'This is a book which not only teaches how integral legal support is to achieving social change but also provides a comprehensive analysis of the concept of justice, as both theory and a practical approach in the wake of the GFC'

Máximo Bomchil
IBA Council Member; Co-Chair, IBA Law Firm Management Committee (2013–2014);
Senior Partner of M & M Bomchil, Buenos Aires

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POVERTY, JUSTICE AND THE RULE OF LAW: the Report of the Second Phase of the IBA Presidential Taskforce on the Global Financial Crisis

Poverty, Justice *and the* Rule of Law

the Report of the Second Phase of the
IBA Presidential Taskforce on the Global Financial Crisis

Edited by
Peter D Maynard, PhD and Neil Gold, LSM, LLM

the global voice of
the legal profession®

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'Despite appearances, deep inside of every human being lies a precious treasure of initiative and creativity waiting to be discovered, to be unleashed, to change life for the better.'

Muhammad Yunus
Nobel Laureate, from his chapter 'Lawyers Can Help Us to Win the War Against Poverty'

'When people across the world agitate to get more global justice, they are not clamouring for some kind of "minimal humanitarianism".'

Amartya Sen
Nobel Laureate, from his chapter 'Global Justice'

'Rights that improve the lot of all or most in society should be distinguished from rights that benefit some at the expense of many.'

Joseph Heckman
Nobel Laureate, from his chapter 'The Viability of the Welfare State'

'Growth in the United States and Europe today is anaemic. It's too low even to provide jobs for the normal new entrants into the labour force.'

Joseph Stiglitz
Nobel Laureate, whose keynote address is summarised in the Report of the IBA Dublin Presidential Priority Sessions.

'We must be the change we wish to see.'

Gandhi

'Injustice anywhere is a threat to justice everywhere.'

Martin Luther King, Jr
Nobel Laureate

'We must find ways to link the Rule of Law with real progress in improving the condition of human kind. We must have some measures to assure that the vast aid, the work of the NGOs, the work of this association has some immediate visible tangible return, so that we can make the case... For us, law is a liberating force. It's a promise. It's a covenant. It says you can hope, you can dream, you can dare, you can plan, you have joy in your existence.'

Justice Anthony M Kennedy
US Supreme Court, opening address, annual meeting of the American Bar Association, 2006.

'Events in Tahrir Square and beyond have sparked optimism about a global democratic resurgence. But at the same time, there is fear of instability and lawlessness. Let us not forget that in 2015, 1 billion people will still be living in extreme poverty. A hard road still lies ahead. Strengthening the rule of law is more important than ever. A legally empowered citizenry is both the guarantor and lifeblood of democracy. Poverty will only be defeated when the law works for everyone.'

George Soros
Founder, Open Society Foundations and Fazle Hasan Abed, chairman, BRAC, a civil society group, *Financial Times,* Opinion page, 26 September 2012.

Introduction

Few contemporary questions for the legal profession are as fundamental as the wellbeing (or lack thereof) of more than one billion people on the planet who are living in poverty. Since the onset of the global financial crisis (GFC) in 2008, the intervening years have been characterised by unprecedented economic volatility and uncertainty about the growth of the global economy and government debt burdens. When the GFC arrived, the poor of the world were already in crisis: crisis is never new to the impoverished in Africa, Asia and the south Pacific islands, Latin America and the Caribbean. The poor had experienced austerity prior to the GFC, in countries such as Argentina. But the events that followed the GFC deepened that crisis; they set back many attempts to escape poverty, propelled people into poverty for the first time, or significantly increased their degree of economic and social inequality, not only in developing countries, but everywhe re.

Corporate governance and responsibility, labour and employment law, pro bono activities, the empowerment of women and vulnerable groups, and the rule of law are not the mainstays of an activist agenda. Rather, they are part of the 'day job' of business lawyers and the daily aspirations of the law for everyone. Fortunately, these demands on the work of lawyers and their firms are increasingly recognised as the new normal. Business lawyers have a professional responsibility to understand the issues and advise clients of the impact on their activities.[1] Their clients have a responsibility to their own interests and to the communities in which they operate to act in ways that promote social and economic wellbeing. Lawyers do well by doing good.

Origin of the Task Force

In a global economy crying out for fresh thinking, lucid analysis and pragmatic optimism, the challenge was to assemble thought-leading lawyers and others who passionately believed that there are smarter ways for the global community to mitigate the effects of the GFC on the poor. Though often invisible to the well-to-do, poverty looms large and overwhelms. Nonetheless, we set out to avoid the perennial danger of doing nothing even though doing something might be problematic. We sought to craft or identify existing, developing and new mechanisms that are both necessary to bring change and at the same time appeal to the self-interest of all stakeholders in a sustainable and improving future.

The theme or mantra of the two-year term of IBA President Akira Kawamura from 2011 to 2012 was 'well-being of the people through the law'. He said: 'When economic hardships intensify, those living in poverty suffer immediately and the most. With no buffer to protect them, the poor risk losing what little they have, including shelter and food. The GFC has taken even the most basic work away from the poor and has driven others into poverty, leaving them with no ready means of recovery. The global legal profession needs to assess and, to the extent feasible, through law reform and legal services provisions, remediate the causes that have led to the hardships encountered by those living in poverty.'[2] The first action was a report on the regulatory failures and weaknesses of the financial system that had contributed to the inception of the GFC; recommendations for reform were given.

Therefore it was no surprise that Past President Kawamura envisaged a second phase of the

1 For example, the Ruggie Guidelines point out the professional responsibility of lawyers to direct attention to the Guiding Principles on Business and Human Rights (see, John Ruggie, 'UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (UNHRC 2011) available at http://ohcr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN. pdf). Similarly, in addition to CSR, lawyers and their firms are called in other fields covered in this book to advise their clients and to shape the law accordingly.

2 See IBA E-News, dated 29 May 2012, on the launch of the second phase of the GFC Project, www.ibanet.org accessed on 8 January 2013.

Presidential Task Force on the GFC. Launched in the second year of his term, this phase was his historic vision – historic because of the direct focus on poverty and the role of lawyers to end or reduce it – and was supported by his successor, President Michael Reynolds, who also gave a fresh emphasis to this subject and improved relationships with impoverished and often inaccessible countries such as Burma.

Past President Kawamura asked that the Task Force focus on the aftermath of the GFC rather than just the crisis itself. Rejecting the notion that lawyers could only point powerlessly to the problems of poverty, he encouraged the Task Force to be forward-looking, to shape and implement change, and to recognise the extreme peril of failing to do so. This project would demonstrate the IBA's interest in making a contribution to society and not only the practice-related issues of its members. Furthermore he believed post-GFC, governments and international institutions should work to encourage countries of the world to behave more humanely. Social equality was an increasingly important driver of political and legal change. Lawyers could and should help to shape that process.

The IBA's Public and Professional Interest Division (PPID) Council and its Chair buttressed that theme. At the opening of the Dubai annual IBA conference, PPID Chair Peter Maynard asked: 'We are "the global voice of the profession", but what are we saying in terms of the big-picture issues of the second decade of the 21st century, such as war and peace, poverty, diversity, human rights, corruption, corporate social responsibility, ethics, pro bono and access to justice, and the rule of law?' At the annual conference in Dublin, he returned to this theme: '(M)ore needs to be done… I am talking about the things that not only have made the IBA good, but will make it great. It is no mystery that the measure of greatness is how much we benefit mankind. Islands of affluence in an ocean of poverty do not make a sustainable or just global economic order. The GFC and the Eurozone crisis have exacerbated the problem of poverty. But… we must continue to question and improve upon the conventional ways of helping poor countries and the poor everywhere.'

Phase Two followed the Phase One work led by the Legal Practice Division on financial regulation. That first phase of the Task Force[3] recognised that current regulation and supervision of the financial industry were weak and unfit to deal with the challenges facing the world economy. In this connection, it reported particularly on developed markets, the actions of which had taken the world to the brink of disaster and calamity in many places, and continues its work.

The 'GFC Phase 2' project was led by the PPID. The overall co-ordination of the project was turned over to the PPID to organise, implement and complete. Phase Two sought to build on the work done in Phase One, where appropriate, and, reporting through this book, directed its attention to the negative impacts of the GFC on those persons least able to manage or counteract them. Inequality was worse as a result of the GFC – the poor were poorer and there were many more thrust into this category. This showed how vulnerable the world's economic system was, and is. Virtually no one warned against it. Economic stability had fallen off a cliff. The downward spiral precipitated by the GFC has resulted in job losses, housing crises, food shortages and generally increased poverty around the world. This devastation of fundamental human needs impacted most on those with little or no capacity to positively influence their circumstances. Indeed, we faced – and some experienced – the prospect of a double-dip recession. The future of many of the world's most vulnerable groups, including women, children, indigenous peoples and other people living in poverty, hung in the balance.

If the GFC had not occurred, quite a number of countries would have been ahead of the millennium development goals.[4] Nevertheless, countries such as Bangladesh were ahead, although they have work yet to do on specific goals, such as infant and maternal mortality. But, this phase was to highlight the plight not just of the poor in developing countries of the world but poor people everywhere, in both developed and developing countries.

3 See, for example, 'Interim report: preliminary views on the financial crisis', April 2010 and 'A survey of current regulatory trends', October 2010, IBA, London.

4 See, eg, www.un.org/millenniumgoals/ and www.undp.org, accessed on 8 January 2013.

The mandate

Phase Two of the Task Force would report on wider social and legal issues that have resulted from, or been highlighted by, the GFC. It would look for solutions to these problems through changes that could be made to the legal arrangements and frameworks reflecting social and economic policy that would serve to improve the circumstances of peoples' lives and avoid the worst and sometimes unforeseen consequences of law and policy in times of financial crisis.

Thus, the goals of the project were to:

(a) review and describe the impact of the GFC on the poor;

(b) assess the impact of the global economic crisis on the modern welfare state and posit ways to avoid or mitigate the negative consequences in the future;

(c) identify and review legislation that may tend to reinforce cycles of poverty in the context of property rights, contract enforcement, labour and employment laws, as well as the impact of austerity programmes, and posit ways to avoid or mitigate such negative consequences in the future;

(d) assess problems facing access to justice, good governance, human rights and civil liberties in circumstances where government changes affect groups such as women, indigenous populations and other marginalised groups, and posit ways to avoid or mitigate the negative consequences in the future;

(e) identify and advocate the ways that the legal profession can improve the prosperity of people throughout the world through legal and justice reform.

As for the report, it was decided that the results of Phase Two would be collected in a book of edited papers to be published by the IBA. It would also compile the contents of the book in a relatively short time frame of less than a year.

The first step was to assemble a Steering Committee[5] to determine how best to carry out the mandate, to choose the experts of the Task Force, to explain the parameters of the exercise to them and provide initial guidance for their work. The Steering Committee consisted of lawyers from both the LPD and PPID. It recognised that the effects of the GFC on poverty were felt in different ways across different countries, sectors, social groups, locations and levels of integration into the global economy. The immediate impacts were transmitted most strongly through unemployment, finance, food, fuel, and austerity measures. These effects have worsened and are still being experienced in many countries and groups. After intensive discussions, a detailed work plan was prepared, especially with the help of Neil Gold, and approved by the Steering Committee, which then identified and engaged experts to carry out each part of it within a limited time.

It was also decided that the programme of the 2012 IBA Annual Conference in Dublin should be examined with a view to identifying particularly relevant sessions that deal with the relationship between the GFC, poverty and the role of law as a neutral, remediating or exacerbating influence on the experience of those in or thrust into poverty. Those sessions were marked in the programme as Presidential Priority sessions. A team of rapporteurs was assembled. Their roles were focused on extracting and reporting on the key content of the Presidential Priority sessions. They gathered and noted the key papers, summarised presentations and discussion found in this volume.

At its meeting at The Hague on 1 June 2012, the Steering Committee recommended to the PPID Council the membership of the Task Force, consisting of the authors who contributed chapters to this book and the two editors.

The PPID Council approved the Task Force, the Steering Committee was dissolved, and immediately after, the Task Force held a meeting in The Hague to launch its work. The experts were asked to look at specific topics in the work plan, with a focus on the role of the lawyers in that sector of the post GFC environment. Some of the experts had expertise in legal and justice reform projects in the context of development and others had broader justice reform, access to justice, pro bono, CSR, employment law and other relevant expertise.

5 The Steering Committee consisted of Olafunke Adekoya, Bernard Bekink, Chris Botha, Adrian Evans, Hendrik Haag (Chair of the first phase of the Presidential Task Force on the GFC), Graeme Kirk, Tim Soutar, Phillip Tahmindjis and the two editors of this volume, Neil Gold and Peter Maynard.

Expert members and authors:

1. Livingston Armytage: Access to Justice: Governance and the Judiciary

Dr Livingston Armytage is a specialist in judicial and legal reform, advising governments, courts and international development agencies on improving justice systems around the world. He is Founding Director of the Centre for Judicial Studies and Adjunct Professor of Law at the University of Sydney.

2. Diamond Ashiagbor: Labour and Employment

Dr Diamond Ashiagbor (BA, Oxford; PhD EUI Florence) is Professor of Labour Law at SOAS, University of London and formerly Reader in Law at University College London and Lecturer in Law at the University of Hull. She researches and publishes in the areas of labour/employment law; equality and human rights; labour law, trade and development. Her previous positions include: Research Fellow in the Institute of European and Comparative Law, University of Oxford and Fellow of Worcester College, Oxford. She has also been a Visiting Scholar at Columbia Law School. Dr Ashaigbor's main areas of research interest are labour/employment law; equality and anti-discrimination law; human rights, equality and multiculturalism; EU market integration and 'new governance'; the law and economics of labour market regulation; labour law, trade and development. She has published widely.

3. Martín Böhmer: Human Rights

Dr Martín Böhmer is a professor and founding and former Dean of the Law School at Universidad de San Andrés in Buenos Aires, as well as Professor of Law at Universidad de Buenos Aires. He is a Senior Researcher and founding and former Director of the Justice Area at CIPPEC (a public policy NGO in Buenos Aires). He is the former Dean of the Universidad de Palermo Law School, and the first Director of its Public Interest Law Clinic. Mr Böhmer received his lawyer degree (Abogado) from the University of Buenos Aires and his JSD and LLM from Yale Law School. He has been published widely.

4. Marius Job Cohen: Property (with Jan Loorbach)

Dr Marius Cohen obtained his Master of Laws degree at the University of Groningen and his PhD at Leiden University. He was a law professor, Dean of Law, and rector magnificus at Maastricht University. He served as State Secretary for Education and Sciences, State Secretary for Justice, and Mayor of Amsterdam. Dr Cohen was elected as lijsttrekker (leader) of the Labour Party. He resigned as Party Leader and Member of the House of Representatives in February 2012.

5. John Corker: Access to Justice: Pro bono

John Corker has been the Director of Australia's National Pro Bono Resource Centre since January 2004. John has been a practising lawyer for 25 years and obtained his law degrees from Monash University (LLB) in Melbourne and the University of New South Wales (LLM). He also teaches post graduate law students in Communications and Media Law and is a director of Australia's National Indigenous Television Service (NITV).

6. Neil Gold: Secretary, co-editor of paper collection and lead rapporteur

Neil Gold is Professor Emeritus of Law at the University of Windsor in Canada. He has advised on legal education, dispute resolution and legal system reform in many countries. He was awarded the Law Society of Upper Canada's Medal (LSM), its highest honour, for distinguished service to the legal profession. He is a member of the Law Societies of Upper Canada and British Columbia and holds a BA (York), LLB (Toronto) and LLM (Osgoode Hall – York). He has been published and spoken widely.

