

From the Big Crisis to the Hope for a Better World*

by

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1. The intensity of the recent economic and financial crisis, which has hit the entire world and whose alarming effects have been magnified by the media, has elicited a strong willingness to participate from all over the world. For the last few months, many proposals have been put forward in reports, memoranda, forums, papers and other contributions, each intended to urge a new set of international rules for a more correct regulation of economic relations and with a view to innovating the current system of preventive and subsequent controls over economic and financial transactions worldwide.

The many proposals for action, as well as the far more consequential communiqués issued at the end of the latest G20 and G8 Summits, have mainly been concerned with macroeconomic issues, but their contents have often covered aspects of businesses' life and even private investors' interests, thereby also assuming microeconomic relevance. The minimum common denominator of all such proposals can be summarised in just a few words expressing a widespread eagerness to improve the ethics of the business and finance environment by defining and adopting a package of internationally accepted principles in order to bring about new "*legal*" or "*global standards on propriety, integrity and transparency of international economics and financial activity*". New rules and innovating instruments have been suggested on the basis of these principles with a view to steering "globalisation" — a phenomenon that affects every business and trading operations in the new century — on a more beneficial course¹.

Looking at the macroeconomic aspects from an essentially EC point of view, it is possible to observe that this innovative drive is obstructed by certain obstacles which make it very difficult to arrive at necessarily innovating rules within the EU. These rules should, on the one hand, separate with certainty what is prohibited from what is permitted in economic and financial matters, and, on the other hand, provide more effective, consistently applied controls over financial institutions². I am obviously thinking of the contrast of the "eurozone" with the

¹ About the factors determining the globalization phenomenon, see SANTA MARIA, *European Economic Law 2*, Austin, Boston, Chicago, New York, The Netherlands, 2009, pp. 182 *et seq.*, 242 *et seq.* and 358 *et seq.*

² About the present European regulatory framework, see SANTA MARIA, *European Economic Law*, *cit.*, p. 380 *et seq.*

“non-eurozone”³, considering that the latter includes, among others, those States which have chosen to remain outside the “euro area” of their own accord, such as the United Kingdom and Denmark, which retain their permanent “opt-out” status, but also Sweden, which is lying in a sort of legal limbo, outside the standard scheme⁴.

It is also important to remember that the ECB can only exercise real powers over the sixteen countries participating in the “euro area”, not over those belonging to the “non-euro area”, whatever the reasons for their being not members of the “euro area” for the time being⁵.

Thus, at the Community level, while the most suitable solution to face the crisis appears to be a “spontaneous” council of the EU’s principal Member States, outside any institutional framework and in concert with the world’s other powers, it is difficult to expect that major innovating changes can be introduced in economic and monetary matters in the short run, since any such change would necessarily require unanimous approval from all of the twenty-seven Member States. New indications will certainly result from the huge work the Commission is doing, but I am afraid we will have to wait until the end of the crisis before the Community engine can be restarted with the purport of old.

However, since what has made the current crisis so strikingly apparent has been its “global” quality, a “Community-specific” solution would — as complex as its achievement may be — have a limited reach and would, therefore, seem to be inadequate in itself to face as well the present crisis as any future hazards. Therefore, a true reform of the entire system can only be expected to come from international channels.

Because of the situation just described above, as private individuals have been affected in their financial interests by the current crisis, regardless of their home countries, they have come to nurture unprecedented pervasive expectations, even higher than those that ushered in the Bretton Woods Agreement (1945) and the GATT (1947) following the end of World War II. A widespread opinion is that any possible prospects for a systemic reform capable both to mitigate the impact of the deep financial difficulties real economies currently encounter across the globe and to face future crises promptly and effectively are bound to depend on shared decisions “collectively” taken by as many States as possible (not the major ones alone) on the contents and efficacy of new rules developed by experts called upon to collaborate with individual States and organisations of States.

³ Please, see my book quoted above, pp. 189 *et seqq.*, 208 *et seqq.* and, especially, 211 *et seqq.*

⁴ Only Denmark and the three Baltic States are currently members of a system (ERMII) which limits domestic currency bands of fluctuation against the euro to +/- 2.25% for the former and to +/- 15% for the latter. As for all the other States outside the Euro area, fluctuation bands is free (quite beyond any restrictive regulations of the former European Monetary System).

⁵ See SANTA MARIA, *op. cit.*, pp. 205 *et seqq.*, 208 *et seqq.* and, for critical comments on the double *standard*, p. 211 *et seqq.*

2. Many have urged more democracy in the management of the International Monetary Fund and the World Bank through greater representation of developing countries.

