MONETARY IMPACTS AND CURRENCY WARS: A BLIND SPOT IN THE DISCOURSE ABOUT TRANSNATIONAL LEGAL ORDERS? *

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Abstract - The emerging literature on transnational legal orders (TLOs) establishes new benchmarks for the elaboration of analyses regarding complex legal and economic issues which transcend the nation state and generate more (or less) settled institutional practices of cooperation. Authors working in this perspective propose that facilitating circumstances, precipitating conditions and a process of recursive cycles of actor collaboration and/or confrontation at different levels (transnational, national and subnational) may lead to the formation of a TLO. The paper argues that TLO theory remains limited in its ability to shed light on transnational economic consequences of monetary policies. A crucial situation that falls largely outside the reach of the analytical categories of TLO theory is the cross-border influence of monetary policy upon different markets and actors' strategic stances. The proposed paper calls this "monetary impacts" operating through "interportfolio relay" – an instance of which was what the Brazilian Minister of Finance in 2010 called "currency war". Having the above issues as a general background, the paper develops an empirical study of the reaction of Brazilian actors to the adoption, by the Federal Reserve, of the so-called "quantitative easing" policy. It then suggests how TLO theory can be expanded so as to include an analytical focus on instances of unidirectional cross-border interportfolio relay.

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Summary

1 – INTRODUCTION

In April and May 2014, more than 800 million voters in India participated in their country's democratic elections. This political event also had bearing on how markets behave. Share prices rallied to record highs in March 2014 as pre-election surveys pointed to a victory of the Bharatiya Janata Party, considered to be more business-friendly than rival political forces. Moody's, a credit rating agency, suggested that if elections would produce an unexpected outcome, capital flight would likely ensue, causing a fall in the value of the rupee and marring the prospects of healthy growth of the Indian economy. Some analysts also remarked that, since the Federal Reserve Bank in the U.S. announced in May 2013 the tapering of the practice by which the institution has been purchasing more than 80 billion dollars per month of treasury bills and mortgage-backed securities – a policy known as "quantitative easing" (QE) –, the rupee lost about 20% of its value as foreign investors sought safety in the dollar.

These and other conditions appeared to have introduced the risk of throwing the Indian economy into sudden disarray, in the event the outcome of the elections would have bought to power a coalition of parties not clearly committed to policies cherished by international investors.[1]

The connections between financial policies having a transnational reach and local politics, however, do not affect only events related to electoral politics. At least since the 1930s, the so-called "beggar-thy-neighbor" currency depreciation has been subject to criticisms.[2] The recent episode involving "quantitative easing" practiced by the United States, the United Kingdom and the Eurozone, as a reaction to the financial crisis of 2007 and to the landmark collapse of the Lehman Brothers bank in 2008, is in many aspects a more recent version of international competition based on the strategic administration of exchange rate policy and of the fall out of this kind of exchange rate management on different national economies. The case of Japan, which from 2001 to 2006 engaged in its own version of QE, and that of China – which has pegged the remninbi (RMB) to the dollar from the mid-1990s to 2005, and more recently to a basket of major currencies, leading American politicians and other actors to accuse Chinese authorities of engaging in "impermissible currency manipulation"[3] – are other instances of strategic administration of exchange rate-related policies having cross-border effects.

Given their multifaceted nature, issues as those indicated above certainly pose a daunting challenge to contemporary legal scholars. Would there be a way to frame such issues legally so as to bring into consideration relevant political, economic, global and local factors, and also normative considerations involved in them, and at the same time offer responses as to what kind of institutional reforms would be legally meaningful or required in the face of complaints against "currency manipulation" by different countries?

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[1] See Reuters News (March 18, 2014), Forbes Magazine (March 19, 2014), Economic & Political Weekly Vol - XLIX No. 12 (March 22, 2014). Clearly, such political vulnerability of India to cross-border capital movements is comparable to that of other regions. See, for example, for the case of Latin America, the analyisis of Martínez and Santiso (2003). See also Parra and Santiso (2008).

[2] Cf. Eichengreen (2013). Cross-border monetary impacts may be beneficial or detrimental to a national economy. In this paper, monetary impact will be used to designate the instances in which such impact has adverse effects on markets, public finance or the life of society in general.

[3] For a discussion of the QE policy of Japan, see Spiegel (2006). On Chinese exchange rate policies and criticisms they have been subjected to, including legal challenges brought before the International Monetary Fund, see Staiger and Sykes (2010).

A body of interdisciplinary literature produced by legal scholars has been emerging in recent years with the aim of dealing analytically with complex issues in which the interactions of local and global players,as well as "middle-ground" negotiators and actors originate several relevant consequences which together are said to form "transnational legal orders" (TLOs).[4] This emerging body of literature – which has been called "TLO theory" – proposes several analytical criteria which seem helpful in addressing complex issues related to processes by which TLOs are formed or transformed. It seems, however, that TLO theory misses opportunities to describe processes of policy and institutional change derived from cross-border monetary impacts, which may originate from unilateral action.

Indeed, a situation that seems to fall largely outside the reach of the analytical categories of TLO theory under its current form is the cross-border influence of monetary policy and financial flows upon different markets and actors' strategic stances. The present paper calls this "monetary impacts" – an instance of which was involved in what Brazilian Minister of Finance in 2010 called "currency war" and was later more hyperbolically referred to as "monetary tsunami" by Brazilian president, Dilma Rousseff.[5] The paper therefore explores this heuristic shortfall of TLO theory and suggests ways to overcome it by adding to it other ideas and analytical tools.

In Section 2, the paper offers an account of the arguments and ideas on which TLO theory has relied to develop its framework of analysis. This description of TLO theory characterizes it as an outgrowth of analytical work that has delved into what it has called "recursivity of law".[6] In Section 3, the paper discusses the strategies deployed by the Brazilian government and other actors to address the issue of cross-border influence of monetary policy generally, and specifically the economic spillovers of QE practiced by developed countries in the aftermath of the 2007-2008 crisis. Section 4 develops a discussion of the analytical limitations to TLO theory to engage in fruitful analysis of institutional change deriving from monetary policy and financial regulation underlying cross-border monetary flows. The discussion in this section will highlight what appears to be a "blind spot" in TLO theory, which limits its ability to account for

[4] The main references are Halliday and Shaffer (eds., 2015) and Shaffer (ed., 2013). The conceptual framework developed and applied in these volumes elaborates on contributions brought by Halliday and Carruthers (2009).
[5] See Financial Times (2010) and The Telegraph (2012).
[6] Halliday and Carruthers (2009).

cross-border monetary impacts and their consequences, including economic spillovers that elicit policy reforms from governments. Suggestions of how to add to TLO theory ideas and analytical criteria that may be useful to address institutional and legal change deriving from cross-border transmission of monetary impacts are given in Section 5. A summary of the main arguments of the paper is offered in Section 6.

