is at the source of the 2008 downturn, illustrates this trend. With the derivatives and other innovations of this kind, the banking system has increased its capacity to provide immediate liquidity to the stock of financial wealth. Until the decade starting in 1970, the means of payment or settlement of debts was limited to the central bank money in addition to its multiplication across commercial banks. Generation of credit was also guaranteed to a cash flow associated with the generation of income through the production of goods and services (See Conjuntura Econômica, November 2008, pp. 19-20). After 1980, the financial system has increased its capacity to provide immediate liquidity to financial assets, thanks to the basis formed by the old currency. With the securitization of debts, for instance, bank loans began to be offered on the market — a transaction that gained scale with the widespread use of derivatives, by which you can buy a security that represents 100% of an asset by investing a small portion of its value, thereby causing an inflation in the value of financial assets far above the estimate based on the present value of a future production..[3]

This shows how the globalization of financial markets, stemming from different strengths and different processes occurring at various spatial and temporal scales, involves complex and intricate causal hierarchies. Far from being a single-line movement of the bottom up or top down type, the phenomenon of economic and financial globalization implies an asymmetric interpenetration of different scales of social organization. And it clashes with the familiar metaphor of the State as a pyramid of standards on whose top the legal system appears as a set of rules that organize the state apparatus, establishing skills and disciplining the exercise of

power; and on whose base lays the society, where the economic relations and the production activities are ruled by the civil and commercial law.

Given the multicenter nature of globalized financial markets, within which the capitals are characterized by hypermobility and the intermediaries increasingly spread high-complexity assets associated with the transfer of risk among stakeholders based in various regions and continents, the national States work with huge delays in the legal and judicial arena, making serious operational mistakes in exercising their regulatory function, unable to anticipate what the creative highly paid teams of executives of financial institutions can generate, and shutdown overlapping agencies or those lacjing efficient interaction ability at the administrative level..[4] In other words, States are no longer able to establish a kind of hierarchical-authoritative regulation over society, since many social and economic systems tend to become autonomous and do not accept any external controls.

In this context of internationalization of economic decisions and different private autonomies, where the public/private dichotomy loses operational ability along with the idea that the State is "the geometric center of positive law," where is the law heading to? Which structural changes will its functional framework undergo? What will be the most profound changes in its architectural lines? Seeking reasonable answers, this paper present five possible scenarios with varying degrees of feasibility. Scenarios are neither descriptions of the existing reality nor forecasts of future events; if anything, scenarios are intellectual constructs or instruments that detect processes, changes and trends to help guide the debate. These five scenarios were designed from an assessment of the current economic climate and should be understood as mere conjectures — more precisely, as an attempt to identify, within the limited visibility that an ever-shifting and uncertain reality allows, some architectural features of law after the financial crisis:

(A) Already ajar due to the development a global trade law, the integration of capital markets through a merger between the New York Stock Exchange (NYSE), Euronext, the projects of a global financial and banking legislation and the proposal to create a global council for economic coordination within the UN, the first scenario emphasizes a process of convergence, harmonization and unification of national laws in specific fields. In this line of thought, which has been reflected particularly where the markets — including the labor market — are more flexible and social welfare is weaker (Anglo-Saxon countries) or is getting more flexible (Nordic countries), some see this trend only limited to what matters to the attainment of integrity, financial health and systemic stability of financial markets. The idea is to create, in financial terms, what already exists in trade — a global authority with supranational powers to enforce laws and arbitrate. From the perspective of Kant's cosmopolitan project of perpetual peace and the state of peoples, some would draw on the accumulated experience of codification of international policies and the constitutionalization of international law to underscore the potential of continuous democratization in the processes of global politics and point out the opportunities for a "global domestic policy" brought about by a unitary globalization. These are called "hyperglobalists". In this case,