7. Adrian Evans

Professor Adrian Evans has taught, practised law and consulted in ethics education contexts at LaTrobe and Monash Universities, Australia. He is both an academic and a legal practitioner, with teaching and managerial responsibilities in legal ethics, justice education and clinical case supervision. Professor Evans is currently working on enhanced processes of individual ethics assessment and accreditation. He is a recipient of the Monash Vice-Chancellor's Award for Distinguished Teaching and is the Associate Dean (Staff) at Monash Law School, Victoria, Australia.

8. Bryan Horrigan: Corporate Social Responsibility and Governance

Dr Bryan Horrigan is the Louis Waller Chair of Law and Associate Dean (Research) at Monash University's Faculty of Law in Melbourne, Australia. He has served as Director of the National Centre for Corporate Law and Policy Research, Deputy Director of the National Institute for Governance, and Foundation Co-Director of the Centre for Comparative Law, History, and Governance. His most recent book in the area of corporate responsibility and governance, *Corporate Social Responsibility in the 21st Century: Debates, Models, and Practices Across Government, Law, and Business* was published internationally by UK-based Edward Elgar Publishing in late 2010. Professor Horrigan completed his undergraduate studies at the University of Queensland and holds a doctorate in law from Oxford University as a Rhodes Scholar.

9. Jan Dirk Loorbach: Property (with Job Cohen)

Jan Loorbach is Former President of the Dutch Bar Association and has been in active practice for many years and served as Dean of the Rotterdam Law Centre.

10. Peter Maynard: Chair, co-editor of paper collection

Dr Peter Maynard holds a BA (Hons) from McGill, LLM from Cambridge and an MA and PhD from Johns Hopkins University. He is qualified barrister in England and Wales and several Caribbean states. He is Head of Chambers at Peter D Maynard Counsel and Attorneys, in Nassau, Bahamas. He is a leader within the IBA and is Past Chair of the PPID. He is formerly an economist at the United Nations, NY, and is the former President of both the Bahamas Bar Association and Organization of Commonwealth Caribbean Bar Associations. His preferred areas of practice are anti-corruption law and asset tracing and recovery. He is the author of numerous publications and a law professor.

11. Shelley Marshall: Labour Law and Employment

Shelley Marshall is a graduate in Arts and Law and in Development Studies from the University of Melbourne and the London School of Economics and Political Science respectively. She is a Senior Lecturer in the Department of Business Law and Taxation at Monash University, Australia. Two of her recent publications address the financial crisis: *Re-Embedding the Market: Crisis and Reinvention?* (2012) and the fall special edition of *Politics and Society* both examine the causes of crisis and propose new ideas for re-governing markets in response to the financial crisis.

12. Sigrun Skogly: Human Rights

Dr Sigrun Skogly is Professor of Human Rights Law and Head of Law, Lancaster University, UK; Visiting Professor, Buskerud University College, Norway. She received her first degrees from the University of Oslo and College of Europe in Bruges. She graduated from the University of Essex with an LLM in International Human Rights Law. Her doctoral degree is from the Faculty of Law at the University of Oslo. Her doctoral dissertation studied the human rights obligations of the World Bank and the International Monetary Fund (IMF) from a public international law perspective. She has published and spoken widely.

13. Birgit Spiesshofer: Corporate Social Responsibility

Educated at Universities of Heidelberg (PhD [Dr. jur.]), 1988, Tuebingen and Freiburg, and Trainee (Referendar) i. a. at the European Commission and at New York University School of Law (MCJ,1990), Dr Birgit Spiesshofer is an Attorney at Law, and has been an Of Counsel at Salans LLP since 1 April 2010. Previously she was a partner at Hengeler Mueller. She began her career at Feddersen Laule (today White & Case), and worked as a foreign associate at Kaye Scholer Fierman Hays & Handler in Washington, DC. She established 'Gaemo Group – Corporate Responsibility International' in June 2009. She is Chair of the CSR Committee of the Council of Bars and Law Societies of Europe (CCBE), Co-Chair of the CSR Committee of the IBA and a member of the Constitutional Law Committee and of the Human Rights Committee of the German Lawyers Association.

14. Muhammad Yunus: Microcredit and Microfinance

Dr Muhammad Yunus is a Bangladeshi economist and founder of the Grameen Bank, an institution that provides microcredit. Yunus and Grameen received the Nobel Peace Prize in 2006 'for their efforts through microcredit to create economic and social development from below'. He is a member of the advisory board at Shahjahal University of Science and Technology. Previously, he was a professor of economics at Chittagong University. He is the author of Banker to the Poor and two books on Social Business Models, and a founding board member of Grameen America and Grameen Foundation.

Coordination members

1. Bernard Bekink

Dr Bernard Bekink is an associate professor and holds the degrees BLC, LLB, LLM, LLD, all from the University of Pretoria. He is an attorney of the High Court of South Africa. After completion of his LLB degree he joined Couzyn, Hertzog & Horak. He was Senior Legal Advisor for the City Council of Pretoria and later joined the University of Pretoria as Senior Lecturer in the Department of Public Law.

2. Christo Botha

Dr Christo Botha holds both a BJuris and an LLB from Rand Afrikaans University. He was awarded an LLD from the University of South Africa and a postgraduate diploma in forensic accounting from Pretoria University. He has been in active practice since 1982.

3. Adrian Evans

Professor Adrian Evans has taught, practised law and consulted in ethics education contexts at LaTrobe and Monash Universities, Australia. He is both an academic and a legal practitioner, with teaching and managerial responsibilities in legal ethics, justice education and clinical case supervision. Professor Evans is currently working on enhanced processes of individual ethics assessment and accreditation. He is a recipient of the Monash Vice-Chancellor's Award for Distinguished Teaching and is the Associate Dean (Staff) at Monash Law School, Victoria, Australia.

4. Neil Gold, Secretary, co-editor of paper collection and lead rapporteur for Presidential Priority Sessions at the Dublin Conference

Neil Gold is Professor Emeritus of Law at the University of Windsor in Canada. He has advised on legal education, dispute resolution and legal system reform in many countries. He was awarded the Law Society of Upper Canada's Medal, its highest honour, for distinguished service to the legal profession. He is a member of the Law Societies of Upper Canada (LSM) and British Columbia and holds a BA (York), LLB (Toronto) and LLM (Osgoode Hall – York). He has been published and spoken widely.

5. Peter Maynard, Chair, co-editor of paper collection

Dr Peter Maynard holds a BA (Hons) from McGill, LLM from Cambridge and an MA and PhD from Johns Hopkins University. He is qualified barrister in England and Wales and several Caribbean states. He is Head of Chambers at Peter D Maynard Counsel and Attorneys, in Nassau, Bahamas. He is a leader within the IBA and is Past Chair of the PPID. He is formerly an economist at the United Nations, NY, and is the former President of both the Bahamas Bar Association and Organization of Commonwealth Caribbean Bar Associations. His preferred areas of practice are anti-corruption law and asset tracing and recovery. He is the author of numerous publications and a law professor.

6. Tim Soutar

Tim Soutar is Vice-Chair of the IBA's Access to Justice and Pro Bono Committee and the convenor of the IBA's Dublin Conference Showcase session on Law and Poverty. Tim read Jurisprudence at St Catherine's College, Oxford before joining Coward Chance. He became a partner Clifford Chance in 1988, practising in their energy and infrastructure team until his retirement in 2005. As well as spending many years in Asia, he ended his career with the firm as the resident Managing Partner for the Gulf Region. In addition to his work with the IBA, he is a trustee at ISLP-UK, where he manages their Tanzanian Law School Assistance Programme.

The report

The Task Force met several times by telephone and face-to-face at the mid-year meeting held in The Hague. Task Force members reviewed the program for the IBA annual conference in Dublin, and identified those sessions that related to its work. The PPID Chair contacted the session leaders and asked that their sessions be included in the PPS, and that they consider addressing the GFC, poverty and law.

In addition, the Task Force engaged in exemplary cooperation with lawyers and the institutions they represented. The most notable example was the cooperation with the American Bar Association (ABA) which, in connection with the World Justice Project, had published a book entitled '*Global Perspectives on the Rule of Law*'. Laurel Bellows, James Silkenat, Stephen Zacks and William Hubbard were very helpful; William Hubbard in particular directed us to that book, and steered us to securing the contributions of two additional Nobel Laureates. Therefore, the present book boasts chapters not only by Laureate Muhammad Yunus, who was a part of the Task Force, but also by Amartya Sen and James Heckman. It also contains, in the report on the Presidential Priority Sessions, a summary of the keynote address at the IBA Annual Conference in Dublin by Laureate Joseph Stiglitz.

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It should be stressed that this book is a first attempt at dealing thoroughly with the post-GFC effects on poverty. It is intended to help legal practitioners and those who interpret their efforts more decisively down the path of dealing with the issues. But poverty is not capable of such an efficient recipe for its eradication. There are still some issues that could not, for various reasons, be covered extensively, or at all. Nevertheless we feel we have captured an essential core of issues and approaches, and it is hoped that this book may be a stimulus to the continuation of the work by many others in these and the other relevant fields.

Marius Job Cohen and Jan Loorbach in 'Poverty and the Law' comment on the impact of austerity measures taken across Europe not only on employment, pensions and wages, but also on democratic core values of the countries of Europe. While they provide perspectives from the Netherlands, their views are of more general application. They posit that human rights that are fundamental can and must be suprapolitical, and ought not to be derogated from substantially, regardless of the political interest involved or the circumstances of the day.

Against a challenging but positive background of success and with specific examples, Muhammad Yunus asserts 'Lawyers Can Help Us to Win the War Against Poverty'. In spite of the GFC, trust-based

microfinance banks like Bangladesh's Grameen Bank have continued to do well. To date, the bank has lent more than $7bn to 8.4 million people. He points out that, astonishingly, the repayment rate is 98 per cent. Now additional microcredit programmes have been established around the world. His work and participation have encouraged the exploration and implementation of microfinance and social businesses, but also of other specific mechanisms to empower the poor.[6]

What is 'The Role for International Pro Bono Work by Lawyers in Addressing the Social Impact of the Global Financial Crisis'? John Corker gives a comprehensive and thought-provoking answer to that question. Some law firms and lawyers already have a strong investment in addressing gender and other human rights issues: working with organisations that conduct real-time monitoring of the impact of a crisis; drafting laws, preparing guides, toolkits and other legal materials; delivering training and representing individuals or groups. Law firms have also made significant strides to set standards such as through the IBA Pro Bono Declaration and other developments. Other law firms provide the broad range of commercial legal work that supports and stabilises organisations. Prepared to make a sustained effort over time, law firms ought to develop strong relationships and work closely with governments of developing countries, established aid or charity organisations or other NGOs, particularly those that have a history of working on the ground. The work may involve: coordinating lawyers across a number of firms and in-house corporate lawyers; conducting detailed comparative studies of the law and its implementation across multiple countries, to be used as an important advocacy tool.

In order to leverage from the available international pro bono legal support, it is important to understand the way in which lawyers and law firms work. Individual firms have quite different pro bono cultures and interests that can change as the structure of the firm, or the key persons involved, change. Spending time understanding a firm's culture or identifying the firm to approach that is likely to be the best match for a project or initiative is well worthwhile. Pro bono coordinators in law firms, brokers and pro bono clearing houses are all good starting points.

Then, Nobel Laureate Amartya Sen gives a master class in reasoning about 'Global Justice'. He explores justice as a pluralistic idea with many dimensions and not as just a monolithic ideal. He admits that he previously tended to agree on the centrality of the perspective of John Rawls, whose path-breaking book, *A Theory of Justice,* published in 1971, set the stage for much of the modern discussion. Agreement on many major issues of world justice can emerge even when there are other matters in relation to which we continue to differ.

In both a revealing and a compelling way, Livingston Armytage advocates that it is 'Imperative to Realign the Rule of Law to Promote Justice'. Regarding foreign aid, he critiques the global approach to promoting the rule of law over the past half century. He recommends that it is urgent to invest in judicial reform for the purpose of promoting justice (outcomes that are fairer and more just) rather than primarily economic growth. Showcasing two major development agencies, USAID and the World Bank, as exemplars in judicial reform, he makes a convincing case that a paradigm shift is required for those development agencies that regard justice as being instrumental to aggregate economic growth and are relatively indifferent to concerns about distribution: wellbeing and wealth do not trickle down.

Should not lawyers be the architects of judicial reform? Armytage is also very critical of the limited and inadequate contributions of lawyers to this discourse. While academic lawyers have produced theories, 'their contribution seems largely ghettoised in academe'. He finds it bizarre that economists and political scientists have so far dominated articulation of the theoretical model for judicial reform.

The prevailing focus on primarily promoting aggregate economic growth has brought the rule of law enterprise to the brink of failure. Once the measurement of growth has been disaggregated, it becomes clear that the promotion of economic growth has failed to alleviate poverty. Moreover, it has had the perverse effect of exacerbating inequality. The human being – rather than the state, the market or the development agency – is the key actor. Justice in development should embrace the centrality of human rights and bring to life the rights that are enshrined in customary, domestic or international law. This theory of rights-based development reframes the approach to the rule of law in international development.

In 'The Global Financial Crisis: A Human Rights Meltdown?' Sigrun Skogly critically observes:

6 Note the formation and activity of the Working Group on Poverty, Empowerment and the Rule of Law, set up within the IBA Rule of Law Action Group.

'What began as a financial crisis is rapidly turning into a global human rights crisis'. This is a crisis of economic and social rights, such as the right to food, health, housing and work, and the repression of growing social protest threatens civil and political rights, such as freedom of expression, freedom of assembly and association and the right to be free from discrimination. Increased xenophobia and discrimination also threaten the well-being of migrants and minorities.

Against this context on the ground, and the lessons and principles contained in the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other human rights treaties, Sigrum considers ways in which states can balance the pressure from the GFC and yet comply with human rights obligations. She also warns of the dangers of ignoring the adverse human rights effects of the GFC on vulnerable groups.

In 'The Viability of the Welfare State', Nobel Laureate James J Heckman posits a typology of four models of the welfare state: the Nordic/corporatist model (Scandinavia, Finland and the Netherlands), the Continental model (Austria, Belgium, France, Germany and Luxembourg), the Mediterranean model (Italy, Spain, Portugal and Greece), and The Anglo-Saxon model (US, Canada, UK, New Zealand and Australia). He makes statistically well-supported observations about their viability. Because of the current 'romance' with the Nordic model, he takes a closer look at Sweden, and the introduction of performance incentives and disincentives there.

Post-GFC, unemployment has been unacceptably high in the many countries affected. In 'The GFC: Impact on Labour and Employment Law', Diamond Ashiagbor points out that employment protection laws and industrial relations systems, established welfare states in industrialised countries, or nascent systems of social assistance in developing countries, that might have served to protect workers from some of the harsher effects of the downturn, have struggled to meet the challenge and, in some instances, have been conspicuously targeted by austerity measures. Nevertheless, significant voices, such as the International Labour Organisation, trade unions and workers organisations, and those parts of the European Commission (EC) responsible for labour law and human rights, argue for labour law and social rights as an essential element of economic and political governance, even more necessary during times of economic crisis.

In 'Impacts of the Financial Crisis on Labour in Advanced and Developing Economies, and Possible Policy Responses', Shelley Marshall identifies three stages of the GFC: the initial shock, higher public deficits and sovereign debt and the labour market crisis. She observes that the policy space available for responding to the third stage is now limited. Deficit-financed public spending and monetary easing simultaneously implemented by many advanced and emerging economies at the beginning of the crisis are no longer a feasible option for all of them. The large increase in public debt and ensuing concerns about the sustainability of public finances in some countries have forced those most exposed to rising sovereign debt risk premiums to implement strict belt-tightening. Austerity policies and across-the-board cuts in public spending programmes are likely to compound the problems in the labour market. But, labour market policies with income-support schemes have the potential for positive job creation effects.