2 – MAIN IDEAS AND SCOPE OF 'TLO THEORY'

2.1 – The Theory of Recursivity of Law

After having produced in 1998 a study on reforms of the law of corporate insolvency introduced separately in the United States and in England in 1978 and 1985 respectively, Terence Halliday and Bruce Carruthers published in 2009 their important study on the generation of what can be called a *global law of corporate bankruptcy*.[7] An interest in establishing such a global law was the result of assessments made by several major international and global actors regarding the causes and consequences of the Asian Financial Crisis of 1997-1998. One of the components of a package of reforms thought to be useful in the prevention of future similar crises and their propagation through cross-border "contagion" was the adoption in many countries of a law of corporate bankruptcy carrying certain key institutional features.

In their 2009 work, Halliday and Carruthers studied the relations and attritions between: (i) national polities (including subnational groups), international organizations and other relevant international actors (such as international professional associations, NGOs etc.), and (ii) global markets.[8] In doing this they attempted to grasp how such

[7] Carruthers and Halliday (1998) and Halliday and Carruthers (2009). Halliday and Carruthers incorporated the their 2009 book several ideas and analyses present in articles they published in previous years. See Carruthers and Halliday (2006) and Halliday and Carruthers (2007).

[8] Halliday and Carruthers (2009, p. xvii) highlight that the "most important" key issue around which they build their argument is "the relationship between states and global markets". This "key issue" arises from the troubling perception that the boundaries markets and states are not always perfectly aligned. Markets and states, they note (idem, p. xviii), "are not coterminus, and in fact some markets have become very much larger that any political jurisdictions. Many market transactions occur between polities as opposed to within them. This situation leads to a kind of 'mismatch' problem between nation-states and global markets. (…) Economic markets exceed the political grasp of any single nation state (…). As a result, for a given political jurisdiction or state actor, global markets are hard to regulate and difficult to control, and such markets have the power to frustrate or constrain public policies. Countries are vulnerable to economic interdependencies that they cannot govern."

interactions related to global norm-formation and to local enactment and implementation of norms. The work of Halliday and Carruthers is therefore, in essence, a study of how institutional and legal change results from efforts of policy diffusion.

From a theoretical standpoint, Halliday and Carruthers criticize existing literature – including the works of authors writing under the "world polity theory", the "world systems theory", "postcolonial globalism" and "law and development".[9] The arguments advanced by these four theoretical perspectives criticized by Halliday and Carruthers typically tend to emphasize the domination of local groups by global forces. According to Halliday and Carruthers,[10] analyses appearing in that literature are flawed because authors overlook conflicts and contests *among global actors* and also because they pay no attention to the influence of key players upon the process of norm-formation, namely professionals drawing on their expert knowledge. In other words, Halliday and Carruthers complain that these four approaches to law and international relations (world polity theory, world systems theory, postcolonial globalism and law and development) treat "the global" as no more than "a monolithic black box", ignoring "[t]he battle within the global center", in spite of the fact that such battle is "always won by the center".[11]

The main contribution of the argument elaborated by Halliday and Carruthers[12] is their view of global law as "recursive". By this they mean that stabilization of adopted normative ideas applicable in a given issue area is the result of multiple and reiterative interactions between the global and the local. Such interactions are protracted in time, take place in a dimension which Halliday and Carruthers label "the middle" (of the relation between global and local), and is impacted by asymmetrical fields of power. Out of reiterative interactions between local and global, most often by means of "intermediaries" having the capacity to "bridge the ideological or cultural divide between the global and local",[13] may result several possible discursive normative structures (law on the books) and several possibilities of actual norm implementation (law-in-action). Intermediaries are thus seen as agents that may contribute to enhance the *legitimacy* of the normative outcomes. Halliday and Carruthers therefore derive

[9] Halliday and Carruthers (2009, pp. 5-6).
[10] Halliday and Carruthers (2009).
[11] Idem, ibidem.
[12] Halliday and Carruthers (2009).
[13] Idem, p. 303.

from their analyses the view that global law is a *contingent* – not a necessary – result of multiple and reiterated cycles of strategic interaction among global and local actors. These cycles also involve the crucial role of several kinds of "intermediaries" that, through "diagnostics struggles" and other forms of disagreement (such as ideological divergence or disparate disciplinary visions among professions), influence diversely in different settings the definition and choice among different possibilities of expert articulation of policy prescription and implementation.

This "recursivity" theory of global law projects an image of international politics in which globalization is characterized as "negotiated" among stakeholders, rather than "imposed" by the global center onto the periphery. Although practices of *economic coercion* may be employed in the diffusion of policy – the most notable example being the conditionalities set up by organizations such as the IMF or multilateral banks – according to Halliday and Carruthers other ways of causing legal reform to be adopted in different countries are preferred by major global actors.[14]

Indeed, one of the main general "findings" of the work of Halliday and Carruthers is that, given the possibility that local forces will resist and "foil" strategies through which global actors attempt to export policy and laws, "globalization must be negotiated, not imposed."[15] From their discussion, Halliday and Carruthers also draw the conclusion that the many normative and institutional outcomes (global law on the one hand, and local laws and their implementation, on the other hand) arising from intermediation reveal varieties of possible institutional arrangements and normative structures which highlight the inherent *indeterminacy of law* and the possibility of *varieties of capitalism* in the global North and elsewhere.[16]

2.2 – TLO Theory

The book published by Halliday and Carruthers in 2009 was empirically focused on the construction of a global law of corporate insolvency, whose general "model" became UNCITRAL's 2004 Legislative Guide on Insolvency. The ideas and

[14] These alternative ways include general persuasion (e.g., the organization of conferences for professional and/or civil society activists on a theme of policy reform), incentives (e.g., technical assistance) and the modeling (creation a model laws by international organizations) of reform. Idem, pp. 14 and 366.

[15] Halliday and Carruthers (2009, p. 422).

[16] As put by Halliday and Carruthers (2009, pp. 423-424), "the possibility of varieties of capitalism and varieties of law should come as no surprise. It is obvious that distinct varieties of capitalism exist among advanced economies in North America and Western Europe, and it seems likely that further varieties may be found elsewhere. Variations in the organization of markets correspond to variations in law."

perceptions advanced in the book have quickly spurred further research and academic discussion around the notion of "recursive law" resulting from the interplay between global and local actors.[17] The articles gathered in Shaffer (2013) seek to refine conceptually, and to apply to different empirical instances of policy reform, the ideal of "recursivity" of law along the lines established by Halliday and Carruthers (2009). Halliday and Shaffer (2015)[18] also engage in refining the analytical framework initially developed by Halliday and Carruthers.

Through these subsequent efforts, a theory of "transnational legal ordering" has been advanced. The arguments developed by these recent works seem to converge in the project to construct a comprehensive theory that aims to account for instances of what has been named "transnational legal order" (hence, the shorthand designation, "TLO theory"). As a result, TLO theory has incorporated many of the claims and concepts of the work on the recursivity of law under globalization.