the idea is that, in a context of growing interconnection between the major world regions and the proliferation of international policy players, self-determined groups and the Westphalian model of international regulation tend to be replaced by a cosmopolitan conception of democracy, by a "world federal republic". To make it real, it would be necessary to reform the UN, currently an intergovernmental agency with a widely disputed authority due to an asymmetric internal distribution of power, enabling it to act as an effective organizer and regulator of a global society with social and cultural gaps. A cosmopolitan democracy so conceived, legitimized by regional parliaments and transnational referendums, would be empowered to establish a public responsibility on a global basis, restructuring markets and clearly defining financial capitals through homogeneous or unified policies. Forged on the basis of believing in the peacekeeping force of global free trade and justified by liberal, federalist and pluralist concepts, the cosmopolitan project maintains that, if we are to demand accountability from many contemporary forms of power and if we want that a set of complex problems that affect us at the local, national, regional and global levels, be regulated democratically, all of us need to learn how to participate in several political communities. "A democratic political community of the new millennium requires a world in which citizens have a multiple citizenship. Faced with a situation of mutually undermining destination communities, they need to be citizens not only of their own community but also of the wider regions where they live and the overall global order". (Held: 2000 and 2005).

(B) From a diametrically opposed and skeptical perspective of hyperglobalization, the second scenario is the expansion of national legislation based on the idea that only the controlling and regulatory intervention of governments meets the demands of employment and social welfare in a period of financial imbalance. Going far beyond the Buy American proposed by President Barack Obama for infrastructure investment programs, the slogan "British jobs for British workers", coined by the Prime Minister Gordon Brown, the intentions of Russia, India and Indonesia to impose trade restrictions, the European Union's decision to increase by 85% the tariffs on imports of Chinese products for the automotive sector, and Brazil's attempt to adopt the system of prior licensing of imports, this scenario has two variants. The first is the model prevailing in East Asian countries like South Korea, Singapore and Thailand, where, thanks to a complex bureaucratic apparatus combined with planning techniques, strategic coordination capacity, power of induction to technological development, preferential interest rates, temporary subsidies and abundant credit offer to certain sectors, the State has long been formulating active industrial and trade policies. The other variant, boosted by an exacerbated post-crisis economic nationalism often justified on the idea of Karl Polanyi that the free market system and unrestrained accumulation of abstract wealth is a "satanic mill" that grinds the living conditions of individuals and generates social exclusion, is the "rediscovery" or "restoration" of the State — that is, the expansion of the controlling, regulatory and planning intervention of the governments in

order to meet the demands of financial stability, employment, basic services and strengthening of social protection systems. To tackle the financial crisis and start growing again — this is the premise — we need more organization, more regulation, more direction and more control over the market. In short, we need a strong State — an interventionist, regulator, inductor and even a producer State, whose work requires, firstly, a combination of the public production activity with public administrative activities of regulation and control, and, secondly, a law expressed in the imperative form under mandatory commands issued by a central authority. A strong State is not necessarily an authoritarian state — instead, it can be a Rule of Law submitted to a properly enacted Constitution able to enforce the law, adopt trade barriers, implement expansionary fiscal and monetary policies, impose progressive tax systems in order to distribute income, rebuild public savings, arbitrate competition, financially support certain industrial sectors and intervene in speculative capital flows. Simply put, it is a State capable of putting on the political agenda the challenges of planning, economic programming and development (Trubek: 2008). Evidently, the limit of its ability to play these roles and meet the business and social claims corresponds to the limit of public expenditure, set by their tax and credit bases. Therefore, the big challenge of this kind of State is not only to produce strong legal texts; above all, it is to gather the material conditions required to ensure their effectiveness and convert them into reality — which is not an easy task in a context of geographical dispersion of production, where the search for comparative advantages by firms affects the fiscal capacity of States, as large corporations began to set up their office where the taxation of capital is lower. This is the scenario that in many developed countries is behind the controversy over the potential of effectiveness of the so-called Republican state, which equates to more advanced forms of representative and participatory democracy. This is also the scenario that today, in various Latin American countries, serves as a counterpoint to the familiar debate between monetarists and those for the development; among the advocates of public spending cuts, privatization of essential services, economic deregulation and elimination of subsidies, on the one hand, and the advocates of a government able to control effectively the most relevant economic variables, such as unemployment and inflation, and to adopt countercyclical Keynesian policies to defend the production, employment and the national industry. Nevertheless, in a context of growing cross interference of transnational players, to what extent is a strong State effectively able to build barriers to foreign trade and to make use of a national legal system capable of changing a virtually transnational organization of credit markets?