Then, in 'Global Financial Crisis, Corporate Responsibility and Poverty', Birgit Spiesshofer aims a bright spotlight at CSR in the post-GFC economy. She explains that, for moral standards to be effective in a business framework, they must be connected – by operation of law, technology or, in the internet age, by reputational impacts – with economically measurable negative or positive consequences, with losses, costs or liability on one hand, or competitive advantages, ultimately translatable into profits, risk or cost avoidance, on the other.

In highly competitive and regulated markets, such as North America or the European Union (EU), expectations regarding ethical, social and environmental requirements are mostly set out in laws, supported by robust enforcement. However, regarding the banking sector, the GFC revealed that the framework was inadequate. Beyond profit maximisation and shareholder value, new corporate responsibility rules must be game changers to introduce the incentives and disincentives to improve the working and living conditions in poor countries and reduce the negative environmental footprint of multinationals, and to unleash the creative potential of companies to develop more sustainable solutions and technologies.

She anticipates that we will hear more discussion about extraterritorial application or the effect of national laws and about the standing of third world citizens in first world courts to hold parent

companies liable for alleged environmental or human rights violations of their subsidiaries in third world countries.

In 'The Roles of Lawyers in Steering Corporate Governance and Responsibility Towards Addressing Social Injustice and Inequality', Bryan Horrigan takes a giant leap forward in clarifying the multi-dimensional roles and responsibilities of lawyers and the corporations they represent. International lawyers not only have an interest in framing the commentary on the way in which human rights have been affected by the GFC, but they also have a responsibility to provide insight into how law may be relevant both in terms of addressing the events and how these events may impact upon the enjoyment of human rights. Furthermore, it is important to determine whether the existing international legal structures may provide guidance to policy-makers as to how they can comply with their human rights obligations in times of crisis. International human rights lawyers are often criticised for being more interested in the approval of human rights standards (through adoption and entry into force of human rights treaties) than in the implementation of and compliance with these standards. In the current GFC, it is imperative that international lawyers live up to their responsibility to seek implementation and compliance.

Towards the end of the book, tectonic shifts and revealing personal insights regarding access to justice in yet another country – Argentina – are explained by Martín Böhmer in 'Something to be Proud of: The Response of the Legal Profession to Argentine Social Crisis'. The chapter starts from the two premises that the crisis in Argentina and the region had much earlier roots in the human rights atrocities perpetrated by military regimes and that Argentina, after the huge sovereign debt restructuring of the mid-2000s, was already immersed in pulling itself out of difficulty so that '(t)he 2008 crisis went almost unnoticed'. As a result of a devalued currency and improving terms of trade, successive husband and wife Kirchner administrations were insulated from international financial markets and external control, financing public expenditure by internal and export taxes. In response to the mass killings, torture and kidnappings, civil society and the families of victims mobilised – especially the Mothers of the Plaza de Mayo. Among lawyers and judges, the practice of public interest law (PIL) emerged, consciously including those who had been excluded or marginalised.

Report of the Presidential Priority Sessions

In his keynote address at the IBA Annual Conference in Dublin, Nobel Laureate Joseph Stiglitz commented on the adverse effects of austerity measures. He pointed out that austerity policies have almost never worked. Tried unsuccessfully by Hoover in 1929 and more recently by the IMF in East Asia and Latin America, austerity policies converted downturns into recessions and recessions into depressions, except in the case of small countries with flexible exchange rates whose exports could replace government spending. Large countries with weak trading partners did not have that option. He also pointed out that the growth of demand in emerging markets was not strong enough to pull the US and Europe out of recession.

The PPID Showcase session, entitled 'Lawyers Against Poverty', which was a joint session of the PPID and its Pro Bono and Access to Justice Committee, made a number of recommendations for reducing global poverty. Lawyers could ensure that an adequate range of norms is in place to support development. They could monitor and assess the effectiveness of relevant rule-making initiatives. They could evaluate the social impact of routine practice activities that may advance the interests of clients but harm the poor (for example, certain forms of intellectual property protection). They could help prevent predatory elites from embezzling resources that should be used for development, by examining the circumstances surrounding the award of contracts (eg, whether tendered, taxes paid and due diligence completed) and by challenging suspect transactions. Although specific rules of professional conduct vary from jurisdiction to jurisdiction, lawyers everywhere share the professional value of responsibility for implementing the rule of law. This responsibility transcends providing client service and preventing clients from engaging in illegal conduct to encompass a commitment to ensuring that the law contains robust rights, including those that alleviate poverty and secure economic development. Another key component is providing the disadvantaged with means to redress rights violations. Activities such as participating in rule-making, assessing the effectiveness and social impact of laws and engaging in pro bono work are essential to the

wellbeing of a legal system and inherent in the role of lawyers. The IBA's Pro Bono and Access to Justice Committee might consider exploring ways of collaborating with A4ID,[7] other similar organisations, and bar associations to expand both the totality of anti-poverty legal projects and access to them by lawyers.

A wide range of other relevant sessions were covered, ranging from intellectual property issues to anti-corruption. An insightful essay by Adrian Evans on 'Connections between the Ethics of Combating Money Laundering and Reduction in Global Poverty' is also offered. He concludes that money laundering has a deleterious impact on the increase in poverty worldwide. He shows that it supports organised crime and reduces tax revenues that would in part be used to meet the needs of the disadvantaged. He also notes that the management of laundered proceeds weakens the integrity of professionals who, wittingly or otherwise, facilitate the handling of these funds. In the chapter he posits ways that lawyers' views and management of their own professional ethics can materially alter the consequences of money laundering.

We extend our sincere thanks to the authors, the other members of the Task Force, the Rapporteurs, the Steering Committee and all the other persons, some of whom are indicated above, who assisted in any way in the successful completion of this project. We thank James Lewis, Tim Licence, Neil Smith, Hannah Caddick and Tom Bangay of the IBA and all other persons who aided in the publication and dissemination of this body of work, notably Nigel Roberts of LexisNexis for his insights. We profoundly thank for their help and cooperation the IBA leadership – President Michael Reynolds, Past President Akira Kawamura, Vice-President David Rivkin, Secretary-General Martin Šolc – and also Gabrielle Williamson, Stephen Macliver and the PPID Council (now the PPID Coordinating Group), as well as Sylvia Khatcherian, Hendrik Haag, Michael Greene, Almudena Arpón de Mendívil, Jaime Carey, Jon Grouf, Mark Ellis, Tim Hughes and other members of the IBA Management Board. We especially thank Elaine Owen, Ronnie Hart, Jenny Clugston, Robyn Wheatley and other IBA staff who gave their assistance.

It was a great team effort, which we think is reflected in the extraordinarily high quality of this book.

Peter D Maynard
Neil Gold

7 Advocates for International Development http://a4id.org.

Chapter 1

Poverty and the Law*

Jan Loorbach[1] and Marius Job Cohen[2]

There are principles of governance that should be treated as undisputed premises for the way society is to be led in a modern, democratically organised state.

The first principle is the rule of law: a legal system is put in place and all members of society must respect the laws produced by this system and are subjected to them. This encompasses not only the individual citizens, including kings and cardinals, but also the institution of the state, including the legislative and executive powers themselves. In the context of this chapter we only mention in passing the theoretical problem of the legislative power that is required to combine its compliance with existing laws with the task and responsibility to add, change and abolish laws.

To assure the compliance of powerful governmental and other institutions with laws, a subtle system of checks and balances has gradually been developed. To ensure that these delicate elements are sustained in a modern democratic state there must be a civic awareness of the fragility of the all-inclusive societal subjection to the rule of law and the equal fragility of its controlling systems with respect to all responsible actors.

There is a second principle of absolute and equivalent authority that must be respected as much as the rule of law and also be regarded as 'supra-political' by any democratic political movement. It is the principle that might be called 'the rule of fundamental human rights'. While the rule of law is an obvious necessity for any system of law that has integrity, the rule of fundamental human rights is a requirement of civility in the recognition of the rule of law and its subordination to the requirement of maintaining fundamental human rights: cruel and unfair laws will not be tolerated. Indeed modern conceptions of the rule of law have expanded it in this direction.

The classic fundamental human rights are: freedom of speech; freedom of religion; freedom of assembly; and the right to life. The next set of rights is called social human rights. These are corollary rights to fundamental human rights, especially the right to life, including the right to food, clothing and housing; and the rights to education and the means and opportunity to earn a living.

Finally, the right to a fair trial under law should also be included in this second inviolable category, also as a corollary to the right to life. Thus, this right to access to justice has been anchored for good reason in the European Convention on Human Rights. Such access requires not only proper legislation but also a system that guarantees the safety of the rule of law through the equally proper application of given laws in any individual and like cases. This goal can only be effected by: having a well-organised, properly educated, independent, and sufficiently empowered and staffed judiciary; by having the availability of competent and independent lawyers; and by having the means of recognition and enforcement so that individuals can reap the fruits of this system.

All laws must be compatible with these fundamental human rights. A legislator, respecting the instructions to be derived from the rule of law and the related rule of fundamental human rights, should refrain from pursuing legislation in contradiction of these overriding supra-political principles.

The GFC crisis has put a heavy and new kind of responsibility on governments, requiring them to find new solutions using new ways.

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* This paper was prepared and submitted August 2012.

1 Former President, Dutch Bar Association.

2 Former Mayor of Amsterdam; former leader, Dutch Labour Party.

The moral and ethical discipline that ensures obeisance to fundamental human rights, no matter what societal changes for the worse we must face, should prevent the executive and legislative powers from allowing any erosion of these absolute values. In the area of social human rights, where the diminution of existing, protective rules is at stake, there is, at minimum, a necessity to address scrupulously why and how various economic measures are introduced and what justifies subordinating these fundamental human rights to the new economic constraints.

Of course, governments are free to reconsider legislation in areas that touch upon the human rights that we have identified above. Such reconsideration may lead to the deterioration of the position of individuals in areas such as housing, work, income security, education and access to justice. But deterioration is not by definition a legislative breach of fundamental human rights. It only becomes such an infringement if the 'inviolable layer' above the inalienable basic human rights is taken away as well as part of the very fundament, the very core of such rights. Indeed, what is free and what is fundamental will be the subject of argument and debate. With the words 'inviolable layer' we aim to conceptualise a first layer that is inviolable, that in no way can be touched upon by executive or legislative powers; above that layer there is a more flexible area that is also related to basic human conditions, but to be freely shaped according to governmental or political insights.

We will now describe how the GFC influenced society, especially in the Netherlands, the country we observe most closely.

As in other countries, various institutions concerned with social human rights are at risk. For example, austerity programmes diminish citizens' income and the services for those who are unable to take care of themselves. Educational programmes become less well-funded and students have fewer opportunities to complete their education or, if they can proceed, it is only at barely affordable costs. Subsidies for cultural programmes are withdrawn; programmes to ameliorate the environment receive less money. Without a well cared-for environment, the human right to health is undermined.

Further, if pension rights are diminished, the circumstances of elderly people, who depend to a large extent on a pension they thought they were entitled to, might become problematic. If labour and employment rights are weakened by removing protective systems that make it easier for employers to lay off long-service employees, people are left adrift. Again, for elderly people whose employment possibilities are diminished due to age, the circumstances might become particularly problematic.

Often, politicians think it is necessary to act rapidly and show strength without hesitation. Take for example the issue of pension rights in the Netherlands: within a couple of months parliament decided that, starting in 2014, the right to a state pension, which is important as a substantial means of support for a majority of retired people, will be delayed: 2014 by one month, and in 2015, by two months, and so on. Although the erosion of the pension is minimal to begin with, in a few years it is substantial – and for many people, there is no alternative source of income. We argue that in cases like this, since these measures touch upon social human rights, the justification and timing of these measures are important issues with significant political responsibilities in themselves. Justification for the reduction of individual rights and the timing of such measures should meet the highest standards and the most demanding criteria.

At the same time, we realise that in other countries, such as Greece, Spain and Ireland, where the financial burden is much heavier than in a country like the Netherlands, measures like these influence the life of many people in a much more dramatic way.

Does this mean that social human rights are in jeopardy?

Earlier, we defined social human rights as rights of a supra-political nature. Taking this position, we aim to withdraw these kinds of economic measures from the political realm: human rights are of a higher nature than political positions. In other words, regardless of the political views one may have, human rights must be preserved. A supra-political human right is inviolable and must not be varied, no matter what the political interest is.

Keeping this in mind we nevertheless think that, although a lot of these austerity measures are tough, especially for those who are adversely affected by them, the core of the fundamental human rights are not directly at stake. Everybody will, at least in the Netherlands, continue to be fed, clothed,

housed and educated, although not as well as before. However, the growing differences and gap between the rich and poor, which some think is a course society should not take, is regarded by many as a political/economic matter, and not one that possesses a supra-political character, and therefore not one that comes within the ambit of human rights.

In times of financial crisis, those with governmental responsibilities are seeking measures to make governing more efficient. Of course, politicians also look at it from this point of view: let measures be both more efficient and cheaper, while achieving the same or even better results. Many such measures are sensible, but some of them need a closer look: when moral principles are sacrificed on the altar of efficiency, the basic values of our society are threatened. We are then in danger of losing the delicate balance that is the very fundament of the rule of law, of the rule of fundamental rights and of a society that protects all its citizens at a minimum civilised level.

Making court proceedings inaccessible for a considerable part of society by increasing court fees to a level that many individuals cannot afford may well be an unacceptable sacrifice. This was an idea launched as a legislative proposal by the Dutch Government. It was defeated after massive opposition from both within and beyond the political arena.

Similarly, the Irish plans to economise upon the operations of the court system by bringing the law profession under direct state control might be another example.

A proposal to change the law regulating the legal profession in the Netherlands also contains some infringements on the guarantees for citizens to enjoy independent and confidential support from lawyers. One could question whether this stems directly from cost-cutting motivations. The same is true for initiatives to optimise the efficiency of various parts of the judicial system: examples include swift criminal proceedings with settlement between prosecution and the suspect without any judicial check and selective systems to obtain leave to appeal and access to the Constitutional Court. Such initiatives clearly have a better chance to become law in times of economic threat than when times are good.

Earlier, we mentioned that measures taken in the Netherlands are less dramatic than those taken in other countries, Greece being the most prominent example of a country within the EU that has taken drastic measures. Wages, pensions and employment rights have been diminished in a very significant and fundamental way. No matter their political stripe, many of these measures have been forced upon the Greek Government and summoned to do so by the so-called 'troika': the EU, the European Central Bank and the International Monetary Fund (IMF) – the very institutions that advise the EU countries on whether they should provide supporting loans. If its government does not accept and implement such measures, Greece cannot remain within the European Monetary Union. These measures are, in fact, not proposed and passed by a democratically elected government and parliament; they are, as we said, forced upon the country by international organisations that are not themselves democratic in nature. Here we see how the GFC influences even the core elements of democratic countries.

There is one further topic to discuss, not apparently directly connected to the GFC. When resources become scarce, differences between people are emphasised. Discrimination and repression frequently rise. And so in the Netherlands there are proposals by some political parties to diminish the right of freedom of religion for Muslims, for example, by proposing the taxing of wearing a headscarf; forbidding the Koran; prohibiting the building of mosques within a city; and so on. Measures like these are not proposed with respect to those who practise other religions. They are unequal and unfair and contrary to fundamental principles and flow from the fears raised by the economic pressures that grow as a result of failing to observe the enforcement of fundamental human rights during and following a financial crisis.

In all these developments, lawyers and political organisations alike should be permanently attentive and should develop a well-considered opinion as to the compatibility of proposed legislation with the basic values we described. For countries without a constitutional court, such as the Netherlands has, this is an even greater necessity.

