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STANDARDS. PART OF THE SOLUTION OR PART OF THE
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Executive Summary - IUC Independent Policy Report: At the End of the End of History

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Abstract

This is the executive summary of the “IUC Independent Policy Report: At the End of the End of History - Global Legal Standards: Part of the Solution or Part of the Problem?,” an Independent Policy Report prepared by a group of lawyers at the International University College of Turin. A draft of this report was presented at the Seminar on Global Legal Standards convened by the G8 Presidency in Rome on May 12, 2009. A full version of the IUC Independent Policy Report can be found in the *Global Jurist* at (<http://www.bepress.com/gj/vol9/iss3/art2>).

The IUC Independent Policy Report was drafted by the “IUC Legal Standards Research Group,” organized by a Steering Committee chaired by Ugo Mattei (International University College of Turin), coordinated by Edoardo Reviglio (International University College of Turin) and Giuseppe Mastruzzo (International University College of Turin), and composed by Franco Bassanini (University of Rome “La Sapienza”), Guido Calabresi (Yale University), Antoine Garapon (Institut des Hautes Etudes sur la Justice, Paris), and Tibor Varady (Central European University, Budapest). Contributors include Eugenio Barcellona (Eastern Piedmont University), Mauro Bussani (University of Trieste), Giuliano G. Castellano (Ecole Polytechnique, Preg/CRG), Moussa Djiré (Bamako University), Liu Guanghua (Lanzhou University), Golnoosh Hakimdavar (University of Turin), John Haskell (SOAS), Jedidiah J. Kroncke (Yale Law School), Andrea Lollini (Bologna University), Alberto Lucarelli (Federico II University), Boris N. Mamlyuk, (University of Turin), Alberto Monti (Bocconi University), Sergio Ariel Muro (Torquato di Tella University), Domenico Nicolò (Mediterranean University of Reggio Calabria), and Nicola Sartori (University of Michigan).

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Erratum

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Independent Policy Report

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INTRODUCTION

The current crisis is not “only” about finance, or only about economics or policy. The truth is that the current Western standard of living is unsustainable. Should the “rest” share the model of development of the “west” our planet will simply not be capable of resisting the growth in consumption and pollution. Within this fundamental setting of scarcity in resources, one cannot use the rhetoric of the “end of history” as the polar star for growth, development and ultimately happiness of the whole world, proclaiming one’s faith in technological innovation as a condition sufficient for survival. On the contrary, there is no long-term future outside of a radical cultural shift banning the self-serving Western perspective. A future can be gained only harvesting all cultural inputs available. Thus, the beginning is necessary of a process aimed at the development of a legal system that is much less about creating an efficient backbone for an exploitive economy and much more about a vision of civilization, justice and respect where the laws of nature and those of the humans converge in a sustainable long-term philosophy

PART I

GLOBAL POLITICAL ECONOMY AND THE END OF HISTORY

Making the current crisis an economic turning point is both an opportunity and a duty to safeguard a future for human civilization. Environmental primacy and global welfare are the values that must guide a global economic constitution to overcome the lock in. Drastic steps to remedy unbalanced wealth distribution are needed even in the self interest of rich countries as admitted by institutions such as OECD, IMF, WB, WTO and ILO. The outstanding debt of all poor countries must be legally analyzed and evaluated according to ordinary private law principles. Cancellation of most of it will be a necessary consequence of analyzing it according to the “general principles” that are already a source of international law. Capitalism displays the capacity to change its form in order to maintain its fundamental substance of exploitive relationship between capital and labor: today, what is at stake is the capacity to manage the next great transformation so that an environment compatible with the survival of human civilization is maintained. To do so, a new institutional framework for long-term global governance is indispensable. The only way to make law sustainable and functional to the long-term solution of the economic crisis is to free it from technological and economic dependency. A new international monetary system is urgently needed. A monetary policy is indispensable in which “money” is understood as quintessentially “public” – i.e. not bound to any automatic market determination. Free circulation of capital outside of any form of public control

leads to unsustainable speculation. Binding restrictions on such free flows are necessary, urgent and comparably simple measures to be taken. In a long-term perspective cash injections in the system are like giving more drugs to an addicted patient - they are just bad policy driven by the very same interests that the law must tame.