(C) The third scenario presents a global law without a State, of a governance system "marginal to" or "outside" the positive law, and a legal dynamics that is systemically autonomous from the public authorities. It is based on the assumptions that (i) there will never be a locus capable of centralizing global policy discussions, (ii) social justice can be achieved without government intervention as a natural outcome of the free market game, and (iii)

at the world level, territorial differences have been replaced by functional differences. Accordingly, the legal reality is increasingly made up of private regulatory regimes that fill the legislative gaps left by the States. Instead of a unified law, with vertically institutionalized legal hierarchies, we see sector-based regulatory formulations — such as universally valid accounting rules for publicly traded corporations and professional codes of conduct — replacing national laws, without a power mechanism that combine them effectively. This is the scenario of a law driven by partial systems of the society, in whose production the traditional legislative authorities of national States interfere little, and in whose application international arbitration courts tend to overlap on the national courts (Teubner: 2004 and Möllers: 2004). Because the players are sufficiently independent from one another, so that none of them can freely impose a solution, as they are sufficiently interdependent to make all of them losers if no solution is found, conflicts are intersystemic. Through negotiation, satisfactory agreements take into account the complexity of the problems and the existence of multiple powers. Thus, the expansion of functionally specialized networks, many of which are narrowly organized and defined, depletes the role of sanctions and standards as key elements to define law and mark out the borders between the domestic and the global level. In other words, conflict resolution would no longer be the responsibility of national States, since the players are aware of the need to pursue the ecological balance of systems and subsystems in which they perform their duties, would seek to comprise in an accountable manner and cooperate to make common choices come to fruition. However, to what extent are these rules with sectoral identities able to promote and ensure a minimum level of social responsibility among private entities performing socially relevant activities? If the financial crisis of 2008 was above all a crisis of responsibility, to what extent are the players capable of considering the social effects of their decisions, preventing different systems and subsystems from exceeding a limit situation in which everyone loses?

(D) The fourth scenario consists in deepening the institutional framework of commercial integration blocks and regionalization processes, by expanding "multisovereignty" experiences from a horizontal and vertical division of legislative powers, of voluntary handover of aspects of sovereignty by the member countries. The paradigm is the European Union. In four decades, it has successfully evolved from three sectoral "communities"— coal and steel, nuclear energy and economy — to a single area, with its own currency, free movement of goods, services, capital and people, and agricultural, commercial, competition and common transport policies, but eventually had troubles with the French and Dutch veto to the referendum on the EU Constitutional Treaty in 2005, and the surprising refusal of the Irish citizens to ratify the Treaty of Lisbon in 2008, which had been conceived seven years earlier to include other matters that could be approved by a majority rather than unanimity of member states. As the unification process went forward, with the transfer of the intergovernmental sphere to the community scheme of various aspects of immigration, judicial

cooperation and police action policies, and the creation of a Council of Ministers, a Parliament and an Executive Committee, its guiding principles were then put into practice through regulations, directives and technical opinions. The regulations are mandatory in content and directly applicable to the internal legal system of each member country, without requiring any act of reception. The directives only require the recipients to make decisions and perform acts necessary for the accomplishment of predetermined goals; the means and procedures used to achieve those goals are at the sole discretion of member countries. Ultimately, this model is characterized by a tension between a confederation of relatively centralized States (a union of sovereign States) and a relatively decentralized federation (a community of interdependent States of a unitary and relational nature). It is a legal, political and administrative framework that attempts to combine integration and differentiation, cutting down on the economic power asymmetries among the member countries (a reduction based on a proportional redistribution rather than on an alignment of the institutional power, as it is the case in the European Union). In this model, the member countries delegate powers on a "bottom up" basis, i.e., to a supranational committee or, alternatively, to a "federal agency", and on a "top down" basis, where the tasks are given to lower levels, to local powers and to entities emerged from the very process of political and administrative decentralization. The difficulty of this scenario lies in the deteriorating economic situation of some European countries, vis-à-vis other nations. The problem is to know the level of institutional and political tension that the EU could withstand if those most toughly affected and vulnerable to the depression, such as Greece, Ireland, Spain and Italy are spellbound by the idea of abandoning the single currency. In theory, this would allow them to restore their monetary sovereignty, thereby depreciating their currency to help exports and resume growth. As much as this strategy is risky and can result in capital flight and excessive devaluation of the new national currency, it was discussed at the World Economic Forum in Davos in January 2009.