Chapter 2

Lawyers Can Help Us to Win the War Against Poverty*

Professor Muhammad Yunus[1]

This is the right time for a serious discussion on how the law and lawyers can enable the poor to help themselves throughout the world. Since 2008, highly regulated banks in the developed world – notably many of them are from the US – are having trouble pricing and trading complex mortgage-backed securities. At the same time, however, trust-based microfinance banks like Bangladesh's Grameen Bank continue to do well, unaffected by the financial uncertainty in the rest of the world.

Grameen Bank: the story of a trust-based bank

Grameen Bank issues loans using very simple trust-based financial arrangements. No legal documents are involved because, in part, Grameen's borrowers are poor and have no collateral. Therefore, Grameen relies on trust and the positive incentives of continued access to credit and other support to ensure repayments. Grameen's repayment rates have averaged at better than 98 per cent. Because Grameen's loans are based on trust and positive incentives and no legal documents, Grameen has never used lawyers or courts to collect any of its loans. Since its inception, this bank has lent more than US$7 billion dollars to 8.4 million people. The repayment rate is 98 per cent and now there are microcredit programmes around the world.

When a potential borrower wants a loan, he or she has to form a group of five or join such a group of borrowers from his or her neighbourhood and agree to meet with that group once a week. Each loan is made to an individual in the group and is the responsibility of that one individual, but others in the group cannot get their next loans if any member of the group is late in their payments.

The borrowers are also required to maintain a regular savings plan, and today its borrowers and their non-borrowing neighbours as a group have US$150 in savings for every US$100 in loans outstanding. Today, the savings deposits of the poor fund the Grameen Bank. Grameen's interest rates for loans and savings are clearly available at **www.grameen.com**. All loans are intended for income-producing activities, housing or education – not for consumption. The basic interest rate for most business loans is 20 per cent. In addition, Grameen has issued more than 600,000 housing loans at eight per cent and about 20,000 educational loans at five per cent.

Grameen has also arranged loans for about 100,000 beggars, whom it calls 'struggling members'. These loans are interest free and offered without time limits. The goal is to encourage these members to cease begging and to become regular savers and borrowers. To date, ten per cent of these borrowers have stopped begging completely.

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* This paper is based on: Muhammad Yunus, 'How Legal Steps Can Help to Pave the Way to Ending Poverty' (2008) ABA Human rights Magazine Vol 35 No 1, see: www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol35_2008/human_rights_winter2008/hr_winter08_yunus.html accessed 16 October 2012.

1 Professor Muhammad Yunus, Grameen Bank

Grameen Bank is 96 per cent owned by the borrowers, 97 per cent of whom are women. Nine of its 12 directors are women.

Its bankers, using bicycles or motorcycles, go to a borrower's neighbourhood for the weekly meetings. Typically, ten or so groups of five borrowers (60 individual borrowers in total) meet every week for about an hour to pay back existing loans, to receive new loans, and to exchange ideas in an open and transparent way in front of the whole group of fellow borrowers. The approach is also practical because Grameen's borrowers typically cannot read financial statements.

Grameen's borrowers have established some of their own rules. Known as the Sixteen Decisions, many of these rules have to do with the health of the family and the care and education of the borrowers' children.

Connecting people, bank and social capital

In view of the general financial uncertainty in the world, one wonders how helpful complex legal contracts have proven to be for the subprime borrowers or for the lenders who are currently experiencing difficulties. How useful are these contracts if the transactions are not ultimately based on trust between bankers and borrowers who know each other? In 50 per cent of the current housing foreclosures in the US, no direct communication exists between the borrower and the lender. Grameen's bankers and borrowers meet and look each other in the eye each and every week during the group meetings.

One must also ask how successful all of the disclosure statements are if they are buried in a large pile of documents that are so long and complex that no one, including the bankers, seems to fully understand the implications of the interest rate adjustments in the documentation. So many of the more complex mortgages and mortgage-based securities in the US are faltering or failing. But Grameen's much simpler trust-based loans to poor women with no collateral seem to be doing well.

A similar situation occurred in 1997, when microfinance continued to grow steadily despite the financial instability that accompanied the Asian currency crisis. The macro economies in a number of Asian countries declined steeply when a bubble of speculative lending burst, but the microfinance organisations in those countries continued to thrive. During a financial crisis, microfinance organisations can be an island of stability.

What makes the trust-based Grameen bottom-up model so valuable is that it builds human, family and social capital by helping the poor (women in particular) to help each other in a voluntary and businesslike fashion that builds respect and self-esteem. Grameen has learned that the poor can take care of themselves, and they can support each other and make important contributions to society. The resulting knowledge, experience, confidence, pride and self respect have become the basis on which Grameen has successfully built its lending programme.

Lawyers' role: poverty does not mean equality

Lawyers can provide vital help to encourage and enable lower-income people to take care of themselves in the US and internationally. The needs are universal, but laws differ among countries, so perhaps lawyers can form groups in each country to develop or revise laws that ultimately help the poor to help themselves. Perhaps one group of lawyers can be formed for each of these or similar objectives in every country where such changes are needed. Here are some areas to focus on:

1. *Simpler laws for microfinance programmes.* Everywhere in the world, simpler laws are needed to allow microfinance programmes to receive savings deposits and relend that money. The right regulations should allow a microfinance organisation to expand through savings deposits. Expansion of lending through savings deposits would be the single most important step in expanding microfinance globally. In the US, credit union regulations might work for microfinance organisations, and Grameen America is studying that option. The best option would be to create a new law exclusively for establishing microfinance banks for low-income people and people on welfare.
2. *Laws focused on individual borrowers.* In the US in particular, low-income borrowers find that starting and managing a small business can be difficult because laws and regulations either are intended for larger businesses or simply are not essential. For example, in the state of Louisiana, a person cannot

arrange and sell more than one variety of flowers in a vase for resale without taking a test to get a state licence. This regulation discourages new entrepreneurs, reduces competition and keeps the cost of flower arrangements high. The licence could be voluntary and optional, allowing the end purchaser of that flower arrangement to decide if he or she wants flowers arranged by a licensed or unlicensed businessperson.

3. *Waiver medallions for the poor.* Very poor people should be entitled to a sort of waiver medallion that enables them to take care of themselves through self-employment opportunities with minimal or no interference from laws that weren't designed with them in mind. Such a medallion would entitle the very poor to do what they need to do in search of earning their own legal livelihood, and no law should be allowed to interfere with that initiative. Free trade and special enterprise zones are common. Let's work to give the poor the individual right to operate in a legal interference-free zone to make a living for themselves.
4. *Welfare and Medicaid laws designed to encourage independence.* Welfare and Medicaid laws often too steeply limit how much a low-income person can save or earn. These laws should be designed to help people gain self respect and independence by taking care of themselves through income-producing activities. Instead, the welfare laws seem designed to keep people on welfare longer than necessary. Creative policy changes should be put in place to help people help themselves and to lose these subsidies gradually rather than all at once.
5. *Simpler laws for the poor.* Laws should be kept as simple as possible for people with a low income in particular, to motivate them to take the next steps to help themselves.
6. *Non-governmental loan programmes.* Governments should create an enabling environment for microcredit programmes without getting directly involved in lending money to the poor. It's extremely difficult for a political entity to recover money that it has loaned to poor people. Some people look at government as an agency that is required to take care of them. Thus, the important discipline of paying back a loan is lost in a government programme. Politicians by necessity are more focused on awarding loans and securing votes than in making sure loans are repaid. For all these reasons, loan programmes should be left to the non-governmental, private sector and social businesses.
7. *Tax laws that encourage social businesses.* Social businesses are designed exclusively to maximise benefits to customers, rather than maximising profits. Social businesses serve social needs in a businesslike manner. Such a business is sustainable and makes a profit, and the investor gets back the capital he or she invested, over time. Profits in a social business are entirely reinvested to expand the existing social business or start new ones. A charity dollar can be used only once, but a social business investment dollar is recycled indefinitely. Current tax laws offer tax benefits to charitable organisations. New tax laws are needed that put social businesses on at least an equal footing with charities.
8. *Simpler visa, immigration and passport systems.* The current visa, immigration and passport systems worldwide are a great source of frustration and wasted time and resources. So many countries want some of Grameen's 27,000 experienced microfinance employees to come and build programmes, but those same countries have complicated and expensive visa procedures. The children of developed countries want to come to Bangladesh to study microfinance. The children of Bangladesh's poor borrowers want to travel and go to international schools. Simple programmes that allow people to travel more easily to share what they know should be devised. The goal should be a world where people can travel freely without the need for passports and visas.
9. *Tariffs and trade barriers that favour the less powerful.* Tariffs and trade barriers seem to favour the powerful over the less powerful. The relatively poor country of Bangladesh has to pay one of the highest tariffs on its textile exports to the US. The goal should be to help poor countries to do more business with rich countries, rather than letting them depend on their foreign aid.

The change lies in believing and investing in people and their ability to change their own lives. All people, including the poor, have enormous capacity to help themselves. Despite appearances, deep inside of every human being lies a precious treasure of initiative and creativity waiting to be discovered, to be unleashed, to change life for the better. If we look at each and every poor person from this perspective, we will find enormous possibilities for this world. Poor people remain vulnerable for

having less or sometimes no access to information and seeking justice if treated wrongly. We cannot simply let this happen. This is where lawyers can listen and work with poor people to ensure they are treated well and can live life better, just like everybody else.

Chapter 3

The Role for International Pro Bono Work by Lawyers in Addressing the Social Impact of the Global Financial Crisis

John Corker[1]

Background

The task of the IBA's PPID Taskforce on the Global Financial Crisis, Law and Poverty (the 'Taskforce') is to examine the role lawyers can play 'post-global financial crisis', particularly with regard to the social impact of the crisis.

The Taskforce is looking at the impact of the GFC. Post GFC there are new financial safeguards and rules that have come into force. New social issues have emerged that have a global impact and affect people's lives – especially those from poorer countries.

Examples of pertinent regulatory provisions might include laws surrounding food distribution, land acquisition, the implementation of financial safeguards, austerity programmes, and the impact of conflict. The Taskforce is preparing a report focusing on what role the legal profession should or could play in this new environment and the positive response, improvements and changes in the law that the legal profession could promote.

This paper traces the development of the international pro bono legal movement, the way in which it works and some of the key agencies involved. It analyses a sample of 100 current or recent international pro bono legal projects to identify trends and draw conclusions about the way that international pro bono legal movement works in the context of addressing the social impact in developing countries post-GFC.

History/development

The use of the term 'pro bono' comes from the latin phrase '*pro bono publico*', which means for the public good. It generally means the provision of legal services on a free or significantly reduced fee basis. The phrase is being used increasingly by other professions.

Pro bono legal work has undergone a profound transformation in the past 25 years. For the most part, pro bono has been ad hoc and individualised, dispensed informally as charity; increasingly it has become coordinated and structured, particularly within large law firms. The key rationale for pro bono is that private lawyers act out of a professional ethical duty to improve access to justice.

The institutionalisation of pro bono has depended notably on the rise of the large, mostly corporately

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orientated law firm. Although small-scale law firms have been important actors in the pro bono system, it has been the large firms that have provided the resources and prestige to promote pro bono as a central professional goal. In addition, because large firms are highly leveraged, they can generally absorb the costs associated with pro bono more readily than their smaller counterparts. Large firms play a leadership role within the pro bono field.

Separately, perhaps due to an increased focus on human rights laws and policies internationally, as well as the rule of law movement, counsel have increasingly appeared pro bono in international courts and tribunals and in the appeal courts of overseas countries, particularly in 'public interest' cases. Such instances include Australian lawyers appearing in cases involving Australians facing the death penalty in a foreign court or lawyers taking on an issue of constitutional law in the European Court of Human Rights. Counsel who practise single-handedly have also provided important oral and written legal advice as part of pro bono projects and programmes. English and Australian barristers, among others, are self-employed and so, in doing work on a pro bono basis, bear the opportunity and associated costs personally, unlike a law firm lawyer who continues to be paid by his or her firm.

Since the mid 2000s, there has been a trend towards internationalisation of pro bono legal work, particularly emanating from the US and the UK. This is now spreading to other countries such as Australia, where a number of large firms have recently joined with international firms.

'In small but increasing numbers, private law firms have begun to take on pro bono projects with global significance – assisting governments and civil society in post-conflict countries to deal on an even footing with foreign investors, for instance, or working with international criminal courts to prepare indictments of war criminals. This development within the legal community is connected to changes in the scope and ambition of the "corporate responsibility" initiatives of many multinational corporations that are clients of the firms leading the internationalization of pro bono services.'[2]

The increasing globalisation of law firms has been a factor in this trend. US firms that opened offices in London post-2000 brought a strong pro bono culture with them. It was said in 2007:

'The concept of international pro bono work was born in the US when the American Bar Association set up the Central and Eastern European Law Initiative in 1990 to provide assistance in former communist countries. Since then, a number of organisations – such as the Solicitors International Human Rights Group, LawWorks and the IBA – have brought together individual solicitors and barristers who have taken the time and initiative to do international pro bono work.'[3]

The large firms have increasingly focused on doing work for large corporate clients that operate in multiple countries. The internationalisation of pro bono has followed this trend in general practice. Some firms have sought pro bono work that matches their lawyers' legal skills, for example, looking for pro bono projects that require expertise in areas of cross-border transactions and agreements, joint venture negotiations, advice on corporate restructuring and international trade agreements. Others have chosen human rights issues such as human trafficking or alleviation of poverty. Each law firm, brokering organisation, or initiative will often have distinct areas of focus for its pro bono work either geographically, by area of social need or area of law, or a combination of these factors.

This trend has been under way since before 2000:

'Corporations have in past years taken on more and more ambitious projects in areas previously considered the exclusive domain of the public sector, laying the groundwork for… international law firms, to enter into… the domestic public sphere of post-conflict societies and developing countries. Both of these converging trends, it should be noted, are part not only of globalization generally, but specifically of the erosion of the distinction between the private and the public spheres in international affairs.'[4]

2 Maya Steinitz, 'Internationalized Pro Bono and a New Global Role of Lawyers in the 21st Century: Lessons from Nation Building in Southern Sudan' (2000) 12 Yale Human Rights and Development Law Journal 205.

3 The Law Society (UK), 'A helping hand' (2 August 2007), The Law Gazette www.lawgazette.co.uk/features/a-helping-hand-1 accessed 1 October 2012.

4 See n 1, above.

International pro bono work is therefore generally considered to be legal work that is focused on meeting legal need outside the countries where a law firm has an office. This still means that much of the legal work is carried out in the country where the lawyer is based, as is the legal work done for organisations whose focus may be on programmes in developing countries but the organisations are often based in the same country as the lawyer doing the work.

Pro bono development and enthusiasm has sometimes been driven by the legal assistance required in the aftermath of disasters or emergencies. In May 2005, following the Asian Tsunami of 2004, Oxfam and other charities initiated the '1,000 City Lawyers project' in London, which sought to recruit at least 1,000 lawyers from the City of London to take action by signing the 'Make Poverty History' declaration and taking legal action to help rebuild the communities affected. Lawyers considered the implications and consequences of debt, international trade treaties and aid in the developing world and their long-term impact on communities. In part, they responded by defending lawsuits by 'vulture funds' over the repayment of debt, and assessed case studies of courts refusing to enforce debts incurred by dictators – odious and *ultra vires* debt.[5]

In 2006, this initiative led to the creation of Advocates for International Development (A4ID), a UK-based international development charity, which was set up to better coordinate law firms' efforts to assist in furthering the eight UN Millennium Development Goals agreed by world leaders at the UN Millennium Summit in 2000. The eight millenium development goals are to:

- eradicate extreme poverty and hunger;
- achieve universal primary education;
- promote gender equality and empower women;
- reduce child mortality;
- improve maternal health;
- combat HIV/AIDS, malaria and other diseases;
- ensure environmental sustainability; and
- global partnership for development.