One of the arguments developed by TLO theory authors to enhance the heuristic value of previous insights is the claim that the processes comprised in transnational legal ordering have visible relations with state change and transformation. Thus Shaffer (2013b) points to five dimensions of state change, which he derives directly from the view of law-making and law implementation as resulting from a cross-border, multidirectional process of interaction. [19]

According to TLO theory, besides being implicated in state change, transnational legal ordering also involves the interplay of different kinds of norms, spanning from privately created codes of conduct, foreign legal models propagated by international organizations, hard law, soft law, of a bilateral, regional or multilateral nature, constructed by state and/or private actors. The interplay of these different kinds of norms, moreover, presupposes communication (direct and/or indirect) between

[17] See the contributions by Gregory Shaffer, John Campbell and Glenn Morgan to the Society for the Advancement of Socio-Economics (SASE) 2010 Annual Meeting, Philadelphia, USA, published in Shaffer *et al.* (2011).
[18] This is the introductory chapter to Halliday and Shaffer (eds., 2015).
[19] See Shaffer (2013a) and Shaffer (2013b).

individuals and also between them and organizations, including private, mixed and public ones.[20]

Halliday and Shaffer[21] further elaborate and refine TLO theory. They make clear that their conception of law (i) incorporates ideas drawn from legal realism (as Karl Llewellyn's notion of non-binding, "incipient law", that may develop into binding law), (ii) encompass hard and soft law, (iii) may be enacted by private and/or public bodies, (iv) often conflate power and reason and (v) carries a practical authority commensurate with the degree legitimacy of its mode of production.

In their effort of refinement of previously elaborated ideas, Halliday and Shaffer define a TLO as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jursdictions".[22] Moreover, they neatly differentiate conceptually "transnational law" (which is the law of transnational legal orders) from Westphalian international law, as well as from "global law". Whereas the coordinates of the Westphalian juridical system have been blurred in recent decades, the proposed notion of "global law" remains misleading since supranational laws often are not truly global in their reach.

Halliday and Shaffer also clearly and expressly distinguish the concept of TLO from notions related to competing theoretical frameworks, namely: "regime theory", "world polity theory" and "global and transnational global pluralism". Thus the main differences between regime theory and TLO theory is that the former remains state-centric, excludes interactions of domestic politics with international processes and fails to deal with law directly with, or in ways that avoid oversimplification of, legal phenomena and ideas. TLO theory contrasts with regime theory in all those aspects, since "recursivity" is actor-centric, looks at the interactions between domestic and international politics, and also takes into consideration, in elaborate terms, the complexities of legal ideas and practices. The distinctions between TLO theory on the one hand and world polity theory and global and transnational legal pluralism, on the

[20] These five dimensions of state change are: (i) changes in substantive law and practice, (ii) changes in the boundary between state and market, (iii) changes in the institutional architecture of the state, (iv) changes in professional expertise and in the role of expertise in governance and (v) changes in associational patterns and normative frames related to transnational monitoring, surveillance and reporting practices. See Shaffer (2013a).
[21] Halliday and Shaffer (2015).
[22] Halliday and Shaffer (2015, p. 5).

other, refine earlier criticisms developed by Halliday and Carruthers (2009) as already mentioned above.

Moreover, TLO theory parallels, but remains distinct from, the ideas encompassed by the "global administrative law" project, led by scholars attached to the New York University Law School.[23] TLO theory addresses more than administrative law principles, which have remained the focus of discussions on global administrative law. On the other hand, TLO theory mixes positive and normative analysis, in its efforts to gauge implications raised by empirical analysis. Global administrative law scholars, in contrast, are intent on assessing existing instruments of national administrative law to aid in improving the accountability of global governance mechanisms.[24]

In addressing the "formation and change of TLOs", Halliday and Shaffer (2015) recognize that transnational law-making does not exist constantly and is not a continuous process. Hence they propose that "facilitating circumstances" and "precipitating conditions" are elements that may trigger recursive cycles of norm formation and implementation until "settlement" (stabilized institutionalization) is reached.[25]

With respect to "settlement" or "institutionalization" of TLOs, Halliday and Shaffer (2015) indicate that, once a process of recursive cycles of actor collaboration and/or confrontation at different levels (transnational, national and subnational) is under way, it may lead to the formation of a TLO, which may at some point in time become a more stable institution. But they recognize that different degrees of stability may be reached in different circumstances.

Thus TLOs are described as either "more", or "less", settled according to whether the meaning and practical import of relevant norms is more, or less, stabilized in institutional practice, leading to various possible situations of "concordance" (concordance, which may be high or partial; and discordance) of norms across levels (transnational, national, subnational) of interaction. Also, Halliday and Shaffer[26] explore different possibilities of "alignment" among ways in which actors relying on different

[23] See Kingsbury, Krisch and Stewart (2005).
[24] Cf. Shaffer (2013a, p. 10).
[25] Halliday and Shaffer (2015, pp. 32-35).
[26] Halliday and Shaffer (2015).

presuppositions (including ideologies, cognitive practices and strategic interests) construe behaviors and thus frame issues. Therefore, according to them, there may be correspondence of a TLO with an underlying issue, multiple TLOs may correspond with parts of an issue, or there may be non-alignment, or yet "competitive or antagonistic" alignment among actors' views on how issues should be framed, what the problems to be confronted are and what should be considered as desirable reforms. The crossovers of different possibilities of norm "settlement" with different modes of "alignment" generate several possibilities (type and pace) of institutionalization of TLOs.

The picture of order-formation that TLO theory develops is multifaceted and context-bound, since it proceeds from empirical observation of actual practice and includes many levels of discourse and action that become interwoven, many kinds of actors, different kinds of participants to a non-continuous and contingent process of norm formation and institutional change. Moreover, TLO theory incorporates a concern with how power and resistance strategies become enmeshed with discourse and procedures of intermediation at play in the formation of TLOs. The theory of TLO formation also contrasts in interesting ways with, and provides a promising alternative to, other theoretical perspectives that miss out on several of the aspects of international and local politics incorporated into the very notion of a TLO. For all these reasons, TLO theory is a highly attractive and promising framework of analysis, corroborated by its application to empirical work that has begun to emerge.[27]

However, TLO theory itself so far seems to have neglected how certain economic relations, which are kept largely secluded from the arenas of actor-centered "intermediation", have an important impact on the very processes by which "order" is formed and transformed in many countries and among them. This topic will be developed below.

[27] See empirical chapters in Shaffer (ed.) (2013).