(E) The last scenario is the proliferation of regulatory regimes that operate within different spatial boundaries, where none is dominant, let alone clashes with the legal system of the State. This is a model of law that functionalizes ties and linkages between labor markets, assets and credits at multiple levels, from local to supranational. Unlike the traditional conceptions of positive law, here the focus shifts from unity to difference; from the notion of hierarchy to network; from the idea of government to governance; from rigid legal structures to networked regulatory processes and interdependencies; from parliamentary legislative ownership to the interstices of social bodies and non-political organizations — and the greater difference between social and economic systems, the harder it is for the State to manage them through conventional regulatory instruments of control and attribution. Therefore, finance, currency, trade, climate, environmental protection, security and fighting terrorism and organized crime, for example, tend to be internationalized in terms of their legal treatment, while health and well-being remain limited by national borders.

Technical and accounting standards of common interest for economic agents, intended to reduce transaction costs and ease comparisons of balance sheets, for example, are the responsibility of organizations like the International Organization for Standardization (ISO), the Internet Corporation for Assigned Names and Numbers (ICANN) and the Financial Accounting Standards Board (FASB) — i.e., private nonprofit agencies in charge of setting international standards that are not legally binding, and that act through delegation from governments or fill the gap left by governments in areas and matters of extreme technical complexity. The standards spontaneously forged at subnational levels arise from the actual needs of different social groups whose substantive interests and regulatory expectations no longer fit in the state law. In the business scenario, it expands into a specific regulatory framework with no jurisdiction over territory, but on markets and supply chains; these regulations operate through a body of practices, uses and customs, codes of good practice or self-conduct, memoranda of understanding and market principles forged in transnational trade networks for the purposes of regulating access to markets, defining and disciplining the transactions and providing criteria, methods and procedures for resolving disputes via arbitration mechanisms, for example (Slaughter: 2004 and 2005). As we can see, this is a model with different sources of regulatory production — supranational sources (through the transfer of statutory powers of States to multilateral agencies); private sources (involving regulatory procedures and practices developed by business entities); technical sources (based on scientific expertise); and community sources (based on the ability to mobilize society, through NGOs and social movements). It is a model of law with enormous flexibility and adaptability to the demands of increasingly complex social and economic systems.

Out of these five scenarios, those which seem to have less potential feasibility are the top three — one because of its excessive idealism and impracticality of a "global regulatory body;" another because it overestimates the ability of powerful States to act independently of the imperatives of transnationalized markets; and the third, because it trusts excessively in the capacity of economic players to behave "responsibly". In the event of a federal "world republic", the problem is how to reproduce the representative democracy on a global scale vis-à-vis the vast array of regulatory regimes, international institutions and multilateral organizations created to manage functionally different sectors of transnational activities (Habermas: 1997 and 2006). Even taking into account the proposals of referendum involving voters from multiple countries, how to forge a democratic system able to streamline political power and centralize global decisions? How to ignore the explosive force of nationalism and separatism of homogeneous regions from the viewpoint of culture, language and ethnicity? In the scenario of a strong State, it is evident that any government can, in principle, refuse to link internal decisions to the operational logic, to organizational forms and to decision standards and criteria of the globalized economy. But given the increasing mobility of production factors, the risk of capital flight and the subsequent difficulties of access to sources of credit and technology, the economic,

social and political costs of a hostile option for transnationalized markets and protectionist stands tend to grow, eventually leading to a commercial, financial and technological seclusion. Finally, in the scenario of a global law without a State, to what extent do the mechanisms of self-regulation and "foreign governance" to positive law contain an inherent morality that reduces risk of misconduct and the desire of economic and financial agents to eliminate regulatory constraints?

Although in a context of great uncertainty and many questions it is almost impossible to assign probabilities to future events, the two other scenarios are more feasible — in fact, what distinguishes them are not really structural factors, but only gradation. What actually authorizes making that kind of statement, avoiding the traps represented by the opposition between globalizing chanting and nationalist litany between secondhand Keynesianism and vulgar Schumpeterianism, are two strategies that states have used in the transition from industrial society to post-industrial society, from the Fordist production model to the flexible specialization model between the late 20th and early 21st century. These two strategies were implemented in a context of globalized and functionally different markets, of interpenetration of the policies of multilateral agencies with national policies, erosion of boundaries between the public and the private sector, porosity between business interests and local, regional, national and supranational authorities.