A4ID's work focuses on three distinct areas: international pro bono; education; and awareness-raising. The international pro bono area provides an international broker function and a newly qualified lawyers' programme that places junior lawyers in developing countries during their qualification leave. A4ID works through many development partners that include local and international NGOs, inter-governmental organisations, social enterprises, bar associations, law societies and developing countries.

A4ID receives requests for legal advice and assistance and matches them with lawyers who are able to assist. Since 2006, they have offered 800 pro bono opportunities to lawyers based in 89 countries and undertaken legal projects in 114 countries around the world.[6] These 'legal partners' (now over 34,000 experts) include a wide range of leading law firms and barristers' chambers in the UK. Partnership with A4ID is also available for in-house legal teams and legal academic institutions. Legal partners pay membership fees.

In the US, the American Bar Association Rule of Law Initiative (ABA ROLI) was established in 2007 to consolidate its five overseas rule of law programmes, including the Central European and Eurasian Law Initiative (CEELI), which it created in 1990 after the fall of the Berlin Wall. Working with in-country partners in a highly consultative manner to build sustainable institutions (both government and NGOs) is a hallmark of the ABA ROLI programmes.[7]

In 2012, ABA ROLI was implementing legal reform programmes in more than 40 countries in Africa, Asia, Europe and Eurasia, Latin America and the Caribbean, and the Middle East and North Africa. ABA ROLI has more than 400 professional staff working in the US and abroad, including a cadre of short-term and long-term expatriate volunteers who, since the programme's inception, have contributed more than US$200m worth in pro bono technical legal assistance.

Recognition of international pro bono legal work by governments and professional bodies came in the form of declarations of support that outlined principles for the way in which the work

5 DLA Piper, '1000 city lawyers make poverty history' (17 May 2005), DLA Piper UK News http://dlapiper.com/uk/news/detail.aspx?news=71; Lorraine Cushnie, 'Joss Saunders: Oxfam' (22 August 2005) The Lawyer: www.thelawyer.com/joss-saunders-oxfam/116494 accessed 1 October 2012.

6 A4ID, 'Brochure (English)' http://a4id.org/sites/default/files/user/brochure_engl_141111_final_lowres.pdf.

7 ABA ROLI website at www.americanbar.org/advocacy/rule_of_law/about/origin_principles.html accessed 24 October 2012.

should be done. The Council of the IBA made its first Pro Bono Declaration in October 2008,[8] two years after it had renamed its Access to Justice Committee as the Pro Bono and Access to Justice Committee to emphasise its accelerated efforts to further a culture of pro bono work by lawyers, law firms and organisations of lawyers.[9] Other countries also made pro bono declarations or statements of principles.[10] The UK Attorney-General's International Pro Bono Committee was established in January 2007 and in Australia, the Attorney-General's International Pro Bono Advisory Group was set up in July 2009. International pro bono was considered at a meeting of Senior Officials of Commonwealth Law Ministries in 2010.[11]

In 2008, the IBA developed a website[12] dedicated to international pro bono information and coordination and managed by the IBA London office. Through a spearate IBA Pro Bono site (**internationalprobono.com**), the IBA conducts an online matchmaking service where IBA member bar associations and Open Society Foundations registered with the IBA may use this site to submit requests for pro bono assistance from IBA group member firms around the world and these firms may use the site to view and respond to requests from member bar associations and Open Society Foundations.

The IBA Pro Bono Declaration calls for the provision of pro bono legal service,[13] principally to benefit poor, underprivileged or marginalised persons or communities, or the organisations that assist them, and indicates that it may involve:

- providing advice to or representation of persons, communities or organisations, who otherwise could not exercise or assert their rights or obtain access to justice activities supporting the administration of justice, institution-building or strengthening;
- assisting bar associations and civic, cultural, educational and other non-governmental institutions serving the public interest that otherwise cannot obtain effective advice or representation;
- assisting with the drafting of legislation or participating in trial observations, election monitoring and similar processes where public confidence in legislative, judicial and electoral systems may be at risk;
- providing legal training and support through mentoring, project management and exchanging information resources; and
- other similar activities to preserve the rule of law.

A number of other brokers and organisations have grown up over the past 15 years (most since 2005) to better coordinate and facilitate the development and provision of pro bono legal services internationally. A list of brokers and clearing houses can be found at the IBA pro bono website and the Australian Attorney-General's Department's website.[14]

Three examples perhaps demonstrate the unique nature of these organisations. The first is PILnet, established in 1997 as the Public Interest Law Initiative in Transitional Societies (PILI) at Columbia University, New York. It has facilitated pro bono development in Europe through the development of clearing houses in Hungary, Russia and China and conducting an annual European Pro Bono Forum every year since 2007.[15] PILnet is unique in its endeavours in seeking to develop the pro bono culture across Europe.

The second example is unique as it involves the integration of a news provider with the coordination and delivery of pro bono legal services. The charitable arm of one of the world's largest providers of news and information, the Thomson Reuters Foundation, became involved in international pro bono in 2010 when it established TrustLaw, and TrustLaw Connect, a broker that aims to bring together legal teams to provide free legal advice for NGOs and social enterprises in any jurisdiction in the world (and

8 IBA Pro Bono Declaration Approved by the IBA Council October 2008.
9 IBA Pro Bono and Access to Justice Committee, www.ibanet.org/PPID/Constituent/ProBono_Accs_Justice/Overview.aspx accessed 24 October 2012.
10 Israel in 2010, Nigeria in 2009, Poland in 2007, the Americas in 2008 and the UK in 2008.
11 John Corker, 'Access to Justice: International Pro Bono Legal Assistance' (Paper presented at Meeting of Senior Officials of Commonwealth Law Ministries, Marlborough House, London) https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/SOLM-AccesstoJustice-IntProBonoLegalAssistance.pdf accessed 1 October 2012.
12 www.internationalprobono.com accessed 24 October 2012.
13 IBA Pro Bono Declaration 16 October 2008, Clause 1.
14 Pro Bono Net, 'Pro Bono Clearing House', IBA, http://internationalprobono.com/clearinghouse; Attorney-General's Department, 'International pro bono brokers and clearing houses'. www.ag.gov.au/LegalSystem/InternationalProBonoAdvisory/Pages/Internationalprobonolawyers.aspx accessed 23 December 2012.
15 www.internationalprobono.com/clearinghouse accessed 24 October 2012.

governments on a case-by-case basis).[16] TrustLaw Connect is just one part of the Foundation's **trust.org** initiative, which brings together news and information services, journalism and media training, and free legal assistance to carry out the charitable aims of the Foundation. TrustLaw Connect was launched in July 2010 and by July 2013 had 1,200 members in 145 countries.[17]

The third example is the International Senior Lawyers Project (ISLP) that started initially in the US in 2001 but now has affiliate offices for the UK (in London) and Europe (in Paris). Its uniqueness relates to the use of highly experienced attorneys, near or at retirement, who want to stay professionally active. It has three broad areas of focus: human rights; equitable and sustainable economic development; and rule of law. In 2011, ISLP deployed 80 volunteers to work on 121 projects in 25 countries from Afghanistan to Zambia – but mostly African countries.[18]

Approaches of law firms and lawyers' organisations

All of the above clearing houses, programmes, projects and initiatives have two things in common. First, law firms, lawyers and lawyers' organisations have been behind the development of nearly all of them and now sit on their boards or committees of management. Secondly, all have grown significantly since their inception in response to the vast need for highly skilled legal assistance throughout the developing and post-conflict world.

Typically, law firms will belong to a number of member-based organisations and consider opportunities to become involved as they arise. However, the best-practice firms will also actively pursue and develop their own international pro bono projects based on their programme's areas of focus or unmet needs, perhaps building on relationships with existing clients, or developing new projects with new clients.

Lawyers have built upon existing lawyer networks to create specific pro bono entities such as the Lex Mundi Pro Bono Foundation, created in 2006 as an affiliate of the Lex Mundi network of 160 top-tier business law firms in 100 countries, with 560 offices. The focus of the Lex Mundi Pro Bono Foundation is supporting social entrepreneurship.[19]

However, one new entity devoted to providing international pro bono was established by a single global law firm. New Perimeter, a separate entity created in 2005 by law firm DLA Piper, was set up specifically to provide long-term, high-impact pro bono legal support to qualifying non-profit organisations, governments and academic institutions primarily in developing and post-conflict regions. More than 4,000 DLA lawyers globally compete internally to be able to work on pro bono projects developed by New Perimeter. Guided by a broad Advisory Board, whose members have international legal, business and development experience, New Perimeter has developed a strong strategic direction for its programme, focusing its work on legal education, women's and children's rights, access to justice and law reform, environmental protection, economic development and food security. DLA Piper allocates 13,000–15,000 attorney hours per year to New Perimeter, which translates to US$6-7m in donated legal services annually.[20]

Type of work

The following comments are based on 100 international pro bono projects, many of which are current or have been completed in the past few years. A description of each project has been obtained from material published by law firms, in hard copy or online, from brokers such as A4ID or ABA ROLI, and from organisations such as New Perimeter, PILnet, TrustLaw and Lawyers Without Borders (LWOB). This has been done in an attempt to identify trends in the types of legal work done, the types of problems to which the legal work has been directed and the types of clients assisted.

This paper organises the 100 projects into seven categories with some projects undertaking activity

16 See, www.trust.org/trustlaw/connect accessed 23 December 2012.
17 See, www.trust.org/item/20130409151703-w145b.
18 See, www.islp.org accessed 20 March 2013.
19 See, www.lexmundiprobono.org/lexmundiprobono/WHO_WE_ARE.asp accessed 23 December 2012.
20 See, www.newperimeter.org/about/index.html accessed 23 December 2012.

in more than one category. The categories also overlap to some degree but seek to provide a framework for the reader to better understand the nature of the work being done. Common themes are building country capacity, improving access to justice and strengthening the rule of law in developing countries. A description and some examples of the work being done is as follows:

Building and strengthening legal systems and institutions

Much of this work is legal education, where teams of lawyers teach everything from drafting to trial advocacy skills. It is usually provided to lawyers and law officers, including police, judges[21] and magistrates,[22] to strengthen the rule of law,[23] and the effectiveness of legal professional associations, but also to improve the professional skills of lawyers and law officers. More fundamental work is also being done such as drafting laws for the creation of a court system and a prosecutorial system[24] or advising prosecutors in relation to procedures for pursuing action for crimes against humanity.[25] Projects under this heading also include directly addressing a critical lack of resources in a law school in a developing country.[26]

Improving access to justice and law reform

There is a broad range of matters that fall under the heading of improving access to justice and law reform. A subset of these projects is aimed at anti-corruption and better public integrity. Examples include: assisting an NGO with UN shadow reporting;[27] a constitutional challenge to South Africa's voting law, which failed to provide for absentee voting;[28] advising on whether an international tribunal could be set up in Chad/Senegal to try the former president for crimes against humanity;[29] a comparative analysis of freedom of information laws across multiple countries to present a perspective on draft freedom of information law in Yemen;[30] and crafting model legislation designed to protect women from socio-economic and sexual exploitation in Nepal.[31]

Other examples include: a group of law firms that have assisted an NGO to investigate and prepare a major report about the treatment of unaccompanied minors in detention after being returned to Mexico after seeking to cross the US/Mexico border;[32] preparation of a report on the issues surrounding the forced rescue of street children;[33] and advising an NGO on the intellectual property risks associated with their campaign calling for an end to child trafficking into the cocoa production industry in Africa.[34]

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21 Garrigues partners and associates developed and taught an online accounting course over a two-month period to Latin American judges from commercial courts.

22 The Africa Law Initiative Council (a public service project of the ABA) provides legal expertise, advice and training to judges, lawyers and government officials throughout Africa. Activities also included plans to develop a Legal Aid Clinic and Victim Service Centre in Liberi.

23 The ABA ROLI supported programmes to increase Chinese lawyers' capacity to advocate for citizens' rights. It aimed to strengthen the Chinese Bar so as to enhance the rule of law.

24 A New Perimeter project focused on restoring Kosovo's judicial and prosecutorial systems.

25 Mayer Brown assisted Human Rights Watch with international criminal law matters.

26 A New Perimeter project at the Addis Ababa Law School where lawyers from DLA Piper provided training and a significant grant to the Law School to purchase texts and new technology, provide research grants and underwrite a publication.

27 Ashurst Australia is assisting Transparency International (anti-corruption organisation) to draft a UN Shadow Report in Papua New Guinea.

28 Davis Polk initiated and led a successful constitutional challenge to South Africa's voting law, which failed to allow for absentee voting by South African citizens residing overseas.

29 Mayer Brown assisted Human Rights Watch (Paris office) on international criminal law matters including crimes against humanity cases, such as the Duvalier case (Haiti) and the Hissene Habre case (Chad/Senegal).

30 Baker & McKenzie, working with in-house counsel from The New York Times, represented the International Research and Exchanges Board to present international perspectives on a draft freedom of information law for Yemen.

31 Lawyers from Baker & McKenzie, as well as others from Accenture and Caterpillar, created and presented Nepalese legislators with model legislation designed to protect women from socio-economic and sexual abuse.

32 Mayer Brown assisting not-for-profit organisations investigating the treatment of these minors. The project and its report (compiled by the not-for-profits) received first place honours from UNICEF Mexico in March 2012.

33 Allens acted for Bahay Tuluyan (a grassroots Filipino organisation) in preparing a report for UNICEF about the rights of street children.

34 N I Jacobs & Associates provided assistance to Stop the Traffik, allowing the organisation to continue to push for new laws to bring an end to child trafficking in the chocolate industry.

Community legal education

There are many projects where law firms have developed handbooks, guides and toolkits about laws and their implications and then followed this by delivering training courses for NGOs, government employees, lawyers, law schools, policy-makers and others. The subject matter for these include good governance practices for NGOs,[35] strengthening responses to people living with HIV/AIDS,[36] best practice in use of paralegals, human rights litigation[37] and legal skills. Often this work is referred to as capacity-building and some examples might be considered nation-building.

Nation-building and economic development

Projects in nation-building and economic development seem to fall into three categories: legislative drafting projects; a broad range of work for governments in developing countries; and legal work supporting NGOs, charities and aid agencies, many of which work globally. Some of this rebuilding work has been done in the wake of natural disasters or political upheavals.