PART II

BEYOND THE END OF HISTORY, ASSERTING THE PRIMACY OF THE LAW OVER ECONOMIC POWER

The UN offers the basic institutional structure to negotiate a Global Economic Constitutional Treaty, and has jurisdiction to do so. The General Assembly is the most legitimate body currently available to initiate the process, although as an institution the UN lacks independence, since the US exercises ultimate control through economic pressures. The initiative for a process leading to global and legitimized economic and financial legality should be placed within the Economic and Social Council. To be capable of governing the global financial system the law should be sovereign. Sovereign law is a political artifact not a technology. The nature of global law as a space without territory must be fully appreciated before attempting to use it as a solution to the financial crisis. The law must gain control of the global space. This is the most important political challenge of our era. There is an apparent tension between legitimacy and effectiveness that can be overcome only by limiting professionalism in favor of politics. Accordingly, the mere substantive dichotomy “standards versus rules” cannot theoretically support the necessity to tackle the crisis by means of the law. Rather, attention should be paid to institutional arrangements. Standards (or “principles”) are highly generic normative propositions, while rules are specific. The choice among standards and rules entails important implications on both interpretation and enforcement. Legal standards should only be adopted with a medium-long-term vision capable of considering a highly pluralistic enforcement and institutional framework. This scenario requires sustained investment in a legal and financial culture up to the task. “Hard law” should be preferred to “soft law” in developing a legal structure capable to govern the market. It is useless to create new rules or standards unless the issue of their effective enforcement is fully appreciated and steps are moved to guarantee it. The most urgent issue is returning privatized global rules and soft-law processes under public control. The judicial function, even within the set limits of jurisdiction, can help in the global effort to develop established principles of fundamental liability and justice. A cosmopolitan exercise of coordinated judicial authority might facilitate this function. Ex-post models of accountability for financial damages may be scarcely effective and difficult to

organize. The desirable gradual reduction in dangerous financial innovation can only be introduced with an effective ex-ante decentralized public-minded gate-keeping control. Fixing the economic and power unbalance between the regulator and the regulated is a priority for any legal project aiming at effectiveness. Consideration should be given to the possible development of a “global financial misconduct intelligence prosecution and police authority” as a first common effort towards the development of a global class of public-minded civil servants.

PART III

LEGAL STANDARDS FOR THE GLOBAL FINANCIAL MARKET

All previous reforms were constructed around harmful dogmas, according to which: (i) crises are inevitable; (ii) markets are self-healing; (iii) crises are a domestic matter. Only by overriding such cultural grid of references a genuinely new approach can be designed. Today, the global institutional framework is a complex, crisis-driven structure: a narrow regulatory culture has created a path-dependent mechanism in which every new legal arrangement was not designed to deal with the growing complexity and globalization of financial markets. Reframing the international architecture implies both the creation of a single, reliable and transparent framework for international bodies, and the establishment of a more consistent domestic architecture for national financial supervisors. Every new authority should fully embrace the conceptual distinction between regulatory powers and supervisory tasks. Such distinction lies at the core of a system based on accountability and transparency principles. To shape a consistent framework for financial market supervision and regulation, financial instability should be directly addressed by setting up regional monitoring agencies and by taxing speculative capital flows. The IMF and the WB - albeit discrete institutions - are de facto highly integrated partners in the making and execution of the system of global financial deregulation that has severely limited the possibility of legitimized political actors to protect themselves against the spreading of the US crisis. The international financial institutions should be reformed in a long-term perspective. Their current role shows the need of a degree of separation of power in any system of global representative government. Before market liberalization, the Western financial system was based on the strict institutional partition between “banking” and “securities”. Socio-economic evolution and technological innovation have favored the legal breaking up of market segregation and the creation of financial conglomerates and giant financial institutions. Unrestrained liberalization and market-friendly controls have contributed to the current financial crisis fostering and exacerbating conflicts of interests and pricing opacity. Mandatory disclosure remedies make information more extensively