The first strategy called for a review of traditional legislative policies and a redefinition of the sources of law, as it implied a drastic downsizing of the legal system and the subsequent stimulation of society to develop ways and mechanisms of self-regulation of their interests. In other words, although it retained sufficient power to impose the so-called "ground rules" onto different social players, the State gave up some regulatory responsibilities, failing to protect certain behaviors and situations, promoting, instead, the self-setting of interests and self-resolution of disputes by different social sectors. The second strategy consisted in providing the different players with tools to compromise on the content of standards. In both cases, the goal was to relieve the State from its controlling, regulating, directing and planning functions within the economy, causing it to surrender to legal pluralism and replacement of the traditionally rigid hierarchy of laws and codes for diverse and flexible standards.

It is widely known that the de-juridification occurs through a process of delegalization and deconstitutionalization of laws and through the creation of alternative dispute-solving mechanisms, which often occurs in parallel with the collapse of state monopolies, sale of public enterprises, privatization of essential services, the delivery of social safety nets and other institutions of collective well-being, the so-called "third sector", abdication of the power of regulation or interference in setting prices, wages and working conditions, by the government. In proceduralizing law, States are no longer the ones to decide the contents of laws, but merely to establish benchmarks or procedures by which the different sectors of society can negotiate the most appropriate regulatory alternatives to their respective interests. Instead of imposing rules that drive substantive ends to be achieved compulsorily, the proceduralization is a technique by which those ends are induced; the substantive ends do not disappear — instead, the means to

achieve them change. Instead of taking unilateral decisions and impose them onto citizens, businesses, community organizations and social movements, law makers choose to promote a negotiated creation of law, based on the correction of existing forces. Ultimately, this strategy would be a "surrender" of the government, in that by benefiting economic, social and political groups with a strong opinion-making power, ability to mobilize and veto power, it leads to the privatization of law-making activities (Sassen: 2004). Thanks to this strategy, business conglomerates, financial institutions, professional associations, corporate representation authorities, and NGOs can multiply their political power, converting it into regulatory power without necessarily going through the traditional democratic filters.

What stimulated the proliferation of strategies of dejuridification and proceduralization of law was a kind of cost/benefit assessment by governors and lawmakers. On the one hand, they became aware that by trying to employ the positive law as an instrument of economic planning and direction, they ended up embracing the most varied sectors, going far beyond what logic and legal rationality would allow. On the other hand, with overly simple regulatory mechanisms to deal with increasingly sophisticated issues and no way to expand either the structural complexity of its legal system or the organizational complexity of its judicial system at an equivalent level of complexity and functional distinction of the socio-economic systems, leaders and lawmakers chose the pragmatism. After all, the more they tried to control, direct, regulate and intervene, less effective they would be, and more difficult would be to maintain the logical coherence and the organic nature of their positive law, which would make them devoid of any other way to preserve the functional authority: the less they sought to control, discipline, regulate and intervene, limiting themselves to ensuring the enforcement of agreements, guaranteeing respect for private property, quelling violence, enforcing public security and allowing the coexistence of several free agents, the smaller would be the risk of ending up demoralized by the ineffectiveness of their regulatory instrument and control mechanisms.

Far from leading to a regulatory vacuum, these processes of deformalization, delegalization and deconstitutionalization have paved the way to an intricate coordination of infrastatal and supranational systems and subsystems — and, by extension, to the coexistence of multiple decision-making centers and distinctive patterns of regulation. In this sense, a significant portion of the positive law of the national State, especially the one with a certain degree of economic integration with other States, has undergone processes of convergence and harmonization of laws, under which regional interests increasingly overlap with national interests. Another portion was internationalized by the expansion of regulations self-produced by business groups and by the financial system and its interstitial relationships with a number of rules and procedures set out by various multilateral agencies. And a third portion was undermined by the constitutive power of certain situations created by those holding economic power and new sources of authority linked to it, which leads to a geometrically progressive increase in the number of parallel standards, at supranational and subnational levels, in that every business corporation and supply chain in which they live tend to create the rules and procedures they need, and to juridify, according to their interests and convenience, relevant working areas and spaces.