Law firms have drafted legislation for developing countries and NGOs seeking to implement model laws. Some examples of this are: legislation to address corporate criminal liability for environmental offences;[38] drafting a country's constitution;[39] decriminalisation of sex work;[40] the review and update of all commercial laws with the aim of helping a country attract foreign capital; harmonised model legislation on disaster response;[41] and protecting workers' rights in unregulated industries.[42]

Law firms have also worked closely with governments of developing countries advising on bilateral agreements with other countries,[43] assisting with energy and resource projects (for example, advising on the risks and benefits of establishing a Special Economic Zone),[44] advising on the establishment of a national bank[45] or assisting to re-establish a property register.[46]

However, much of the work done by law firms in this area is done for NGOs, aid agencies and charities, particularly global organisations. This work can consist of legal assistance with the establishment, governance and structuring of an organisation, a new initiative or existing project being run by an NGO, charity or aid agency. Examples include: advising a non-profit leader in microfinance on labour law;[47] assisting with compiling a detailed report on the major regulatory obstacles to microcredit;[48] helping with a loan agreement to finance a social business in an African country;[49] advising an NGO supporting social entrepreneurs by providing comparative international perspectives on laws relating to employment and diversity, intellectual property, the use of social media and data privacy, anti-corruption and governance, corporate structures and tax-exempt status;[50] or creating a series of simple template agreements between small businesses and financiers and an international charity so

35 King & Wood Mallesons, in association with CARE, developed a handbook for NGOs in Papua New Guinea, which aims to enhance NGOs' legal knowledge and backed this up with a series of training sessions.
36 HWL Ebsworth assisted in formulating a legislative proposal for the decriminalisation of sex work and male homosexual sexual intercourse in PNG as part of PNG's HIV response (funded by AusAID).
37 New Perimeter created a paralegal resource manual to assist the Namibia Paralegal Association.
38 Shearman & Sterling assisted Progressio (charity focusing on sustainable development) to develop laws relating to illegally sourced timber in the EU and UK. The law was ratified by the EU in 2010.
39 DLA Phillips Fox assisted the Nepalese Government with the constitution drafting process.
40 See n 24 above.
41 Baker & McKenzie worked with lawyers from Microsoft to represent the ICRC to draft uniform model legislation on disaster relief.
42 Baker & McKenzie worked with lawyers from Vodafone to develop legal mechanisms in an attempt to stop bonded labour practices in Nepal.
43 DLA Phillips Fox assisted the Timorese Government in relation to agreements with Indonesia.
44 New Perimeter undertook a comprehensive study on Special Economic Zones which discussed the risks and benefits of a Special Economic Zone in Timor Leste.
45 DLA Phillips Fox advised the Government of the Democratic Republic of Timor-Leste regarding the establishment of a national bank.
46 Ashurst Australia provided a secondee to the Government of the Democratic Republic of Timor-Leste to help create a property register.
47 Mayer Brown provided labour law advice for Planet Finance's (NGO) microfinance initiatives.
48 Led by Orrick and Latham & Watkins, as well as many other law firms, the consortium compiled a country-by-country report outlining regulatory obstacles to microcredit across the EU's 27 Member States in 2011.
49 Mayer Brown also advised in relation to a loan agreement to finance a social business in Ghana.
50 Baker & McKenzie gave assistance to Ashoka's Global Fellows, as they work to empower communities.

as to facilitate credit to support agricultural groups grow their businesses.[51] Work for charities or aid agencies[52] might include advice on tax, incorporation, registration, risk and insurance issues but also advice on relevant laws in particular jurisdictions such as competition or occupational health and safety laws.[53]

Environmental protection

Issues addressed under the heading of environmental protection include illegal logging,[54] encouraging take up of solar powered devices[55] and raising awareness of climate change.[56] Law firms have established relationships with local counsel to assess pertinent legislation, customary law and actual practice, providing advice on current law and supported NGOs variously, to become commercially stable (via trademarks, contracts and trade agreements) and to provide briefs for NGOs to support their advocacy for law reform and enforcement.

Gender equality

Gender equality is a recurring theme in international pro bono work in African and Asian countries, including China; there is also an example from Peru. Work includes documenting human rights abuses against women and preparing affidavits and a report outlining the abuse,[57] designing an agenda and securing appropriate speakers for a summit meeting[58] and providing technical drafting assistance to a group of congresswomen in Peru as they developed legislation against domestic violence.[59] Work has also been done in evaluating legal and regulatory schemes and policy strategies in some African countries to assess how they impact women's ability to access savings and credit services.[60]

Hunger and food security

Work in the area of hunger and food security area includes: advising an NGO on the current pastoral rights of nomadic herders being forced into permanent settlements, based on customs and the Rural Code of Niger, and on measures to improve their rights;[61] supporting the creation and operation of a multinational hunger relief non-profit, including corporate formation and governance, tax work and assistance with various contracts;[62] and advice on patent protection laws to another NGO to improve access to medicine.[63]

51 Simmons & Simmons helped create simple template agreements between Oxfam and the bank /monetary financial institution (MFI), or between the enterprise and bank/MFI.

52 Herbert Smith Freehills indicated in 2011 that it had assisted, over the previous 18 months, 30 clients with an international focus, most of which were international aid agencies.

53 DLA Piper provided information on legal and risk issues to World Vision Australia (Kenya operation), governance advice to Optometry Giving Sight and competition law advice to Oxfam.

54 New Perimeter focused efforts in Colombia and Peru where it established relationships with local counsel and developed strategies for legal developments.

55 Work done by A4ID's legal partners provided advice on trademark, brand protection and contracts.

56 Clayton Utz acted for Oxfam and the World Wildlife Fund's Legal Resource Initiative, which involved real time legal advice to delegates during the climate negotiations in Barcelona and Copenhagen.

57 New Perimeter, in association with AIDS-Free World, documented human rights abuses against Zimbabwean women. DLA Piper lawyers also interviewed women who were abused because of their political viewpoints.

58 New Perimeter assisted Vital Voices Global Partnership in planning and implementing a programme on female political empowerment at the Vital Voices of Asia Summit.

59 New Perimeter sent lawyers to Peru help congresswomen draft new legislation against domestic violence.

60 A team of New Perimeter lawyers evaluated legal and regulatory schemes in Malawi and assessed how these impacted women's abilities to access savings.

61 Project in Niger with local organisation JEMED (Youth with a Mission), international NGO Tearfund, A4ID and law firm Weil, Gotshal and Manges.

62 New Perimeter lawyers supported the creation and operation of a multinational hunger relief non-profit, the Global Food Banking Network.

63 A4ID brokered project finding intellectual property lawyers to work for MSF.

Observations, trends and patterns

This scan of international pro bono work displays some trends and patterns. The first is that large law firms have strong corporate law skills and a number of the projects and initiatives can be seen to utilise these skills successfully. These tend to be projects for larger, well-organised NGOs and charities that have a track record of delivering outcomes in the countries where they operate. These organisations can benefit considerably from good governance, structuring, tax, intellectual property and general commercial law advice. The legal support helps them to successfully implement significant initiatives by providing the necessary contractual and commercial arrangements that underpin their operation or a particular project, and help troubleshoot other issues that may arise, such as regulatory issues. Pro bono legal support for these organisations makes good sense as the core skills of large law firms are well matched to the need of these organisations and are utilised to deliver outcomes that potentially affect the lives of many.

A second observation is that, consistent with the ethos of pro bono work of prioritising a limited resource towards the greatest unmet social need, much international pro bono work is directed towards significant and apparent injustices, and towards egregious breaches of human rights. Issues such as the following are often difficult issues to tackle: for example, the treatment of people living with HIV/AIDS; human trafficking; the plight of refugees; the lack of inheritance for women and women's rights generally; gender-based violence; and the treatment of minors. In some countries, relevant laws may already exist to address these issues and the problem lies with implementation and enforcement. In other countries, the laws may be non-existent or inadequate. The pro bono project will vary accordingly.

Importantly, pro bono legal work addressing these issues is most effectively carried out when it is in partnership with organisations that are on the ground and working with the community, and when the legal brief is developed in consultation with these organisations.

The sources or points of referral for this work vary widely. Clients may self-refer, be referred by a staff member in a firm who has a connection to the organisation or by an existing pro bono or fee-paying client. Some of the large NGOs, charities and aid agencies are long-term clients of law firms and have been assisted over a number of years to address a broad range of legal issues that have helped them to stabilise, grow and better achieve their mission. Pro bono clearing houses have become more sophisticated and skilled at brokering projects to law firms and increasingly provide a source of opportunities where law firms can find appropriate projects with which to become involved.

Projects vary considerably in their size, strategic direction and desired outcomes. For example, an ABA ROLI project aiming to stop the trafficking of women in Nepal [64] employed a number of different strategies over a two-year period, including to:

- raise awareness of and empower potential victims;
- build the competence of key anti-human trafficking-related institutions to improve the quality of criminal investigations; and
- facilitate better systemic coordination between governmental and civil society stakeholders.

Each component of this programme fills discrete gaps and seeks the broad outcome of decreasing the incidence of trafficking in women, while improving investigative effectiveness, and increasing prosecutions and convictions.

On the other hand, a law firm may undertake discrete tasks, such as undertaking the legal work associated with the opening of eye hospitals[65] as part of a long-term relationship with an NGO.

Law firms generally provide legal services but a number have their own foundations that are used from time to time to provide funds to financially support a pro bono project or client, usually for a specific initiative rather than for operational funds.

64 Training and consultancies provided by ABA ROLI in relation to trafficking in Nepal aim to raise awareness, empower potential victims and build competence of anti-trafficking institutions.

65 DLA Phillips Fox undertook all the legal work associated with the opening of two eye hospitals in Fiji and Timor-Leste.

Social impact of legal services may be indirect

Legal services, unlike the provision of food or medical services, are one or more steps removed from the outcome in achieving social change. The upshot of legal support may not be seen for some time but is nevertheless important. For example, training delivered to women about the importance of registering the birth of their child may not have a direct effect until 18 years later, when a child is required to prove his or her age to obtain a driving licence. The effect may be significant in that a driving licence may be vital to that person being able to earn a living.[66] On the other hand, the drafting of a patent licence agreement between a research institution and Médecins Sans Frontières (MSF) facilitates MSF being able to support the development of new diagnostic tests, and makes them accessible and affordable to many people in developing countries from the moment the agreement is executed.[67]

Social impact of the GFC

It is not the goal of this paper to provide an analysis of the needs of countries in a post-GFC world. However, a few excerpts from key reports reproduced below provide a context for drawing some conclusions about how international pro bono might better assist countries affected by the GFC. The first comments concern the East Asian financial crisis in 1998:

'Widespread economic hardships are tearing at the fabric of society: it is essential to ensure that food markets work, to augment the purchasing power of vulnerable households, to cushion the impact of price increases, and to preserve the poor's access to health and education. Strengthening public and private institutions responsible for service delivery is also crucial in both the short and longer-term.'[68]

'Too often in the Latin American crises, policy makers' energy was devoted to restoring macroeconomic stability and implementing structural reform. East Asia has the opportunity to avoid this mistake by putting social issues at the forefront. Drops in income, employment, and public services have widespread and complex social consequences. Therefore, it is important to take action on a wide range of fronts, and make every effort to anticipate these consequences. Targeting is crucial. Special funds set up in Latin America, designed to cushion the social costs of economic adjustment measures, had mixed success, largely due to poor targeting.'[69]

In terms of lessons for the future following the more recent GFC, the following actions were suggested:[70]

- Plan for crises before they occur: governments need both to invest in prevention (for example via adequate regulation of finance) and to stress test their economic policy, state institutions and social policies against the response to and management of possible future crises.
- Monitor the impact and talk to people: the best responses have involved on-the-ground, real-time monitoring of the impact of the crisis, and genuine dialogue with affected communities about the best way to respond.
- Support local-level coping mechanisms: governments should build the capacity of families, local civil society and faith-based organisations to respond to crises.
- Access to information: support during crises can also include providing information on sources of help, and even supporting connectedness and 'moral messaging' – for example, respected local figures calling on citizens to check on the welfare of their neighbours.
- Gender matters: one near-universal characteristic of responses to date is gender blindness. Governments have responded to job losses in textiles and garments industries, largely of women, by channelling fiscal stimuli into construction, which largely employs men. Attempts to inject credit into cash-starved economies too often end up being pounced upon by large enterprises,

66 Example from Christina Storm, Founder of Lawyers without Borders in video interview found at www.youtube.com/watch?v=f9EF68RxXKQ&feature=related (http://bit.ly/13pivAQ).

67 A4ID brokered project finding intellectual property lawyers to work for MSF.

68 Tamar Manuelyan Atinc and Michael Walton, Social Consequences of the East Asian Financial Crisis (World Bank Group, 1998).

69 Nora Lustig and Michael Walton, 'East Asia Can Learn From Latin America's Travails' International Herald Tribune (New York), 29 May 1998.

70 Duncan Green, Richard King, May Miller-Dawkins, 'The Global Economic Crisis and Developing Countries' Research Report, Oxfam GB, 28 May 2010 6.

which employ relatively few workers, rather than benefiting small, labour-intensive firms, or people working in the vast informal economies of the South.

- After a crisis, replenish resilience: each crisis depletes the coping capacities, both physical and psychological, of poor people and communities. After the crisis has passed, there is an urgent need to replenish those sources of resilience before the next shock arrives.

And as to the timing of action required:

'The crisis has highlighted social protection as a development issue, and the importance of managing risk and volatility at all levels. It is not enough to pursue economic growth now, and social welfare later – the two must come together in pursuit of improved well-being.'[71]

And as to the need for concerted action:

'The global economy is passing through a period of profound change. The immediate concern is with the financial crisis, originating in the Northern Hemisphere. The Southern Hemisphere is affected via reduced demand and lower prices for their exports, reduced private financial flows, and falling remittances. This is the first crisis. Simultaneously, climate change remains unchecked, with the growth in greenhouse gas emissions exceeding previous estimates. This is the second crisis. Finally, malnutrition and hunger are on the rise, propelled by the recent inflation in global food prices. This constitutes the third crisis. These three crises interact to undermine the prosperity of present and future generations. Each has implications for international aid and underline the need for concerted action.'[72]

Conclusion

There are a number of messages and themes that emerge from the above statements about appropriate action in a post-GFC world that resonate with the way international pro bono legal work is already operating and the kind of projects that are being undertaken. These messages also serve as an important reminder for those involved in international pro bono legal work of the elements that are vital in order to achieve meaningful outcomes.

This paper has demonstrated the wealth of international pro bono projects that have been undertaken to help *strengthen institutions to build resilience*; those who undertake this work are also good at understanding and managing risk – vital skills when developing and implementing new initiatives. Some law firms and lawyers already have a strong interest in addressing gender and other human rights issues, and are currently working with organisations that conduct real-time monitoring of the impact of a crisis. These organisations are *partaking in genuine dialogue with affected communities about the best way to respond*, and law firms need to continue to partner with these organisations to ensure that their pro bono work is effectively addressing the need.

The greatest impact that international pro bono can make in the post-GFC world is possibly also the key thing that law firms do well, that is, to provide the broad range of non-litigious legal work that supports and stabilises organisations. It is this stabilisation that can help developing countries be more resilient and grow. However, as significant outcomes are often only achieved by sustained effort over time, law firms need to develop strong relationships and work closely with governments of developing countries, and established aid or charity organisations or other NGOs, particularly those that have a good history of working on the ground in that country.

Law firms also have the knowledge and skills to draft laws, prepare guides, toolkits and other legal materials and to deliver training and represent individuals or groups of individuals whether it be, for example, to assist persons to seek compensation, or in relation to immigration laws. These services can perhaps be part of a more immediate response to a crisis. Also, by coordinating lawyers across a number of firms and in-house corporate lawyers, detailed comparative studies of the law and its implementation across multiple countries can be prepared, to be used as an important advocacy tool. Law firms and barristers can also pursue public interest litigation that, on its own or as part of a campaign for change, can lead to a significant outcome of social change.

71 *Ibid* 7.

72 Tony Addison, Channing Arndt, and Finn Tarp, 'The Triple Crisis and the Global Aid Architecture' (2010), UN University Working Paper No 2010/01.

For those wanting to work with lawyers and law firms, organisations like New Perimeter, or initiatives like the ABA ROLI, it is important that they understand the way in which lawyers and law firms operate in order to leverage the most useful services from the available international pro bono legal providers. Individual firms have quite different pro bono cultures and interests that can change as the structure of the firm, or the key persons involved, change. Spending time understanding a firm's culture or identifying the firm to approach that is likely to be the best match for a project or initiative is well worthwhile. Pro bono coordinators in law firms, brokers and pro bono clearing houses are all good starting points. Above all, good personal relationships are vital for success in pro bono projects.

There is however no doubt: through a myriad of institutional, agency and law firm initiatives, pro bono legal services have supported important responses to support communities and individuals as they face the challenges of financial crises and poverty.