Major support to the definition of new rules has come from the Italian Presidency of the G8 Summit, which, together with the OECD, developed a set of documents which were disclosed to the general public on 13 June 2009 and approved, as a whole, at the L'Aquila G8 Summit⁶, resulting in twelve new rules fully open to further contributions⁷.

Yet, quite beyond the changes made to the criteria for appointment to the managing bodies of the IMF or the WB, to the process by which either can take support measures and to the requirements for eligibility to such measures, the real issue arising from the ashes of Bretton Woods is how to identify and bring forward new *minimum* rules to regulate exchange rates. For there is no such rule for the time being, save for the unspecific provisions contained in Article IV, Section 1, of the IMF's Articles of Agreement seeking orderly exchange arrangements and prohibiting — rather, earnestly advising against — competitive devaluation.

It should be specified, in my view, when and to what extent targeted currency underquotation — a result of the relevant State's individual policies — can legitimately be resorted to without causing unbalances apt to degenerate into protectionism in whatever form and to become a serious distorting factor in the “uniform” application of competition rules in the *global market*.

Without considering the exchange rate of the US dollar to the euro (which has obviously been agreed to by the United States and the States of the eurozone), there have recently been dazzling examples of continuing currency underquotation. Just think of China with its “seeming” currency basket, which keeps the yuan linked to the US dollar in fact — despite the unique, fast-moving development of the Chinese economy (China's GDP now growing 6%, while the United States' is declining 4% and EU about 4.2%) — resulting in the yuan being heavily devalued against the euro.

Another instance of utter confusion in the field of exchange rates is Russia. The ruble has been devalued more than twenty times over the last few months — by over 15% against the euro since early 2009 — as has been the case with the currencies of Russia's neighbouring countries, former members of the Soviet Union.

⁶ I refer to *The Lecce Framework, towards a Global Standard for Property, Integrity and Transparency of International Economic and Financial Activity*.

⁷ See as published in The Global Standard Blog of the OECD, (<https://community.oecd.org/community/gcls/blog/2009/07/06/12-principles-for-a-strong-fair-and-clean-economy>), under the heading *Global Charter/Legal Standard: 12 Principles for a Strong, Fair and Clean Economy*. Most of those principles confirm to be microeconomic in nature.

The issue is also quite topical within the EU, though, in respect of the exchange rates of the sixteen Member States' single currency to the individual currencies of the other eleven Member States which — as indicated above — are not members of the eurozone for various reasons. The pound sterling, with fluctuations exceeding the $\pm 30\%$ band from the introduction of the euro to mid-2008, has devalued by more than 15% against the euro in the last few months. Though the Swedish krona had largely remained stable until September 2008, it has recently been devalued about 12% against the euro. The domestic currencies of the Eastern European countries newly acceded to the European Union have also been devalued against the EU's single currency.

Distortions of exchange rates are even more disruptive within the European Union as they occur in a market otherwise considered "single" for all purposes and, lacking suitable correctives to deal with such distortions, serious inequalities occur between undertakings operating in the same market, which are bound to impair proper application of competition rules and, above all, of the rules on individual State aid or State aid regime⁸.

The plainest solution of such problem lies in determining new minimum rules for the rates of exchange or, in the alternative, in introducing a *new currency unit* into the scheme of the currency basket, to be used solely for payments relating to international transactions involving goods and services⁹.

3. Even before taking action on the "system", the "*enforcement*" issue must be faced. I do not believe it so important that a large number of new rules are introduced. It should be remembered that the enforcement of restrictive rules can entail costs that would be unbearable if the intended addressees are too many.

As a follow-up to the general condemnation of speculative financial activities, I wonder whether it would not be wise to distinguish very clearly among users. If private individuals must unavoidably be free, whether in isolation or in association, so long as they are correctly informed, to use financial derivatives¹⁰ or other highly speculative financial instruments (in the same way as individuals are at full liberty to go horse-race betting or casino gambling with their savings or even all of their assets), I wonder if such behaviours should not be

⁸ I refer to my book often quoted here, p. 426 *et seqq.*

⁹ A similar solution has been envisaged by Minister Tremonti in the last few months. Not far removed from it is the proposal of the Governor of the People's Bank of China, who favours the use of *special drawing rights* for cross-border payments.

¹⁰ Obviously, I am referring neither to the so-called "*plain vanilla*" or hedging derivatives nor to swaps, which are necessary contracts to protect traders against foreign exchange risk in the international markets.

prohibited outright to banks and other financial institutions, which should be barred from *speculating* for their own account under threat of severe penalties¹¹.