3 – THE BRAZILIAN ATTEMPT TO SUBJECT MONETARY POLICY TO INTERNATIONAL LEGAL COORDINATION

3.1 – The Global Economic Context

As is well known, in the aftermath of the global economic and financial crisis of 2008-2009, several governments around the world adopted economic policies to prop up their national economies, including fiscal and monetary stimuli. On the monetary side of economic policy, beginning in 2008, a coordinated action by the central banks of Canada, China, the euro area, Sweden, Switzerland, the UK and the U.S. was rolled out to cut short-term interest rates. Subsequently, with rates approaching the so-called "zero lower bound", central bankers began seeking policy alternatives.[28]

Fiscal policy measures were also adopted. According to a study by the International Labor Organization (ILO), the size of fiscal stimulus among the G20 countries in the months that followed the collapse of the Lehman Brothers bank reached $2 trillion, amounting to about 1.4% of the world GDP.[29] In the U.S., a major package of fiscal stimulus was structured under the American Recovery and Reinvestment Act, adopted in 2009. But authorities were not satisfied that *fiscal* measures would be sufficient to impart enough momentum to economic recovery. As highlighted by the chairman of the Federal Reserve, Ben Bernanke, in an important speech he gave at the London School of Economics in 2009, "fiscal actions are unlikely to promote a lasting recovery unless they are accompanied by strong measures to further stabilize and strengthen the financial system."[30] Among the "strong measures" mentioned by Bernanke, he referred specifically to the removal of "troubled assets" from financial institutions' balance sheets through public purchase of such assets.

Bernanke's reference to "public purchases of troubled assets" is key to much of what economists have called "unconventional monetary policy", which includes prominently a policy that became known as "quantitative easing" (QE). As indicated by Bowdler and Radia, QE essentially involves "large-scale asset purchases financed by the issuance of central bank money".[31] The Federal Reserve Bank, the Bank of England, and the Bank of Japan have put in place programmes of such large-scale asset

[28] Cf. Bowdler and Radia (2012).
[29] International Institute for Labour Studies. (2011).
[30] Bernanke (2009).
[31] Bowdler and Radia (2012, p. 604).

purchases. But the central banks of the U.S. and of England have moved beyond the more conventional practice of purchasing short-term government securities – the basis of Japan's QE from 2001 to 2006 – and have targeted "longer-dated gilts, as well as private-sector assets, including corporate bonds and mortgage-backed securities".[32]

3.2 – The Brazilian Stance on "Currency War"

It was in the context of enhanced monetary flows crucially influenced by unconventional monetary policy, including QE, that Brazilian Finance Minister, Guido Mantega, began complaining against what he termed "currency war" in September 2010.[33] In referring to "currency war", Mantega was essentially using a catchphrase that conveyed the concerns of Brazilian industrialists with the rapid reduction of their capacity to export, resulting from the effects of QE on the price of the dollar. There was the perception that the combination of low interest rates with "issuance of central bank money" by the U.S. caused an increased inflow of cheaper dollars in emergent markets and an appreciation of local currencies.[34] In this view, cheaper dollars hurt exports and also offered an incentive for governments in emerging markets to adopt protectionist measures in trade and financial policies.

By the end of 2010, the Brazilian National Confederation of Industry (NCI), in fact, made clear that the "currency war" had become the third most important issue for major Brazilian industrialists, topped only by their concern with high taxes and cut-throat competition.[35] In 2011, the chairman of the NCI pressured the government for policy changes, requesting "urgent measures" to stop the fall of the value of the dollar.[36] A report commissioned by the Federation of the Industries of the State of São (FISSP) Paulo also made explicit that analysis of exchange rate data indicated exchange rate depreciation would result in significant increase of the GDP per capita.[37] Moreover, an article published by the chief economist at the FISSP[38] insisted that a dangerous process

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[32] Idem, p. 607. Bowdler and Radia (2012) point out that, besides 'QE' and the instruments just mentioned, unconventional monetary policy comprises also a variety of "liquidity operations" and measures of "credit easing", all of which provide or facilitate the flow of funds throughout networks of financial institutions and markets.
[33] See Financial Times (2010).
[34] As indicated in a background paper published by the IMF on the practice of unconventional monetary policies, foreign exchange markets have reacted to announcements made by U.S., UK, Japan and euro-area authorities that QE would be adopted in their countries. See International Monetary Fund (2013, p. 45, figure 15).
[35] G1-Valor OnLine (2010).
[36] Folha de São Paulo (2011).
[37] Toneto Junior *et al*. (2013).
[38] Fonseca (2010).

"deindustrialization of Brazilian exports" was taking place: a fall in the exports of manufactured products as a share of total exports. In his article, the chief economist of FISSP characterized such deindustrialization of exports as a direct result both from Chinese exchange rate misalignment and from "the choice made by the U.S. of dumping more than 600 billion dollars in the economy (quantitative easing 2)".[39]

The controversies underlying assessments of the international impacts of unconventional monetary policy have lingered on. Academic economists joined discussions in specialized journals as well as through op-eds published in newspapers and blogs. Thus, for example, Pedro Rossi, a professor of economics from a prestigious Brazilian university (Unicamp), rebuked arguments of renowned American economist, Paul Krugman, on the matter of "currency wars". According to Rossi, the phrase "currency war" was not a misconception.[40] Using the phrase to describe current facts was not a silly gesture of Brazilian authorities (as was apparently suggested by Krugman).[41] The phrase, argued Rossi, actually "laid bare the disfunctionalities of the international monetary system and its asymmetrical character". Rossi insisted that the language used by Brazilian authorities aimed at highlighting the fact that the international monetary system is "hierarchical and dysfunctional" and that it works to the detriment of emerging economies, which have to "bear the effects of the monetary policies of the center". Rossi's conclusion was that authorities in emerging economies were justified in adopting "defensive measures" (e.g., a tax on cross-border capital flows) to offset the impacts of monetary policy pursued by the countries in the center.[42]

On the diplomatic front, the Brazilian government developed a strategy under which the issue of trade-related aspects of exchange rate policy would be officially taken to the World Trade Organization (WTO).[43] In principle, the idea was to transform

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[39] Fonseca (2010).
[40] Rossi (2014). Cf. Krugman in The New York Times (2013).
[41] See Rossi (2014). According to Krugman, "currency war" is a nonissue. In his own words: "OK, people have been asking me where I stand on the "currency war" issue. My answer is that it's all a misconception, and it would be a very bad thing if policy makers take it seriously." See Krugman in The New York Times (2013).
[42] Rossi (2014). As one would expect, what the "true" economic facts are about cross-border influence of QE has remained to a certain extent a matter of controversy. Brazilian academic economists have often sided with the view that unconventional monetary policy adopted in the global North is detrimental to economic interests of industries in the global South. See, e.g, Prates and Cunha (2011). On the other hand, a team of economists of the Brazilian Central Bank has resorted to intensive use of models (statistical tests) to advance the notion that QE has had "positive effects" on the Brazilian economy. See Central bank of Brazil (2013).
[43] See World Trade Organization (2011). See also Pereira and Allard (2012).

the discussion about the links between monetary policy and trade policy from a purely *political* into a *legal* argument and eventually progress toward norm enactment and implementation.

The Brazilian proposal was presented to the WTO in 2011. It outlined two "pillars" by reference to which institutional action in the WTO should be organized. Activities of the first pillar would be aimed at fostering discussion based on a review of relevant economic theory and case studies that addressed the issue of the relationship between exchange rates and international trade. As stated in the Brazilian proposal, Brazilian diplomats were convinced that "exchange rates do influence, in some cases significantly, the foreign trade performance of any given country". [44] So in order to consolidate this view institutionally, they proposed that the WTO's Working Group on Trade, Debt and Finance should produce a review of specialized theory and empirical evidence.