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Chapter 4

Global Justice[1]

Amartya Sen[2]

'Injustice anywhere is a threat to justice everywhere', wrote Dr Martin Luther King, Jr, 45 years ago in April 1963, in a letter from Birmingham Jail. It would be hard to find a more urgent intellectual agenda today than the demands of world justice. But world justice is not an easy subject. Nor is the notion of 'the rule of law', which motivates this research initiative. I think I should begin with a few remarks on the idea of justice in general and that of world justice in particular, as well as on the idea of the rule of law.

It is, I would argue, useful to distinguish between (i) an organisation-focused understanding of justice; and (ii) the basic idea of realised justice. Sometimes justice is conceptualised in terms of certain organisational requirements – some institutions, some regulations, some rules (for example, free speech, free trade or progressive taxation, depending on a particular understanding of the structural demands of justice). This can be fine enough as far as it goes but going beyond institutions and structures, we also have to examine what actually does emerge, influenced by institutions and organisations, but also by other features of the society (such as behaviour modes, social norms and practices, and so on).

In classical Sanskrit, two distinct words – *niti* and *nyaya* – help to differentiate two separate concentrations. Words such as *niti* and *nyaya* have been used in many different senses by different legal theorists in ancient India but one of the main uses of the term *niti* is organisational propriety. In contrast, the term *nyaya* stands for a more comprehensive concept of realised justice. In this line of vision, the role of institutions, important as it is, takes a subsidiary and partial role. For example, the ancient Indian legal theorists talked disparagingly of what they called *matsyanaya*: 'justice in the world of fish' – a society of fish where a big fish can freely devour a small fish. This is outlined as what is to be avoided and it is seen as imperative that the 'justice of fish' cannot invade the world of human beings. So *nyaya* is the subject matter of the kind of society that the social institutions and practical rules should be aimed at, working with other influences. The realisation of justice in the sense of *nyaya* is not just a matter of judging institutions and rules, but of judging the societies themselves. Whatever the propriety of established organisations, if a big fish remains free to devour a small fish, then this is a violation of human justice, no matter to what the causation of that transgression is traced.

In the inclusive perspective of *nyaya*, there is little room for judgments like Ferdinand I's famous 16th century maxim: 'Fiat justitia et pereat mundus' (let justice be done, though the world perish). If the world does perish, there would not be much to admire in this development in the perspective of *nyaya*, even though the austere *niti* leading to this result could be defended with very sophisticated arguments of different kinds. The distinction is important, even when *niti* and *nyaya* complement each other. For example, setting up many more schools for children in educationally deprived countries would be an important *niti*, but what would be celebrated in the perspective of *nyaya* is the achievement that boys and girls are actually educated and have the freedom that comes from that accomplishment. Similarly,

1 This article was produced for the ABA as part of the ABA's World Justice Project, funded by generous grants from the Bill & Melinda Gates Foundation and the William and Flora Hewlett Foundation.

2 For helpful suggestions, I am grateful to Dr Pedro Ramos Pinto and Kirsty Walker.

reforming the counterproductive patent laws for medicine to make urgently needed drugs against preventable diseases affordable by the poor of the world would be an excellent departure in *niti*, but it is the actual overcoming of those diseases (through the combination of cheaper drugs, more-targeted research, better delivery and use, and so on) that would demand inclusion in the vision of *nyaya*.

It is easy to see that the pursuit of world justice would need a great many institutional developments and organisational changes around the globe, but underlying our interest in institutional analysis must be some idea of the overall demands of global justice itself. The distinction between *nyaya* and *niti* is, thus, important for the subject of world justice.

Something similar can, in fact, be said of our understanding of the 'rule of law', the basic idea behind our research initiative. The challenge is not confined only to making sure that the laws, as they exist, apply to all and are followed by all, though these demands can be very important too (as Frederick Marryat put it famously in 1830 in *King's Own*, 'there cannot be one law for the rich and another for the poor'). But going beyond that, we must also take on board the need to scrutinise the kind of comprehensive justice (in the sense of *nyaya*) that emerges from practices of the rule of law. As James Heckman, Robert Nelson and William Neukom point out, it is necessary to examine 'fundamental normative questions as to what defines a good life and what the ultimate ends of a rule of law system might be' (2007). The subject matter of this volume is, thus, both complex and momentous.

Contemporary political philosophy

We are not, of course, working in an intellectual vacuum, for these subjects have engaged attention over a very long period of time. There are also well-developed bodies of literature on the theory of justice in political philosophy, in jurisprudence and legal philosophy and in welfare economics. That large literature has much relevance to the challenge that this project is attempting to address.

Even though the inspiration for contemporary works on justice goes back to classic contributions of the stalwarts of the European Enlightenment, for example, the contributions of Jean-Jacques Rousseau, Immanuel Kant, Jeremy Bentham and Thomas Jefferson, the modern discipline of the theory of justice has been most strongly influenced by the writings of John Rawls, whose path-breaking book, *A Theory of Justice*,[3] has set the stage for much of the present-day animation in the theory of justice. Even those of our leading contemporary political philosophers, such as Ronald Dworkin, Thomas Nagel, Robert Nozick and Thomas Scanlon (to name a few), who have proposed rather different ways of dealing with issues identified by Rawls in his famous contribution, have tended to a great extent to see the requirements of a theory of justice in basically Rawlsian coordinates. John Rawls is clearly the dominant influence in the contemporary philosophy of justice.

I must admit that I too have, until fairly recently, tended to agree on the centrality of the Rawlsian perspective on justice, seeking departures mainly in the form of different answers to essentially Rawlsian inquiries. I now believe that this is a serious mistake, despite the profundity of Rawls's ideas and the debt that we owe to him.[4] It is, I believe, quite useful to examine why the scepticism of the Rawlsian basic framework may be justified, and why there is an urgent need for foundational departures from the prevailing theories of justice in contemporary political philosophy. These departures are necessary for the theory of justice in general, but they are particularly important for addressing the challenges of world justice.

Rawlsian theory of justice as fairness

The starting point of Rawls's formulation of the theory of justice is his insistence that the idea of justice – and the institutions needed for it – should be based on the demands of a more foundational concept than justice, namely fairness. It is on the foundations of fairness (as characterised by Rawls) that the Rawlsian principles of justice are developed. Fairness involves a demand to avoid bias in our assessments and in particular the need to escape being influenced by our respective vested interests or personal advantages. It is, in this sense, a demand for impartiality. Rawls's explication of the demands of impartiality makes use of an imaginary device, which he calls the 'original position'. The original

3 John Rawls, *Theory of Justice* (Belknap Press of Harvard University Press, 1971).

4 The outline of a very different approach to the theory of justice is the subject matter of my book, *The Idea of Justice* (2009).

position is a postulated situation of primordial equality, when the parties involved have no knowledge of their respective personal identities *within* the group as a whole. They have to choose, under this devised 'veil of ignorance', what exact rules should govern the society they are, as it were, 'establishing'. The influence of individual vested interest or personal gain is 'kept out' through the insistence that the deliberations on the choice of rules occur under ignorance of each person of his or her own personal interests and particular desires. This is how Rawls gets to his principles of justice.

Rawls's principles of justice, thus chosen, are aimed at the selection of the basic institutional structure of the society. He characterises in the following way the exact principles that he expects would emerge in the 'original position', with a priority for the first principle over the second, in the case of any conflict.

> '(1) Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.
>
> (2) Social and economic inequalities must satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.'[5]

It will be readily seen that the principles of justice, which are aimed at setting up 'just institutions', take the form of specifying organisational requirements mainly in the sense of *niti*, rather than judging the societies as a whole, in the sense of *nyaya*. That, as will emerge, is indeed a problem, but I must also emphasise that despite this rather limited focus, Rawls does also provide plentiful discussion of the kind of just society we might hope to see as emerging from these appropriate institutional choices.

More substantively, it can be seen that the principles of justice identified by Rawls include the priority of liberty (the 'first principle') giving precedence to maximal liberty for each person subject to similar liberty for all. Other issues of institutional choice are taken up through a compound set of requirements that are combined in the 'second principle', but the 'priority of liberty' comes first.

Among the important features of this set of principles for just institutions is the special role that Rawls gives to the claims of personal liberty. This is given priority over the demands of the second principle related to the equality of certain general opportunities and to the need for equity in the distribution of other general-purpose resources.

The first part of the second principle is concerned with the institutional requirement of making sure that public opportunities are open to all, without anyone being excluded or handicapped on grounds of, say, race, ethnicity, caste or religion. The second part of the second principle (called the 'Difference Principle') is concerned with distributive equity as well as overall efficiency and it takes the form of making the worst off members of the society as well-off as possible.

Rawls' analysis of equity in the distribution of resources is done through an index of what Rawls calls 'primary goods', which are general-purpose means to achieve a variety of ends (whatever resources would be generally helpful in getting what people would want, varied as they might be). Rawls sees primary goods as including such things as 'rights, liberties and opportunities, income and wealth, and the social bases of self-respect'[6].

Some questions

Rawlsian theory of justice has been a major constructive force in political philosophy, welfare economics and legal theory. Even though I must argue for the need for several radical departures from the Rawlsian understanding of the theory of justice, I must also emphasise how much our thinking on justice has benefited from Rawls's constructive work – both affirmatively and dialectically. Also, there are elements of Rawls's theory that, I would argue, cannot be anything but central to any plausible theory of justice. For example, I would strongly support Rawls's chosen starting point, to wit, the need to consider the demands of fairness as a prelude to the scrutiny of justice. Even though I shall presently suggest that the particular way Rawls proceeds to characterise fairness has several difficulties, I concur with his general belief that some exacting demands of impartiality must be incorporated in the foundations of justice.

5 John Rawls, *Political Liberalism* (Colmombia University Press, 1993), 291.

6 See n 3 above at 60-65.

The discipline of comparison

I proceed now to a number of critical issues that are problematic in the Rawlsian framework. The first question is extremely simple but, I would argue, rather far-reaching: 'what do we want from a theory of justice?' In his analysis of justice, Rawls takes the principal task of a theory of justice to be aimed at identifying the 'just society'. This leads to what can be called a 'transcendental' approach to justice that focuses on identifying perfectly just societal arrangements, rather than offering a way of comparing not entirely just societies against each other (the kind of societies we might actually encounter in the world – to decide on what we should actually do). The transcendental approach goes back at least to the writings of Thomas Hobbes and to his insistence that we cannot talk about justice without invoking a sovereign state, since we cannot fulfil the exacting requirements of a perfectly just society without the help of unimpeded sovereignty. So this is in line with a transcendental approach (focusing on the unsurpassably just), but there were, in fact, many other approaches in political philosophy that emerged during the Enlightenment that did not take the transcendental route (for example, those proposed by Adam Smith, Condorcet, Mary Wollstonecraft, William Godwin, Jeremy Bentham,or James Mill).[7]

However, in Rawls' work, and in the theories that have followed his identification of the requirements of a theory of justice, attention of modern political philosophy has tended to be relentlessly focused on addressing the transcendental question (and quite often *only* that question). In contrast, what can be called a 'comparative' approach would have concentrated instead on ranking alternative societal arrangements (whether some arrangement is 'less just' or 'more just' than another, so that we get guidance on what to do), rather than focusing exclusively – or at all – on the identification of a fully just society. Modern social choice theory takes a robustly comparative approach.[8] I shall call this 'the comparison question'.

Room for disagreement

The second question concerns the type of agreement that can be reasonably expected to emerge from public reasoning under conditions of fairness (in Rawls's case through his device of the 'original position'). Can we really expect that everyone in the original position would proceed to accept some one specific set of rules – principles of justice – as the only way to go? Is it sensible to assume that all our disagreements really arise from our respective vested interests (so that once they are taken out of action, we would all come to exactly the same conclusion)? Could it be that some of our differences are linked with basically different conceptions of justice, focusing on different grounds of justice? I shall call this the 'room for disagreement question'.

Individual interest, social parochialism and open impartiality

The third issue concerns Rawls' way of characterising the demands of fairness. How do we specify these demands so that evaluation of justice and the choice of principles of justice, under those conditions, guarantees the necessary impartiality? The issue of impartiality relates both to eliminating the influence of vested interest across the board, and also to eradicating the impact of local parochialism – an issue of some importance not only for global justice, but also for local or national justice in a global world. Rawls keeps his exercise of fairness confined to the limits of each polity on its own, that is, roughly speaking, separately for each nation state. While fairness in the treatment of all the persons in a nation (or 'a people', as Rawls calls that collectivity) is pursued by Rawls through vigorous elimination of individual vested interests, others who do not belong to this nation or people do not come into consideration in the same way at all.

That is problem enough, but there is in addition a second problem as well. The exclusive focus on eliminating the influence of individual vested interest, as opposed to that of community-based

7 The emergence of alternative approaches is discussed in my book, see n 4 above.

8 Social choice theory, in its modern form, has been pioneered by Kenneth Arrow (1951); see also Amartya Sen *Collective Choice and Social Welfare* (Holden-Day 1970). The analytical priority of the comparative can also be seen in the early formulations of social choice theory in the 18th century, particularly by Marquis de Condorcet (see Marquis de Condorcet, *Essai Sur L'application De L'analyse À La Pluralité Des Voix* [1785] (Chelsea Publishing Co, 1972, facsimile reprint of original published in Paris by the Imprimerie Royale).

parochialism, makes the pursuit of impartiality and fairness in the Rawlsian framework that much more limited. I shall call this 'the impartiality question'.

Freedoms and capabilities

Fourthly, since Rawls concentrates on a person's holding of 'primary goods' (like income, wealth, etc) to judge the overall advantage that he or she enjoys compared with others, there is some serious overlooking of the fact that different persons, for reasons of personal characteristics or environmental influence, can have widely varying 'conversion' opportunities of external objects (like income and wealth) to their respective capabilities – what they can or cannot actually do. A person with a proneness to illness, or living in an epidemiologically challenged environment, may get far less out of a given amount of income than another who is not similarly afflicted.

Rawls does talk about the eventual emergence of special provisions for 'special needs' (for example, for the blind or for those who are otherwise clearly disabled) at a later phase – the 'legislative phase' – of his multi-stage story of Rawlsian justice. This is good rectification as far as it goes, but (i) these corrections occur (if they do) only after the basic institutional structure has been set up through the Rawlsian 'principles of justice' (which are not influenced by such 'special needs'); and (ii) even at a later stage, when special note is taken of 'special needs', there is no attempt to come to terms with the pervasive variations in conversion opportunities between any two different persons.

Transcendental versus the comparative

The transcendental and comparative approaches are quite distinct, and neither approach, in general, subsumes the other.[9] This is unfortunate for the transcendental approach, since no matter what other characteristics a theory of justice might sensibly have, it must also, for use in practical reasoning, help us to address comparative assessments of justice, such as: how can we make a country, or the world, less unjust? The pursuit of justice in the world can never take the form of jumping in one go to some perfectly just society. Despite that, the Rawlsian framework, and nearly all the theories of justice in contemporary political philosophy, are exclusively devoted to identifying 'the perfectly just' rather than being concerned in any direct way with comparative assessments.

The intellectual interest in, and practical relevance of, comparative questions about justice are hard to deny. Investigation of different ways of advancing justice in a society (or in the world), or of reducing manifest injustices that may exist, demands comparative judgments about justice, for which the identification of fully just social arrangements is neither necessary nor sufficient. To illustrate the contrast involved, it may well turn out that in a comparative perspective, the introduction of social policies that eliminate widespread hunger (or remove rampant illiteracy) is widely seen as a manifest advancement of justice. But the implementation of such policies would still leave the societies involved far away from the transcendental – or unsurpassable – requirements of a fully just society (since transcendence would have many other demands regarding equal liberties, distributional equity, and so on).