This is one of the paradoxical aspects of the metamorphosis that the national State and its legal institutions have sustained. Deregulation and delegalization do not mean less legal content. Instead, these mean a smaller degree of positive law and a smaller degree of mediation of political institutions in producing rules for the benefit of the regulations issued by different forms of agreement and the tendency of different sectors of social and economic life to self-regulate and self-resolve conflicts. Although still remaining as a basic reference for citizens, in practice, the state legal system has lost centrality and exclusivity and is no longer the axis of a single regulatory system, to become part of a polysystem or a multi-level system. At the same time, it also ceased to be the source of legitimacy of a regulatory order self-centered within the strict limits of a territory and started to open up to regulatory regimes from multilateral agencies, international organizations, regional groups and local authorities, as well as market agents which, drawing on their economic power and financial influence, often convert feasibility into regulation. Therefore, deregulation and delegalization within the State are nothing more than another form of legalization and regulation in non-state venues (Santos, 2003:64-65). In concrete terms, this is a re-regulation and re-legalization which occurs both in the context of intergovernmental and supranational bodies, with principles, values, logics, deliberative procedures and decision-making speeds different from the legislative agencies and procedures of the States, and within the very socioeconomic systems and subsystems.

As the positive law can hardly prevent and provide solution to all legal problems, absorb and regulate new types of conflicts and cope with the emergence of new categories of economic, social and political, players, it is difficult — if not impossible — to change this legal framework today, however large is the disorder of financial markets and their impact on the real economy and on society. As soon as the protectionist nationalism emerged, in the form of increased tariffs, antidumping measures, government procurement, subsidy policies and countervailing measures, it was ruled by the World Trade Organization (WTO). Besides reaffirming the rules it imposes grounded on multilateral treaties and the role of their dispute-settling bodies, the director general of the organization, Pascal Lamy, in successive interviews, he urged for "collective discipline" to avoid the temptation protectionism as a response to the crisis and noted that this strategy sets off a vicious spiral in which the defensive decision of a government tends to result in equivalent responses of other governments, so that the "mirroring" of protectionist measures ends up jeopardizing the efficiency of purely national solutions. If all countries choose to erect trade barriers and escape the "collective discipline," Lamy said, none of them will get even the short-term gains resulting from this initiative.

Due to its scale and systematic character, the financial crisis can only be addressed globally, through coordinated regulations, synchronized decisions and shared capabilities to deal with a wide range of contingencies. This was in evidence in April 2009 during the G-20 — the new negotiating table of the international politics and global governance created to discuss the modernization of the mechanisms of action of the IMF and the World Bank. While providing an informal forum non-institutionalized and devoid of legal authority to discuss major global issues, the G-20 came to the conclusion that no country is able to overcome the economic crisis

by acting independently. The summit delivered a broad agreement on the need for (a) increasing the IMF's credit capacity by three-fold (US$ 250 billion to US$ 750 billion) and inject US$ 250 billion in Special Drawing Rights; (b) allow the IMF to get funds from the stock market, which had never happened so far; (c) expand the former Financial Stability Forum, now named Financial Stability Board, by increasing the number of member countries; (d) set new and more efficient rules of operational safety of national and international markets to cover all systemically relevant institutions and industries; and (e) extinguish all of the 72 tax havens around the world in order to deter tax evasion and ensure a minimum standardization among international regulatory rules (Cf. Valor Econômico, April 15, 2009). In spite of much that was said in the G-20 summit on the possibility of preserving space for "national regulators" to take into account the specific conditions of their economic and institutional environments, the emphasis on minimum standards of international regulation, based on universally applicable principles, leaves no room for doubts. That is, what States may do to a greater or lesser degree, depending on their political weight and the strength of their domestic market, is trying to implement, without necessarily going through the national legislative filters, what is negotiated and agreed in multilateral organizations and entities like the Bank of International Settlements (BIS), the Institute of International Finance (IIF), the Federal Reserve, the European Central Bank and major institutions of the financial system with regard to standardization of capitalization rules, adoption of "prudential rules", to avoid competition between markets with tighter regulations compared to others with weaker regulation, international regulation of derivative transactions made over the counter, determination that the jurisdiction of funds should be based on the location of their managers (rather than on the legal domicile), regulation for investment banks and brokerage firms (which are not organized as bank holdings today) and review of accounting standards to deal with low-liquidity instruments.