The second pillar was intended to put in motion a process of elaboration of the meaning and practical reach of what is known as the "coherence mandate" embedded in the Marrakesh Final Act of 1994. This mandate states that "[g]reater exchange rate stability, based on more orderly underlying economic and financial conditions, should contribute towards the expansion of trade, sustainable growth and development, and the correction of external imbalances."[45] Moreover, under the coherence mandate, the WTO must "pursue and develop cooperation with the international organizations responsible for monetary and financial matters". The Brazilian proposal was, in short, that the WTO should elaborate a more detailed legal meaning of the "coherence mandate" as a way of beginning a process of more effective international coordination between monetary and trade policy.

Whatever the merits of these proposals, the efforts of Brazilian diplomats failed. Major global powers, including China, were not in favor of further developing discussions of trade-related aspects of monetary and exchange-rate policy in the WTO. The prevalent view was that such matters should be discussed within the IMF.[46]

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[44] See World Trade Organization (2011, p. 2).
[45] See World Trade Organization (1999).
[46] See World Trade Organization (2011). See also Pereira and Allard (2012).

4 – CROSS-BORDER TRANSMISSION OF MONETARY IMPACTS AS A BLIND SPOT IN 'TLO THEORY'

4.1 – The Emergence of Global Finance

A theory of "recursive law", subsequently refined into "TLO theory", is supportive of this basic view about how institutions and policies change across the world today. The conflicts between the Brazilian and other interests around trade-related aspects of monetary policy, however, seem to defy explanations provided by the theory of "recursivity" of law, incorporated into TLO theory.

The question of whether the Brazilian attempt to subject monetary and exchange rate policy to international coordination was legally warranted is not at issue here. Rather, it is the question of whether the analytical framework of TLO theory is appropriate to be employed in the investigation of the concerns of Brazilian industrialists and policy makers, which they attempted to capture under the term "currency war".

Contrary to what is suggested by TLO theory, the transformation of order by means of cross-border monetary impacts does not result from "negotiated" normative materials and explicitly designed legal reform. In fact, cross-border monetary and financial relations have become largely secluded from contestation and hence from arenas of TLO formation and explicit legal reform that result from a process of negotiation. An account of how "free" global finance has grown beyond the reach of regulation typical of "embedded liberalism" that characterized the international post-World War II settlement, with its crucial directive that proscribed free speculative cross-border capital movements, helps to clarify this point.

As indicated by Helleiner,[47] after an international settlement was reached at the end of World War II, under which speculative cross-border capital movements remained "illegal" because of the risk of economic disruption they were associated with, international economic accommodation led to corrective devaluations across Western Europe in 1949. This helped the creation of the European Payments Union (EPU) in 1950. As a mechanism of coordination of payment systems, the EPU was instrumental

[47] See Helleiner (1994).

in strengthening the balance-of-payment position of countries in the region and was part of the "cautious move to European dollar convertibility".[48]

Further steps in that direction were: (i) the reopening of London's foreign exchange market in 1951, (ii) the permission granted in 1953 to banks of EPU member-countries to deal in other countries' currencies, and (iii) the reopening in 1954 of London's commodity markets in standardized commodities (as grain and gold). These reforms and policies helped bring Western Europe close to market-based dollar convertibility by 1955. Before convertibility was achieved, some extra time was needed by a few governments to accumulate enough monetary reserves that could be used to stem speculative movements of capital. Thus many governments only agreed to restore the convertibility of their currencies with dollars after balance-of-payment positions had strengthened in 1958.

The conditions described above provided the institutional context in which the so-called Euromarket flourished in the 1960s. Although the changes indicated above brought a degree of freedom to private operators not seen in decades, states continued to be wary of disruptive cross-border capital movements. The uneasiness of public authorities was due their perception that speculative capital movements could affect exchange rate stability and trade relations, restricting thereby policy autonomy. [49] This is why states continued to adopt direct and indirect capital controls and also schemes known as "offsetting finance". The latter involved the provision of IMF funds to offset capital movements (for example, through the General Arrangements to Borrow, created in 1962) and the provision of short-term credits and swaps between major central banks, coordinated through the Bank of International Settlement (BIS), also to offset speculative capital movements.[50]

The greater freedom of private operators since the 1960s, however, encouraged the growth of speculative capital flows beyond the capacity of available schemes to offset them. In other words, there was "increasing inability of unilateral capital controls to handle speculative flows". [51] Yet, the U.S. remained opposed to the creation of monetary cooperation schemes (cooperative capital controls) in the early 1970s and

[48] Idem, pp. 67-77.
[49] Idem, p. 91.
[50] Idem, pp. 96-97.
[51] Idem, p. 103.

even announced in 1973 that it would abolish its own capital control program in 1974. The U.S. also opposed a proposal to recycle petrodollars through the IMF, based on criteria aimed at insuring prudent and equitable allocation of these funds.

According to Helleiner, the position of U.S. officials against monetary cooperation and in favor or market freedom throughout the 1970s reflected their interest in using speculative capital movements to induce policy reforms in other countries. As expressed by Helleiner, the U.S. "perceived speculative capital movements as an important central tool in [its] strategy of encouraging foreigners to absorb the adjustment burden required to correct the country's large current account deficits."[52] As described by Helleiner, the U.S. strategy in the 1970s context could be captured in the notion that "[m]arket pressures would achieve what direct negotiations could not: both the revaluation of the currencies of Western Europe and Japan and an expansion of their economies".[53] This was an instance of what Helleiner (adapting a term used by Susan Strange) calls "market-based 'structural' power".[54] Of course, the subsequent "triumph of neoliberalism",[55] which owes much to the propagation of reform "scripts" by international financial institutions, has had as a core element the exercise of the kind of "market-based structural power" mentioned by Helleiner.

This basic element of the neoliberal reform agenda – namely, market-based structural power – did not decline after the onset of the 2007-2008 crisis. In the areas of global finance and monetary relations, the exercise of market-based structural power requires seclusion of financial and monetary institutions and practices from contestation. This is the reason why *de facto* fluctuation, subject only to nationally (not globally or transnationally) defined normative parameters, has become the standard practice in the area of exchange rate policy.

On the other hand, besides *ad hoc* bilateral relations, the more or less improvised G-7 and (more recently) G-20 summits, and also the rather informal, "clublike" meetings of central bank senior executives and officials in the BIS, there are scant venues to build effective coordination of monetary policies of different countries in the

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[52] Idem, p. 112.
[53] Idem, p. 112.
[54] Idem, p. 114. "Market-based 'structural' power", proposed by Helleiner, is an idea similar to that of "monetary power", used by Kishner (1995).
[55] See Gilpin, (2001, pp. 309-316).

world today. Whatever role policy makers may have attempted to carve out for soft law as a means to discipline – on the basis of "prudential regulation" – what some academics envision as a global financial "system",[56] a substantial degree of global or transnational institutionalization of policy in that area remains more an idea than a tangible reality. Hence the difficulty in describing an existing, normatively settled TLO in the area of cross-boundary financial relations – what Helleiner (2015) has termed (with many caveats) "transnational financial legal order" (TFLO).[57] Moreover, the financial connections of monetary policy and exchange-rate policy with privately organized (and often insufficiently regulated) financial markets – which include opaque practices known as OTC markets, dark pools, algorithmic trading and shadow banking – make the challenge of legal regulation all the more difficult.