Any new rules should be *straightforward, precise and directly enforceable*.

I have no doubt that the “international treaty” is a far better instrument than the use of vague proclamations — reminiscent, at best, of “soft law” provisions — with a view to facile results. Furthermore, through the customary mechanisms for the adjustment of the Contracting States’ internal systems of law to the rules of an international treaty, the result would be *uniform* transposition of treaty rules into the individual domestic systems, which would thus provide the source of subjective rights and legal obligations placed on private individuals, who will then have standing to rely on them in vertical as well as horizontal disputes (to use settled Community terminology) in each relevant domestic Court.

In the different domestic systems of law, infringing any treaty rule qualified as “imperative” or “mandatory” could also entail the invalidity of the underlying private-law instrument or result in the joint liability of the public entity that benefited therefrom, which will be punished accordingly alongside the bodily infringer¹².

In my view, the optimal approach would be, a “general agreement on economics and finance” (to follow the successful WTO/GATT approach in words as well) to operate as an umbrella instrument for all existing international conventions in economic and monetary matters, the enforcement of which should adequately be coordinated, also including the multilateral treaties already in force to suppress such morbid conditions as bribery, money laundering, terrorism and pollution, all of which instruments should be extended to any new Contracting States along with the introduction of measures for coordination on an international level¹³. Further connections could be sought in relation to the existing set of bilateral conventions on double taxation patterned after the most advanced OECD Model Convention, by extending and reinforcing the mutual information

¹¹ Moreover, the banks, should be required to investigate quite carefully, based on objective, verifiable criteria, into the financing plans of private equity funds and each applicant fund’s legal, economic and financial position in connection with the relevant acquisition project.

¹² Refer to the OECD Report issued on 17 October 2008 about the state of implementation of the Convention on Combating Bribery and to a bill (the “Bribery Bill”), currently laying before the UK Parliament, which contains administrative liability principles and criteria applying to companies and public entities responsible for “failing to prevent bribery”. It is my view that the same approach should be taken to all international criminal offences. If the deterrence effects so many have advocated are earnestly sought, this would be the ideal approach. Under the Italian system of law, the issue of the “administrative” liability of a company or a public entity liable for criminal offences is governed by Legislative Decree No 231/2002, whose scope for application *ratione materiae* has considerably been expanded following subsequent amendments based on a different rationale.

¹³ About the current structure of international cooperation in these matters, see: SANTA MARIA, *European Economic Law, loc. cit.*, p. 368 *et seqq.*

exchange commitments of the Contracting States' tax authorities and eliminating banking secrecy to a material extent.

Further, as drawing up a multilateral convention may take years before being submitted, I believe it important to set this goal *medio tempore* and provide such an effort with a sound basis already at this time.

At this stage, though the G20 Partners come from many different countries and political environments, they are fully equipped to aim realistically at defining at least some *common ethical principles* to be adopted as early as the next Pittsburgh, Pa, Summit and on which the widest convergence of States should be prompted.

4. Against the international background of growing expectations and widespread willingness to participate just described above, the Encyclical Letter *Caritas in Veritate*¹⁴ issued by Benedict XVI on 29 June 2009 has come as an invaluable contribution both to the identification of the causes — not only economic but social and human as well — of the current crisis and to the determination of possible approaches to its solution.

At the root of the papal message is the concept expressed by the very title of the Encyclical, which is reflected in the conjunction of *Caritas* with *Veritas*. Hence, the call for the vocation to giving as an element of fundamental importance in man's choices at all levels of capability and responsibility, based on the love for God but also on brotherhood among peoples. Brotherhood translates into the close link of *subsidiarity* with *solidarity*, two principles that must direct *cooperation for development* quite beyond the economic dimension alone, offering a “*wonderful opportunity for encounter between cultures and peoples*”.

The high religious inspiration underlying the contents of the Encyclical has not prevented the Pontiff from putting forward concrete assessments as the logical evolution of concepts already enunciated by Pope Paul VI in the Encyclical *Populorum Progressio*¹⁵ over forty years ago, which is the starting point of the present Encyclical. This continuity of thought is typical of the social doctrine of the Church, whose remote origins can be traced back to the Gospels and the writings of the Fathers of the Church and which has developed throughout the previous encyclicals with a social and political content, from *Populorum Progressio* to *Pacem in Terris*¹⁶ of John XXIII, *Centesimus Annus*¹⁷ of John Paul

¹⁴ Obviously drawn up in Latin, it has been published in the principal languages of the world. The Italian edition has been published by the *Libreria Editrice Vaticana*, Vatican City, 2009.