accessible and affordable to consumers, but they are not alone sufficient to address conflicts of interest and price manipulation. In order to overcome role confusion, re-establishing market segmentation is a necessary step to effective reform. The law should monitor the originate-to-distribute business model. Ex-ante legal control should be provided to guarantee the full understanding of the relationship. Reviving securitization and its benefits requires deep structural change. However, the reform process does not need to start from scratch. It could draw on from safe and steady financial techniques, such as ‘Pfandbriefe’ and covered bonds. Ensuring transparency of insurance contracts is another key objective of an effective legal and regulatory framework. However, one should be aware of the ideology according to which in every domain of life uncertainty private insurances are good substitute for public institutions.

With the financial crisis, rating agencies have come under repeated criticism, either for poor responsiveness and delays in modifying ratings in view of market developments, or for the abruptness of unexpected downgrades. Their role should be limited and their activity monitored. The highly favorable legal regime shielding rating agencies from liability should be radically transformed. The possibility to establish an international not-for-profit public or quasi-public institution to carry on reliable rating should be explored.

In the last couple of decades, the shareholder’s model of corporate governance has gradually become the dominant mode of organizing listed corporations in the world. This structure is responsible for distorted incentives and weak regulation favoring shortsighted and often predatory corporate choices. This supremacy of optional contract-based law over regulation should be stopped and radically inverted. Short from obeying the logic of economic democracy, the public company structure actually encourages the concentration of irresponsible power. On the contrary, very different models of ownership structure of the systems of large corporations characterized the rise and decline of 20th-century State-owned enterprises in Europe. Basic structural elements of that experience, dismantled in the privatization frenzy at the end of history, should be used in the new public intervention required to overcome the negative effects of the crisis. A significant number of irrationalities affecting the current corporate governance structure are located in property theory - especially in the paradigm of individuals’ rationality when following their self interests. To this, it is usually added that the interests of the owners are in line with the interests of the consumers.

The process of labor commodification, reflected in its legal organization, was exacerbated at the end of history. There is a global urgency to reverse this process. The separation of labor law from commercial law institutionalizes a division of the cooperative surplus that is unfair and unsustainable. Any benefits of financial capital mobility must always be synergized with the realities of social

capital mobility. Alternatives aiming at the birth of a sustainable global economic law should be explored. Systems of co-decision, profit sharing and employees' ownership structurally facilitate long-term sustainable corporate decision making.

CONCLUSION

The law, in order to be able to govern finance (and more generally the economic system) should be based on a collective, public political authority. It should not be functional to the profit motive of any private individual or corporation. It should be structured to serve the public good. It should find its life in the public spirited justice motive of each and every individual in different societies. The nature of law as a public good is perhaps its only universally-recognized structural character. The privatization of law at the service of narrow special interests is a degeneration that must be cured. Either the law is a public good serving the public interest or it is not law. The legal standards for the 21st century must be a public good produced by a highly-inclusive global political process. Accordingly, it is imperative to re-think access to the public and common resources, starting from the "commons". Not only individuals but also communities have rights; not only humans but also nature has rights, as recently recognized by Article 10 of the Ecuadorian Constitution of 2008.

Both law and the economic system must be understood as deeply political artifacts, through which human forces driven by particular - most often - opposite interests shape their future. The attempt to maintain some financial stability through the legal system is the purpose of a system of global legal standards for the 21st century. This crisis puts us in front of incontrovertible facts: we have just one planet; human societies are all interconnected; and no discrete human group no matter how rich, powerful or technologically advanced, can behave as if it were alone on earth, and as if the entire planet were the object of its ownership and sovereignty. The law, the economic system, or the financial system, are all means to allow the dignity and the gifts of humans as well as of nature to survive and prosper. The law should provide an order to all of this, or at least should not serve the disorder that precludes the ultimate end of a society based on peace and respect from being achieved.