If global actors are sometimes motivated to jump into action and produce global law or TLOs – as was the case of a global law of corporate insolvency discussed above – after the Bretton Woods accord, they have lacked the necessary drive to harness the energies of financial markets and of international monetary relations in order to produce new norms conducive something like a post-Bretton Woods legal order of monetary and financial relations. The shift to more or less informal efforts to disseminate globally standards of prudential financial regulation[58] was more a failure than a success in establishing and settling some kind of TLO.

Quite naturally, the need of cooperation in this field is clearly perceived by many important actors. As remarked by Bernanke in his 2009 speech at the LSE, for example, "a clear lesson of the recent period is that the world is too interconnected for nations to go it alone in their economic, financial, and regulatory policies". But the fact remains that the U.S. Secretary of the Treasury, Timothy Geithner, in that same year, rejected the European idea to engage in an effort to create a global financial regulator.[59]

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[56] See, e.g., Brummer (2012).

[57] As expressed by Helleiner (2015, p. 232): "It is difficult (...) to describe the TFLO as having become highly 'institutionalized' (in the sense that [Halliday and Shaffer] use the term) not just because of ongoing changes in the normative content of the order at the transnational level. [There are also] substantial challenges relating to normative settlement and compliance at the national level. Difficulties in encouraging compliance with the TFLO are not new, but they have been intensified in the wake of the 2008 crisis by: the expanding functional scope of the order; the diffusion of financial power in the state system; the widening of membership in key governance institutions; and heightened domestic politicization of financial regulatory issues. These developments have undermined the effectiveness of a number of tools that have encouraged compliance with the TFLO's soft law in the past".

[58] See Helleiner (2015).

[59] Financial News (2009).

It was a fundamental refusal by a hegemon to cooperate. And effective cooperation never took off in the area of global financial and monetary governance.

4.2 – Analytical Limitations of TLO Theory

TLO theory, which has grown out of a "recursivity theory of law", certainly aspires to have a say in all issues related to transnational governance-building, but it remains limited in its ability to analyze crucial matters of global or transnational *financial* governance. As already indicated in section 4.1, characterizing the existence of a "transnational financial legal order" (TFLO) is certainly spreading too thin the categories of TLO theory. Several aspects of the means through which institutional and legal change takes place as a consequence of cross-border transmission of monetary impacts inevitably remain outside of the analytical scope of TLO theory. Some points about this important limitation of TLO theory will be briefly addressed below.

- Halliday and Carruthers note that the focus of their analysis has special emphasis on "the middle" (of the relations between the global and the local). Their research effort is largely oriented to render explicit what the processes of "intermediation" between global forces and local structures are, how they work and what practical consequences originate from them. In fact, as they explicitly indicate, a substantial part of their book – the whole of Part III – "is an exercise in 'mapping the middle'" in order to "explain the contingency of globally induced law reforms".[60] Halliday and Shaffer also make clear that TLO theory is interested in new forms of social connection forming "processes [that] spur the development of intersecting, transnational economic, social, regulatory, and judicial networks" in which participants "act as intermediaries between national and transnational governance arenas". Yet, paradoxically, TLO theory has no analytical equipment to look at "the middle" of processes that connect, on one end, operations whereby central banks in the global North purchase billions of dollars' worth of mortgage-backed securities, and, at the other end, industries in the global South pile up their manufactured products and face the prospect of disinvestment, while workers lose the jobs. Indeed, "the middle" between "powerful" central banks at the global center and local economies around the world, in the case of QE and cross-border transmission of monetary impacts, does not involve "intermediation" in the sense the word is used in TLO theory analytics, but does require instead the deployment *market-based financial strategies*, which are many and diverse.

[60] Halliday and Carruthers (2009, p. 293).

- TLO theory, as was seen above, is "actor-centric", in contrast to a close competitor, regime theory, which has remained "state-centric".[61] But policy reforms or adjustments occurring as a result of cross-border monetary impacts cannot be analyzed under an actor-centric approach. The process that connects *the global* (global markets) and *the local* (local markets and local systems of public finance) has no "actors". Instead, "the middle" of what connects the two extremes of cross-border transmission of monetary impacts has only flows of price signals and coded information in a structured context of rules, not all of which are publicly known. (In fact, such rules very often are not even legally knowable, due to their private or secret legal status).[62]

- TLO theory is all about the analysis of "migration of law across borders".[63] But cross-border monetary impacts do not imply such migration of law across borders. It typically takes place in the absence of any cross-border "migration of law". Arbitrage opportunities that become available to speculators are enough to cause devastating cross-border monetary impacts.

- TLO theory has incorporated the idea of "recursivity" of law-making and implementation as a central feature of its framework. It therefore describes "transnational legal processes" as "the processes through which [transnational legal] norms are constructed, carried and conveyed, always confront national and local processes, which may block, adapt, translate or appropriate a transnational legal norm and spur its reassessment".[64] In contrast to these features of transnational legal processes, institutional or policy changes resulting from cross-border monetary impacts do not involve discursively intermediated and contested mutual adjustments between local law and some "model" global (or transnational) law. So there isn't a norm to be blocked, adapted, translated or appropriated and elicit reassessments. There are financial impacts that spread through certain financial channels and eventually translate into outcomes in the real economy, often spurring policy and legal reform.

- TLO theory posits that a series of recursive cycles of norm formation come into play and may eventually reach some degree of "settlement". As put by Shaffer, "[s]ome sort of settlement may occur that persists over time until that settlement is destabilized". [65] In the case of institutional change resulting from cross-border capital flows, there is no norm to be

[61] Halliday and Shaffer (2015, pp. 22-23).
[62] The transparency of credit rating agencies' rating methodologies would be an example. See discussion in White (2010).
[63] Shaffer (2013, p. 1).
[64] Shaffer (2013, pp. 1-2).
[65] Shaffer (2013, p. 14).

"settled". Change is not the outcome of a history of reiterative adaptation of some discursive background (a norm), it is only an absolutely contingent reaction to price swings.

- Recursivity in TLO theory may involve foiling, resistances, adaptations of a model norm and associated scripts, all of which contribute to the notion that, whenever there is settlement, it must be regarded an expression of a "negotiated" order. [66] In contrast to this, cross-border transmission of monetary impacts results from *unilateral* action. Generalizing from Helleiner's characterization of the strategy deployed by the U.S. during the 1970s in the area of international financial governance (see above), the exercise of market-based structural power does not leave room for negotiation: monetary authorities of a hegemon unilaterally steer market forces to achieve what direct negotiations are unable to accomplish. Where monetary impacts strike and no venue for cooperative discussion about norms is available, there is no "foiling", no political resistance, no effective contestation. Only recourse to rhetorical protest – of which the phrase "currency war" used by Brazilian authorities is an example – remains available.