¹⁵ Drawn up in Latin and published in the principal languages of the world, it is available on the website http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_pvi_enc_26031967_populorum_it.html

¹⁶ Drawn up in Latin and published in the principal languages of the world, it is available on the website http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_it.html

II and *Rerum Novarum*¹⁸ of Leo XIII, the first “social” Encyclical, which had a paramount influence, in the early twentieth century, on the definition of the relationships between capital and labour for the recognition of the value of private ownership and for the protection of the workers’ core rights under an approach to the Christian way of living together in utter contrast with the views pertaining to the Marxist culture then burgeoning.

5. Patently present in previous “social” Encyclicals is the awareness that the social question has long acquired a global dimension¹⁹: “In the present day, however, individual and group effort within these countries is no longer enough. The world situation requires *the concerted effort of everyone, a thorough examination of every facet of the problem — social, economic, cultural and spiritual*. The Church, which has long experience in human affairs and has no desire to be involved in the political activities of any nation, ‘seeks but one goal: to carry forward the work of Christ under the lead of the befriending Spirit. And Christ entered this world to give witness to the truth (Cf. *Jn* 18.37); to save, not to judge; to serve, not to be served. (Cf. *Jn* 3.17; *Mt* 20.28; *Mk* 10.45)’. Founded to build the kingdom of heaven on earth rather than to acquire temporal power, the Church openly avows that *the two powers — Church and State — are distinct from one another; that each is supreme in its own sphere of competency*. But *since the Church does dwell among men, she has the duty ‘of scrutinizing the signs of the times and of interpreting them in the light of the Gospel.’*”²⁰.

In the last encyclical, Pope Benedict XVI, in developing such remarks from today’s point of view, ponders mainly over the causes of the economic-financial crisis: “the foremost news is *the outbreak of the planetary interdependence, now commonly known as globalization...*”²¹. However, he had already offered a thought somehow veiled in sadness, “a more globalized society makes us close together, *but does not make us brothers*”²².

The analysis covers the degenerative aspects of people’s everyday life as well as those emerging in the relations among States. In both cases, there are

¹⁷ Drawn up in Latin and published in the principal languages of the world, it is available on the website http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centessimus-annus_it.html

¹⁸ Drawn up and published in the principal languages of the world, it is available on the website http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_it.html

¹⁹ See *Mater et Magistra*, AAS53 (1961), para. 440 and *Populorum Progressio* (1967), para. 2.

²⁰ Emphasis added.

²¹ See paragraph 33.

²² Emphasis added.

continuous references to ethics as well as to *caritas*: man is the centre of any necessary innovating future relationships, helped by ongoing cooperation among the States in the common pursuance of a new world order — not in the economical transnational relations alone²³.

The great challenge “is to demonstrate, in thinking and behaviour, not only that traditional principles of social ethics like *transparency, honesty and responsibility* cannot be ignored or attenuated, but also that in *commercial relationships* the principle of *gratuitousness* and the logic of *gift* as an expression of fraternity can and must find their place within normal economic activity”²⁴. Eagerness to help others is such that “*charity goes beyond justice*”, transcends reciprocity and fully displays its constructive power.

In the stringent analysis that follows these thoughts, all major issues of the world of today are scrutinized, from the notion of a *globalized market* to the impact of *outsourcing* of production, and its conflicting social and economic aspects, which affect the labour environment both in the outsourcing enterprise’s home State and in the host State²⁵, to *migration processes*, to mankind’s relationship to the natural *environment*, which must be viewed as God’s gift to be used responsibly by man²⁶, and to a better use of all of *the globe’s resources* and, generally, *profit* to be viewed as “a means of achieving the goal of a more humane market and society”²⁷.

The positive awareness of the emergence of new forms of enterprise, both for profit and for no profit — which also need adequate legal and fiscal regulation in every country — is accompanied with a general call for greater corporate *social*

²³ In *Populorum Progressio*, paragraph 26, Pope Paul VI stressed that: “Economics is supposed to be in the service of man” and, further, at paragraph 42: “The ultimate goal is a fullbodied humanism” and at para. 66, under the title “Worldwide Brotherly Love”, “Human society is sorely ill. The cause is not so much the depletion of natural resources (...); it is rather the weakening of brotherly ties between individuals and nations.”.