From this perspective, in short, the national States cease to play the role of exclusive and privileged players to become a political and administrative milestone, among many others, in economic and financial negotiations. Too slow for the pace of global transactions, their real power only allows them to adapt to a complex setting, which far transcends it. Hence, considering the challenge that is to reorganize the relationship between production and financial system, the functional framework of law after the financial crisis will be somewhere between the fourth and fifth scenarios — the most visible and feasible picture today, in a context of economic uncertainty and an enormous asymmetry of countries in the world political order, is a set of several micro legal systems and regulatory chains characterized by extreme multiplicity and variety of rules and procedural mechanisms; temporality and mutability of their gearing regulations, once the rules are no longer stable and change throughout the course of problems and events; attempts to accommodate a myriad of conflicting and often exclusionary claims; complex conflicts and discussions in terms of hermeneutics, requiring operators and interpreters to have expertise not only on positive law but also on macro and microeconomics, financial engineering, accounting and compliance, actuarial science, information technology and analysis of credit, market, liquidity, technological and systemic risks.

In a regulatory system with these characteristics, and taking into account that many issues, topics and milestones of public policies increasingly tend to be dictated by global markets, some traditional legal concepts such as welfare, social order and public interest, can no longer play the role of "totalizing principles" intended to catalyze, coordinate, integrate and harmonize specific interests in pluralist yet socially divided communities. Because of its strong potential for communication and persuasion, these concepts can still be symbolically preserved in legislative policy and in legal texts, surviving the processes of deregulation, flexibilization, delegalization and deconstitutionalization. However, they no longer have the strong ideological and functional weight held at the inception of the constitutional State, representative democracy, the modern statements of rights and social safety nets.

From that kind of State, what remains, beyond the recognition of fundamental guarantees, property rights and enforcement of contracts, are two lines of intervention in the economy and society. These are not residual or secondary functions — by contrast, these are roles that provide "gambling spaces" for the decisions of social players and economic agents, while they are also open to binding guidelines and forms of coordination from other regulatory sources; more precisely, these are the fundamental roles of organization, coordination, mediation, control, correction and guidance that the State may exercise in the context of a multicentric world order, where the biggest challenge is managing the interconnections of markets of goods and credit. The first line is translated by rules of administrative, economic, antitrust, economic and criminal law, involving, either through governmental agencies or regulatory agencies, encouraging the free market game, competition regulation, setting the acceptable forms and levels of business concentration, fighting abuse of economic power, controlling anticompetitive practices and protecting citizens against monopolistic powers. The second line has a social nature and involves replacing the idea of "universal rights" by "targeting" strategies, which concentrate social spending in a well defined and selected target audience in the limit of survival, to ensure the maximization of effective allocation of scanty resources. That is, these are compensatory measures, some more specific than structural, in the form of "targeted" outreach programs supporting those poor and excluded sectors, and consequently "dysfunctional", since the risks of certain actions by social movements (like land invasion, occupation of urban property by squatters, resistance to eviction, etc.) coupled with increasing criminal violence and insecure law enforcement teams, are considered to "deter the international financial inversion". With that, the idea of universality, by which the government provides essential services and social benefits financed by taxes for the entire population without any distinction, would make room for the Bolsa Família *(a Brazilian cash transfer program),* Bolsa Gás *(financial aid for poor households to buy cooking gas),* Ação Jovem *(governmental program for poor young adults), and* Renda Cidadã *(another cash transfer program in Brazil), and other programs of "minimum integration income" and "positive social rights".*

Once these two lines are outlined, forming a sort of a social floor and an economic ceiling, whatever is between them is likely to be freely negotiated and self-settled. In other words, the State imposes two limits or regulatory frameworks and, within them, the economic, social and

political players are totally free to develop the most varied and creative contract formats and choose the most suitable regulatory regimes to suit their needs and interests. They may even promote corporate agreements, giving new shape to the relations between capital and labor, and sign "social" treaties driven by productivity goals, increased competitiveness, sustainability goals, etc. At the time the Rule of Law of classical liberal features in the 20th century, one of the legal maxims emphasized that whatever was not formally prohibited was automatically permitted. Today, everything is permitted, but is contingent upon not exceeding the social floor and the economic ceiling - and, to avoid this, punishing any transgressors, positive law has been undergoing an extensive process of strengthening of its punitive and repressive sanctions, especially in the criminal field.