It seems clear, therefore, that TLO theory as a set of concepts, ideas and analytical tools produced to enable legal scholars to unpack the middle-ground relations that connect global actors to local groups remains quite limited when it comes to cross-border transmission of monetary impacts. On the other hand, TLO theory remains extremely useful, perhaps crucial, to tackle many issues and processes of contemporary law and institutional change in a revealing and useful way. Yet certainly the heuristic value of TLO theory can be enhanced if its framework is expanded to include new analytical criteria that can be of help in unpacking "the middle" of global monetary and financial relations.

5 – MIXING 'TLO THEORY' AND 'LAEP'

In recent years legal scholars from the global South have begun developing new ideas and insights that incorporate local concerns, but benefit from, and at times

[66] In one of their descriptions of these characteristics of recursivity, Halliday and Carruthers (2009, pp. 29-30) state the following: "Our investigations indicate that ostensibly weak countries can foil hegemonic power. Countries develop repertoires of resistance, weapons of the weak through which they manage to carve out zones of independence form external pressure. In these openings, they deviate and design, reject and adapt, conform and contest as their situation permits. These repertoires (…) reinforce our argument that globalization is contested and negotiated".

converge with, the work of legal scholars from the global North. In what follows, some brief suggestions will be given of how this possibility to promote meaningful convergence of research agendas might be explored with respect to TLO theory and new legal approaches to policy reform developed in Brazil since the second half of the first decade of the present century.[67] Specifically, the paragraphs below will argue that ideas and analytical tools taken from the Legal Analysis of Economic Policy (LAEP) approach[68] can be usefully blended into TLO theory to enlarge its ability to probe into issues related to (cross-border) transmission of monetary impacts.

There are several basic ideas proposed by the LAEP approach which provide elements of a framework to be employed in the analysis of economic policy and practices. Such ideas are intended to help legal scholars address several aspects of economic policy-making, including what comprises "the middle" of monetary and financial relations of the global with the local, which was shown to be a "blind spot" of TLO theory in its current form. Some of the main ideas of the LAEP approach are the following:

(i) Markets, including financial markets, should not be taken as abstract entities or "black boxes", but rather as empirical practices, with distinct rules that often regulate matters such as who can be a market participant, precisely what kinds of procedures count as valid exchanges, what is allowed to be exchanged in a given market, etc.

(ii) All markets are embedded in nonmarket institutions, such as states, courts, professional associations.

(iii) But markets themselves have an "institutional" fabric of their own, mainly formed by partially overlapping (hence discontinuous) networks of contracts, formed by short-term contracts and/or longer-term contracts in the sense that contractual performance may be of longer or shorter duration, or parts of performance may be deferred in time.

(iv) "Contractual contents" are normative stipulations with legally binding force. As such, normative stipulations structure relational expectations and are a guide to relational performance.[69] Contractual contents are either privately negotiated by the parties to a contract, or "injected"

[67] See Castro (2014).
[68] Castro (2014).
[69] Relational expectations refer to expectations that individuals and groups form regarding the actions or attitudes (performance) of other individuals or groups or organizations.

into contracts by law from public deliberation: mainly from the legislative, administrative (decisions and policies adopted by regulatory agencies) or judicial processes, or a combination of them.[70] The binding force of contractual contents is deemed a consequence of legally valid contract formation, amendment or termination.

(v) Contractual contents will be considered "public-interest contents" if they are "injected" from public deliberation, while contractual contents that are privately negotiated are deemed "private-interest contents".[71]

The LAEP approach also proposes that all economically relevant contracts have two types of clauses: the "utility clause" (U clause) and the "monetary clause" (M clause).[72] The U clause refers to normative stipulations regarding utilities (goods and services). The M clause records normative stipulations about relational performance with respect to money and financial assets. Real-economy contracts are those contracts in which the contents of the U clause are real-economy utilities (goods and services). By contrast, *financial* contracts are those contracts in which contents of the U clause are either money or financial assets.[73] In *nonfinancial* contracts, the normative stipulations regarding real-economy utilities comprise the contractual contents of the U clause, while the contents of the M clause are stipulations bearing on money or other financial contracts or both.

Contracts can be combined in "portfolios". Often portfolios are professionally-packaged contractual aggregates formed by clusters of contracts interconnected by strategically designed intercontractual linkages that presuppose the legally binding force of contracts. Portfolios are supposed to generate consumption opportunities and/or opportunities of investment. They correspond to collections of contracts which are present in empirically existing contractual networks but are "earmarked" according to some investment strategy that designs and manages intercontracual linkages. Porftolios are carriers of combinations of normative stipulations and hence relational expectations

[70] As put by Castro (2014, p. 47):"[I]in contemporary market economies no business can produce or sell, say, pharmaceutical drugs, automobiles, smart phones or television sets without a host of regulations (in areas such as public health, environmental protection, consumer protection and so on) coming into play. All such policies add public-interest contents (…) and can only be suppressed or modified by means of public procedures subject to public legal oversight: they cannot be changed or cancelled by means of private contractual bargaining."

[71] See Castro (2014).

[72] Both the utility clause and the monetary clause are proposed as "ideal-typical" clauses to be used as analytical tools.

[73] Financial assets are themselves financial contracts.

regarding both utility contents and monetary contents of contracts. Some will be private-interest contents, others will be public-interest contents.

In contractual terms, monetary impacts are changes in *monetary contents* of a contract or portfolio through *interporfolio relay*. This consists in the practice through which a received monetary impact originated from changed relational performance in portfolio "A" and affecting a contract of portfolio "B" is deflected in the form of changes in relational performance in other contracts of the same portfolio ("B") which cause changes in monetary contents of a third portfolio ("C"). Thus, for example, if the price of the energy bill of my business goes up, I can raise the prices of commodities I sell.

One of the main challenges of affording "protection" through law to portfolios that stand as the institutional support of fruition of fundamental rights is that price signals travel through contractual networks by means of *interportfolio relay*. Although specific price signals may affect some portfolios, not others, the price of money and of financial assets (interest rates) spreads quickly and pervasively throughout contractual networks.

It is important to understand that price movements may come as response to changes in private investment strategies, but they may also result from public policy decisions. Money market interest rates upward or downward movements occur largely in response to monetary policy decisions. Here is a stylized description of this process:

> Since, in their ordinary operation, banks engage in transactions in the interbank market [in the U.S., the so-called federal funds operations] and decide where to allocate funds – whether in government securities carrying a given interest rate or some other asset, such as short-term interbank credits etc. – the base rate [sometimes also called policy rate] is contractually transmitted to all other contracts banks engage in and thus to consumer credit, corporate credit and so on. [74]

In light of this example, it becomes clear that both tax charges (or tax credits) and policy-induced variations in interest rates (the "base rate" or "policy rate") are public-interest monetary contents "injected" into contracts through the implementation of economic policies. Thus such public-interest monetary contents will vary according to tax policy, monetary policy and financial regulation.