²⁴ See *Caritas in Veritate*, paragraph 36. Emphasis added. The obligations stemming from human and supernatural brotherhood “present a three-fold obligation” — stressed Paul VI in *Populorum Progressio, loc. cit.*, par. 44 — “mutual solidarity, the aid that the richer nations must give to developing nations; social justice, the rectification of trade relations between strong and weak nations; universal charity, the effort to build a more humane world community, where all can give and receive, and where the progress of some is not bought at the expense of others. The matter is urgent, for on it depends the future of world civilization.”.

²⁵ *Ibid.*, para. 40.

²⁶ *Ibid.*, para. 48.

²⁷ *Ibid.*, para. 46.

*responsibility*²⁸, but also with the consideration that the “*consumers and their associations*”, as an emerging new political power, itself a result of global interconnectedness, have “a *specific social responsibility*, which goes hand-in-hand with the social responsibility of the enterprise”²⁹.

The Encyclical also offers a realistic criticism of the exceedingly high costs of international cooperation, which are incurred to maintain international organisations’ “bureaucratic and administrative machinery”. The addressees of this criticism are those who use public resources or funds raised through private donors’ charity for their own preservation and divert them from the institutional purpose of development³⁰. Therefore, the Encyclical advocates the commitment of all international agencies and non-governmental organisations to *complete transparency*, informing donors and the public of the percentage of the funds so raised allocated to programmes of cooperation, the actual content of those programmes and, finally, the detailed expenditure of the institution itself³¹.

In concluding his Encyclical, the international contents of which I have briefly summarised above, Benedict XVI, in addition to his continuous calls addressed not only to governments but also to human beings *uti singuli* as well as in associations³², urges the States of the world to develop a reform of the *United Nations Organisation*³³ and the *international economic and financial*

²⁸ See, again, *ibid.*, para. 40. On the subject, see SANTA MARIA, *op. cit.*

²⁹ *Ibid.*, paragraph 66. A more incisive role for consumers is desirable for building economic democracy, “as long as they themselves are not manipulated by associations that do not truly represent them”.

³⁰ *Ibid.*, para. 47.

³¹ *Ibid.*

³² Paragraphs 17 and 47 contain two quotations from *Populorum Progressio* of Pope Paul VI, paragraphs 15 (*loc. cit.*, 265) and 77 (*loc. cit.*, 295), respectively, reminding of the Catholic principle that each human being or nation, whatever be the outside influence on either, is the chief architect of his or its success or failure. As for nations, it is stressed that they cannot accomplish their own development *in isolation*.

³³ In February 2009, following the resolution adopted at the 62nd session of the UN General Assembly on 15 September 2008, concerning the Security Council reform, intergovernmental negotiations were started on that reform in New York. At this time, the main draft proposals are those emanating from the G4 (Germany, Japan, India and Brazil), the African Union (whose members are 53 African countries), the S5 (Small 5) (Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland), the group of the present permanent members (USA, UK, France, Russian Federation and China), and the UFC (United for Consensus), a group comprised of several States, Italy among them. For an in-depth analysis of the different reform draft proposals, see Preschern, *La Riforma del Consiglio di Sicurezza dagli anni '90 ad oggi: problemi e prospettive*, published by Istituto di Affari Internazionali (2009), summarising the basic features of the various drafts. This document also investigates into the involved issue of the EU’s common representation within

*architecture*³⁴. What is needed in order to face the present situation is a true *world political authority*, whose active members should not be the most powerful States alone, and which, as already advocated by Leo XIII, should be regulated by law, observe the principles of subsidiarity and solidarity, seek to establish the common good and make a commitment to “*securing authentic integral human development inspired by the values of charity in truth*”³⁵. Such an authority should be universally recognised and vested with enforcement powers to make its decisions fully effective and effectual within the ambit of international law.

This is a high-impact plan and by no means one that can readily and easily be implemented, but the Pontiff relies, in this, on the help of God³⁶ because “apart from me you can do nothing”³⁷.

the Security Council, highlighting the obstacles now encountered by the project, foremost among which the impossibility to regard the European Union as a “State” — a core requirement for being admitted as a member of the United Nations (the EU is allowed to attend the General Assembly Meetings in an observer’s capacity).

³⁴ See *Caritas in Veritate*, paragraph 67. Not so far removed from the solution I am suggesting in the final part of paragraph 3 of this paper.

³⁵ *Pacem in Terris*, *loc. cit.*, 293.

³⁶ See *Caritas in Veritate*, *ibid.*

³⁷ *Ibid.*, paragraph 78, in the *Gospel of John*, 15:5. The whole passage is: “I am the vine; you are the branches. The one who remains in me – and I in him – bears much fruit, because apart from me you can accomplish nothing”.