Designed from the assumption that regulatory standards can be beneficial in some circumstances, but ineffective and counterproductive in others, this model has certain subtleties. One of them is that the distance between the floor and the ceiling tends to be retractable. That is, it can be enlarged or reduced according to the problems of systemic instability in the economy and society. From a functional standpoint, in terms of positive law, such retractability is one of the instruments which the State may use to try to promote a strategic and decentralized coordination of the economy. In this sense, the aftermath of the abrupt deflation of assets, the illiquidity of markets and the loss of value of commodities and stock exchanges, commodities and futures, is a certain reduction of the space between these two lines, through the reformulation of regulatory processes. Increased supervision of markets, demand for higher level of equity from banks and a stricter assessment of asset risks, directing credit to boost the financing of the production sector, to stem the banking oligopoly, internationalization of records of financial transactions, less freedom of management to banks that received contributions with public money and "surgeries" in the financial system, for example, through the temporary nationalization of some institutions and the subsequent separation of healthy assets and distressed assets. These measures are compatible with this model. This type of temporary nationalization has already been adopted successfully in Sweden and Brazil in recent decades, under the justification that it enables the government to make the financial system to serve the real economy again, instead of appropriating it. This does not necessarily mean more State and less market, more Keynes and less Schumpeter, as we see in some simplistic and ideologically biased debates. In terms of functional framework of the legal system, the most feasible scenario after the financial crisis is more of the same old thing — that is, the continuity of a legal system that no longer stems solely from the verticality of national or global authorities, but from the irradiating effect of different decisions taken at different levels and spaces, in different systems and functionally different subsystems.

In conclusion, even if national governments expand their expansionary fiscal and monetary policies so far adopted to try to offset the decline in private investment, promote the temporary nationalization of financial institutions in troubles under the lines of the Brazilian Program of Incentive to the Restructuring and Strengthening of the National Financial System (PROER) and adopt financial supervision mechanisms capable of covering all agents without

leaving gray zones, and institutionalism in force is not expected, in principle, to sustain radical changes; more precisely, central banks, government agencies and independent regulatory agencies must remain with their legislative powers and fields of functional and disciplinary action — if anything, administrative, managerial and operational plans can be reformulated by eliminating overlaps and provide a better risk management structure, to try to play their roles in a more cohesive and efficient manner. The same may occur with the forms and mechanisms of direct and indirect control of economic regulation and control of credit markets — the alliance between them can even change, but the probable increase in the weight of direct controls with respect to indirect controls is unlikely to change the existing institutionalism in the relationship between the State and the financial system. In a context of many doubts, in which the conjectures about the future are inversely proportional to their knowledge, this is perhaps one of the few bets that can be placed. The purpose here was not to justify it, regret it or disqualify efforts towards greater democratization in market regulation; this study was intended to just register it and draw attention to the need for new legal theories and more suited to contemporary economic reality.

: MANUSCRIPT APPROVED ON AUGUST 31, 2009 : *RECEIVED ON MAY 25, 2009*

NOTES

1 *I appreciate the comments, criticisms and suggestions made by Celso Fernandes Campilongo, Emerson Ribeiro Fabiani and Rafael D. Pucci. Text prepared for the conference organized by the International Institute for Sociology of Law, Onnati, held in July 2009.*

2 *Executed in 2001, the Basel II sets out how banks should assess financial risks and determine the size of the capital control mechanisms of capital without, however, providing or offering any margin for long-term fluctuations in the asset market. Instead, it relies on value at risk measurements binding risk to standard notions of market volatility in the short term market. The problem is that these mediations assume that risks fall when markets are going well, requiring less capital during periods of stability and more capital during volatile periods. Thus, capital requirements based on these measurements of probability of default tend to be pro-cyclical, which ultimately increases systemic risk rather than reducing it.*

3 *In 1980, the value of financial assets of G-7 nations accounted for approximately their GDP; in 2005, it represented four times the GDP.*

4 *In Brazil, for example, the supervision of investment funds and stock market is the responsibility of the Brazilian Securities and Exchange Commission; the supervision of banking operations are under the responsibility of the Central Bank; and for insurance, it is under the Department of Private Insurance.*

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