[74] Castro (2014).

Moreover, it also becomes clear that large-scale speculative or policy-induced price movements may – by means of *interportfolio relay* – "implode" portfolios in affected markets and may indeed throw into disarray a whole national economy. "Implosion" occurs because contractual networks unravel as portfolios cease to generate expected opportunities of consumption and/or investment. This possibility is connected to the fact that, in the areas of financial regulation and monetary policy, public policies may take the form of sets of newly created "structured portfolios" designed to attain certain projected financial results by means of (sometimes cross-border) interportfolio relay. Economic policy and financial regulation can design structured sets of portfolios with several strategically conceived "public-interest contents". And, in many cases, the interportfolio relay affects relational performance in portfolios of foreign economies where the parties to relevant contracts do not match "the public" in the name of which the original policy and regulations were designed at the global center.

Of course, in many instances, the introduction of new policy-based structured portfolios may become a driver of cross-border transmission of monetary impacts. This kind of financial (as opposed to actor-centric) mediation, may then become unidirectional. Figures 1 and 2 below offer graphic representations of two different pictures of transnational legal ordering. Figure 1 refers to the notion of transnational legal ordering as it is conceived under TLO theory in its current conceptual form. An expanded version of TLO ordering would include what is represented in Figure 2: the presence of unidirectional interportfolio relays.

Figure 1 – TLO formation under current TLO theory

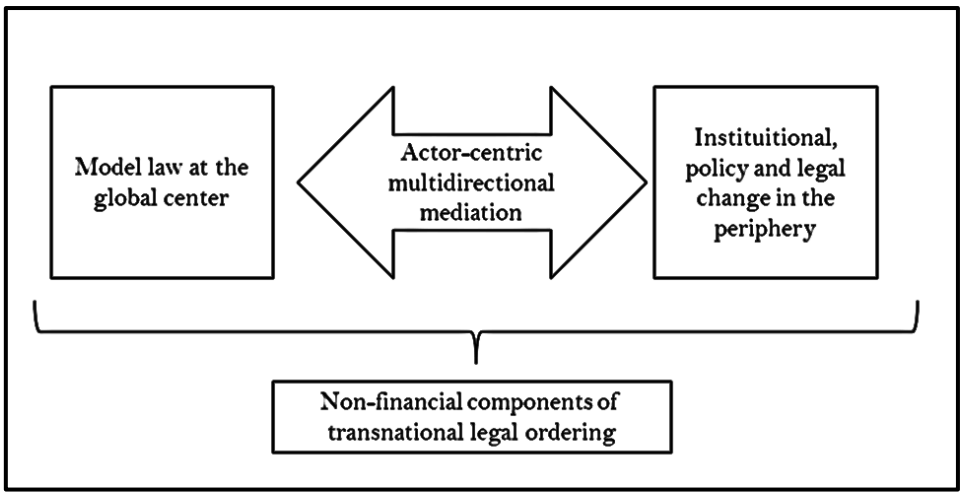
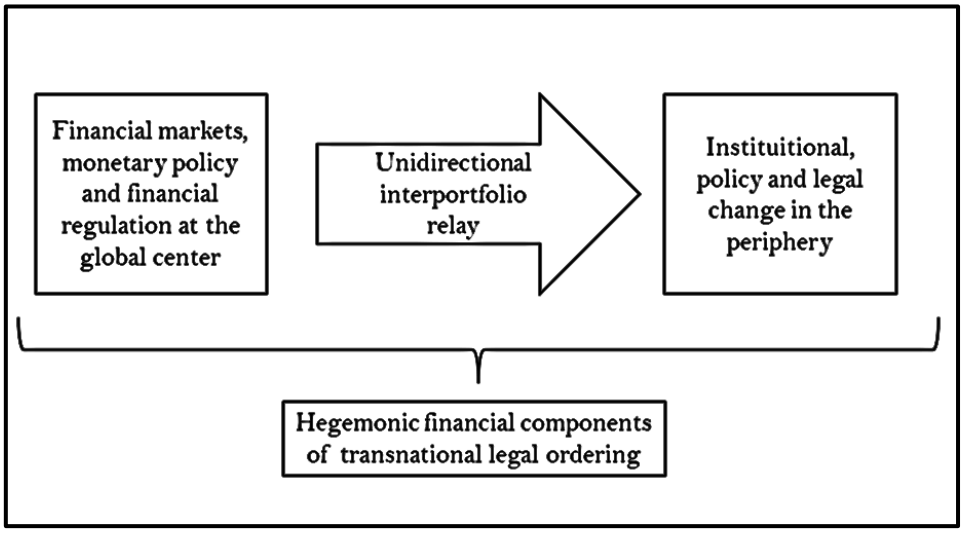


Figure 2 – Elements of TLO formation to be included in "expanded TLO theory"



In the context of transnational legal ordering conceived under an "expanded TLO theory", it becomes relevant to consider that many aspects of technical details of the process by which portfolios are set up are legal in nature. As remarked by Katarina Pistor,

> Lawyers do (...) play a critical role in the world of finance. They help structure new instruments, advise market participants on the legality of their actions and devise strategies for them to minimize the costs of regulatory restrictions. Lawyers also serve as expert witnesses to Congress and work in committees or at regulatory agencies that are charged with developing new legislation or regulations. [75]

Thus, one important conclusion that may be derived from the above arguments is that "intermediation", in the sense the term is used in TLO theory in its current form, should be enlarged to include many new elements derived from analysis of the legal set up of portfolios. Special attention should be given to criteria by which portfolios are "packaged" unilaterally by monetary authorities and to how attendant monetary strategies play out through interportfolio relay.

[75] Pistor (2012, p, 63).

6 – FINAL REMARKS

This paper has described TLO theory as an outgrowth of a theory of recursivity of law. The assessment offered of TLO theory is that it ingenuously elaborates a framework of analysis that is useful to reveal with clarity how norm-making and implementation in the world today follows patterns that cannot be precisely anticipated and may foster the creation of many variations of institutions and policies, with different degrees of practical and conceptual stability and varied degrees of comprehensiveness of given issue-areas. For these reasons, TLO theory remains an attractive set of ideas.

However, the paper also showed that TLO theory in its current form remains limited in its ability to analyze processes through which important policy changes take place and indeed whole programs of governments may be swept out or restricted. Specifically, TLO theory does not seem able to equip legal scholars with tools to develop useful analysis of cross-border monetary impacts, which are an expression of what authors have diversely called "market-based 'structural' power" and "monetary power", and which may be described as the result of interportfolio relay flowing from portfolios strategically structured by monetary authorities.

Therefore, suggestions were made whereby elements from the "legal analysis of economic policy" can be added to TLO theory and produce an "extended" version of it. An "extended TLO theory", it is suggested, may be capable of enabling legal scholars not only to canvas processes of "mediation" of transnational legal ordering that are actor-centric, but also "unpack" other specifically monetary and financial processes that currently lay outside the purview of most analytical approaches of norm formation in the context of globalization.

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