To take another example, instituting a system of health insurance in the US that does not leave tens of millions of Americans without any guarantee of medical attention at all may be judged to be an advancement of justice, but such an institutional change would not turn the US into a 'just society' since there would remain a thousand other transgressions to remedy. Some non-transcendental articulation is clearly needed.

But, it can be asked, do we not need a transcendental pure theory to have an intellectually adequate theory of comparative assessment of justice? There seems to be fairly widespread belief among many of the practitioners of Rawlsian and other transcendental theories of justice that comparative questions can be answered only with the help of a transcendental identification of a perfectly just society. It is, however, not at all easy to see why this should be the case. Indeed, the two exercises are quite distinct and neither need throw much light on the other. You cannot get anything like the richness of a comparative approach from identifying a transcendental possibility. For example, you may firmly

9 Amartya Sen, 'What Do We Want from a Theory of Justice?' (2006) Journal of Philosophy, 103: 215-38.

conclude that Leonardo da Vinci is the best painter ever in the world, but it won't tell you how to rank Picasso against Braque. Conversely, you could not necessarily get the unsurpassable (or the transcendental) alternative from the totality of our comparative judgments. We may be able to make a great many pairwise comparisons, but not quite all. We may be able to rank, say, Picasso against Braque or Dali, and make many other such judgments, and yet we may fail to identify the 'very best' or the 'absolutely right' choice, because of an inability to rank some pairs of alternatives, say Picasso against Van Gogh (if the two are competing for the top position).

This is not to reduce in any way the importance of the inspiration that Rawls' transcendental theory has provided in drawing general attention to many issues of practical importance, such as the critical role of social institutions, the special status of personal liberty, or the centrality of poverty removal as a social concern. And yet if we want to use that theory not just for inspiration but for guidance in making judgments about the enhancement of justice through institutional reform or behavioural transformation, we would not, alas, get any specific comparative implications from the identification of a transcendental alternative.[10]

Disengagement from world justice in transcendental theories

It is not hard to see that world justice demands many reforms and many new institutions and practices. But the mere identification of the 'perfectly just society' would not tell us much about what to do to pursue the advance of justice in the world in which we live. Indeed, the concentration on the transcendental approach has had, I would argue, a seriously negative effect on practical discussion of justice in general and global justice in particular. We can think of many changes that would manifestly advance world justice as we see it, without getting us to 'the perfectly just world'. However, that kind of discussion would appear to be just 'loose talk' to those who are persuaded by the Hobbesian–Rawlsian claim that justice is about the perfectly just society, and that we need a fully sovereign state to apply the principles of justice with its extensive institutional requirements, which is a consequence of taking questions of justice to be exclusively issues of transcendental justice.

Consider the strongly argued dismissal of the relevance of 'the idea of global justice' by one of the leading contemporary philosophers, Thomas Nagel. His argument draws on his understanding that there are extensive institutional demands to think cogently about justice which cannot be met at the global level at this time. As Nagel puts it, 'It seems to me very difficult to resist Hobbes's claim about the relation between justice and sovereignty' and 'if Hobbes is right, the idea of global justice without a world government is a chimera'.[11] In the global context, Nagel concentrates, therefore, on clarifying other demands, distinguishable from the demands of justice, such as 'minimal humanitarian morality'[12].

In the Rawlsian approach too, the application of a theory of justice requires an extensive cluster of institutions that determines the basic structure of a fully just society. Not surprisingly, Rawls actually abandons his own principles of justice when it comes to the assessment of how to go about thinking about global justice. In a later contribution, *The Law of Peoples*, Rawls invokes a 'second original position' with a fair negotiation involving representatives of different polities – or different 'peoples' as Rawls call them – who serve as parties under this second veil of ignorance.[13] However, Rawls does not try to derive principles of justice that might emanate from this second original position, and concentrates instead on certain general principles of humanitarian behaviour.

Thus, the theory of justice, as formulated in this transcendental approach, reduces many of the most relevant issues of justice in the world as being simply inadmissible when they would seem to be most strongly needed. This is a pity: when people across the world agitate to get more global justice, they are not clamouring for some kind of 'minimal humanitarianism'.

10 The mathematical 'disconnect' here is discussed more fully in Sen 2006, n 9 above.
11 Thomas Nagal, 'The Problem of Global Justice' (2005) 33 Philosophy & Public Affairs, 115.
12 *Ibid*, 130-133, 146-147.
13 John Rawls, 'The Law of Peoples' (Harvard University Press 1999).

Incomplete orderings and the use of comparative judgments

Am I overstretching the dichotomy between the transcendental and the comparative? The former may be neither necessary nor sufficient for the other, but should not a sequence of pairwise comparisons invariably lead us to the very best? That presumption has some appeal, since the superlative might indeed appear to be the natural end point of a robust comparative. But this is, in fact, a non sequitur. It is only with a 'well-ordered' ranking (for example, a complete and transitive ordering over a finite set) that we can be sure that pairwise comparisons must ultimately identify a 'best' alternative.

We must, therefore, ask: 'how complete should the assessment be, for it to be a systematic discipline of evaluation?' In what can be called a 'totalist' approach that characterises the standard theories of justice (including Rawls's), incompleteness tends to appear as a failure, or at least as a sign of the unfinished nature of the exercise. Indeed, the survival of incompleteness is sometimes seen as a defect of a theory of justice, which calls into question the positive assertions that such a theory makes. In fact, however, a theory of justice that makes systematic room for incompleteness allows one to arrive at possibly quite strong judgments (for example, about the injustice of continuing famines in a world of prosperity, or of persistently grotesque subjugation of women), without having to find highly differentiated assessment of every political and social arrangement in comparison with every other arrangement (for example, addressing such questions as: 'is a top income tax rate of 39 per cent more just or less just than a top rate of 38 per cent?')

I have discussed elsewhere why a systematic and disciplined theory of normative evaluation, including assessment of social justice, need not take a 'totalist' form.[14] Incompleteness may be of the lasting kind for several different reasons, including unbridgeable gaps in information and judgmental unresolvability involving disparate considerations that cannot be entirely eliminated, even with full information. For example, it may be hard to resolve the overall balance of the comparative claims of equity considerations, when different considerations conflict in subtle ways. And yet, despite such durable ambiguity, we may still be able to agree readily that there is a clear social injustice involved in the persistence of endemic hunger or exclusion from medical access, which calls for remedying for the *advancement* of justice (or reduction of injustice), even after taking note of the costs involved. Similarly, we may acknowledge the possibility that liberties of different persons may, to some extent, conflict with each other (so that any fine-tuning of the demands of equal liberty may be hard to work out), and yet strongly agree that torturing people in custody would be an unjust violation of liberty, and such policies demand immediate rectification.

There is a further consideration that may work powerfully in the direction of making political room for incompleteness of judgments about social justice, even if it were the case that every person had a complete ordering over the possible social arrangements. Since a theory of justice invokes agreement between different parties (for example, in the 'original position' in the Rawlsian framework), incompleteness can also arise from the possibility that different persons may continue to have some differences, even after agreeing on a lot of the comparative judgments. Even after vested interests and personal gains have been somehow 'taken out' of consideration through such devices as the 'veil of ignorance', there may remain possibly conflicting views on social priorities, for example, in weighing the claims of need over entitlement to the fruits of one's labour.

Room for disagreement: an illustration

Conflicts of distributive principles that are hard to eradicate can be illustrated with an example. The illustration is concerned with the problem of deciding which of three children should get the flute (about which they are quarrelling) – you have to adjudicate between these different claims. Child A claims it on the ground that she is the only one of the three who knows how to play the flute (the others don't deny this). If that is all you knew, the case for giving it to the first child would be strong.

However, child B expresses his claim to the flute on the ground that he is the only one among the three who is so poor that he has no toy of his own, and that the flute will give him something to play

14 Amartya Sen, 'Consequential Evaluation and Practical Reason' (2000) Journal of Philosophy, 97: 477-502; see also Sen 1970, n 8 above; Sen, 'Maximization and the Act of Choice' (1997) Econometrica, 65: 745-79; Sen, 'The Possibility of Social Choice' (1999) American Economic Review, 89: 349-78; Sen, 'Incompleteness and Reasoned Choice' (2004) Synthese, 140: 43-60.

with (the other two concede that they are much richer and well-supplied with engaging amenities). If you had only heard child B and none of the others, the case for giving it to child B would be strong.

Child C, on the other hand, argues that she has been working for many months to make the flute with her own labour (the others confirm this), and just when she had finished her work, she complains, 'these Johnnies came along trying to snatch the flute away from me'. You might have given it to child C if her statement is all you had heard.

However, having heard all three you do have a problem. Theorists of different persuasions – utilitarian or egalitarian or libertarian – may believe that a just resolution can be readily spotted here, though, alas, they would respectively see totally different resolutions as being 'obviously right'.

The main point to note in the present context is that the different resolutions all have serious arguments in support of them, and we may not be able to identify, without some arbitrariness, one of the alternative arguments as being the only one that must invariably prevail. Different impartial judges may take different views in this decisional problem (unrelated to their respective vested interest or hope of personal gain). And the problem of choice in this case is ultimately one of priorities in the principles of justice, so that the decisional dilemma reflects a deeper problem of conflict of unrejectable principles that would need to be accommodated.

And yet in many particular cases, there will be no decisional dilemma to resolve, even when none of the underlying reasons is summarily rejected. It may turn out that the child who has made the flute is also the poorest, or the only one who knows how to play the flute. Or it might be the case that child B's deprivation is so extreme, and his dependence on something to play with so important for a plausible life, that the poverty-based argument might come to dominate the judgement of justice. There could be what can be called 'circumscribed congruence' despite the varying weights that different impartial judges apply to the conflicting considerations.

Rawls has shown, rather convincingly in my view, why liberty has a special place that cannot be ignored when comparing the claims of liberty against other considerations, including the avoidance of inequality and poverty. Rawls went on to argue for giving total priority to liberty in *all* cases. It is much easier to be persuaded that such a priority would be quite right when the violations of personal liberty happen to be extremely serious, whereas issues of economic inequality are not at all matters of life and death. And yet when the transgressions against liberty are rather marginal, and the inequalities involved can cause extremely tragic deprivations, then, as Herbert Hart, the Oxford legal philosopher, argued in a famous critique of Rawls, the case for giving invariable priority to liberty would be hard to defend.[15] In his later writings, Rawls was willing to make some concessions to Hart's argument,[16] and yet his theory makes that very hard to do.

Open impartiality and global public discussion

I turn now to the third issue, the impartiality question. The role of impartiality in the evaluation of social judgments and societal arrangements is well recognised in moral and political philosophy. There is, however, a basic distinction between two quite different ways of invoking impartiality. With what I would call 'closed impartiality', the procedure of making impartial judgments invokes only the members of a given society or nation. The Rawlsian method of 'justice as fairness' uses the device of an 'original contract' between the citizens of a given polity. No outsider is involved in such a contractarian procedure, or is a party to the original contract (either directly, or through representatives). For the members of the focal group, the 'veil of ignorance' requires them to be ignorant of their respective identity *within* the focal group, and this can be an effective procedure for overcoming individual partialities within the focal group.

However, even under the veil of ignorance, a person does know that he or she belongs to the focal group, and is not someone outside it – indeed he or she could be anyone in that particular group – and there is no insistence at all that perspectives from outside the focal group be invoked. As a device of structured political analysis, the procedure is not geared to addressing the need to overcome group prejudices or parochialism.

15 H L A Hart, 'Rawls on Liberty and Its Priority' (1973) Univ. of Chicago Law Review, 40: 534-55.

16 John Rawls *Political Liberalism* (Columbia Univ. Press 1993).

In contrast, in the case of 'open impartiality', the procedure of making impartial judgments can (and in some cases, must) invoke judgments, inter alia, from outside the focal group. For example, in Adam Smith's use of the device of 'the impartial spectator', the requirement of impartiality requires the invoking of disinterested judgments of 'any fair and impartial spectator', not necessarily (indeed sometimes ideally not) belonging to the focal group.[17]

Adam Smith was particularly concerned about avoiding the grip of parochialism in jurisprudence and moral and political reasoning. In a chapter entitled 'Of the Influence of Custom and Fashion upon the Sentiments of Moral Approbation and Disapprobation', Smith gives various examples of how discussions confined within a given society can be incarcerated within a seriously narrow understanding:

> '... the murder of new-born infants was a practice allowed of in almost all the states of Greece, even among the polite and civilized Athenians; and whenever the circumstances of the parent rendered it inconvenient to bring up the child, to abandon it to hunger, or to wild beasts, was regarded without blame or censure... Uninterrupted custom had by this time so thoroughly authorized the practice, that not only the loose maxims of the world tolerated this barbarous prerogative, but even the doctrine of philosophers, which ought to have been more just and accurate, was led away by the established custom, and upon this, as upon many other occasions, instead of censuring, supported the horrible abuse, by far-fetched considerations of public utility. Aristotle talks of it as of what the magistrates ought upon many occasions to encourage. Plato is of the same opinion, and, with all that love of mankind which seems to animate all his writings, no where marks this practice with disapprobation.'
>
> (*Ibid*: V.2.15, 210)

Adam Smith's insistence that we must 'inter alia' view our sentiments from 'a certain distance from us' is, thus, motivated by the object of scrutinising not only the influence of vested interest, but also the impact of entrenched tradition and custom. While Smith's example of infanticide remains sadly relevant in some societies even today, many of his other examples have relevance to other contemporary societies. This applies, for example, to Smith insistence that 'the eyes of the rest of mankind' must be invoked to understand whether 'a punishment appears equitable'.[18] Scrutiny from a 'distance' may be useful for practices as different as the stoning of adulterous women in the Taliban's Afghanistan, selective abortion of female fetuses in China, Korea and parts of South Asia,[19] and plentiful use of capital punishment in China, Singapore, or for that matter in parts of the US (with or without the opportunity for celebratory public jubilation).

While we are not likely to have a global state or a global democracy any time soon, Smith's emphasis on the use of the impartial spectator has immediate implications for the role of global public discussion in the contemporary world, to arrive at some important comparative judgments. Global dialogue, which I believe is central for world justice, comes today not only through institutions like the UN or the World Trade Organisation (WTO), but much more broadly through the media, through political agitations, through the committed work of citizens' organisations and many NGOs, and through social work that draws not only on national identities but also on other commonalities, like trade union movements, cooperative operations, or feminist activities.

Primary goods versus capabilities

I turn, finally, to the capability question. In comparing the relative advantage of two persons in applying the Difference Principle of Rawls, we are directed by Rawls to proceed on the basis of the holdings of primary goods the two persons respectively have. But he focuses on command over general-purpose resources, rather than actual ability of the person to do this or be that. In a series of contributions, the Rawlsian approach of focusing on primary goods has been fairly extensively challenged in recent

17 Adam Smith, *The Theory of Moral Sentiments* (Clarendon Press 1976).

18 Adam Smith, *Lectures on Jurisprudence*, R L Meek, D D Raphael and P G Stein (eds) (Clarendon Press 1978; reprinted Liberty Press 1982), 104.

19 See, for example, Amartya Sen, 'The Many Faces of Gender Inequality' (2001) The New Republic, 17 September 2001.

years by the alternative perspective of what is called the 'capability approach'.[20] In that line of vision, a central role is given to the person's actual ability to do the different things he or she has reason to value. These attainments in human living (like being well nourished, avoiding premature mortality, taking part in the life of the community, and so on) are called human functionings. We have to concentrate on those functionings that we value and have reason to value, and the focus is specifically on a person's capability to achieve particular combinations of valued functionings. All the achievable combinations of functionings are called a person's capability set, and it is on this that the capability approach concentrates.

Through this elementary procedure, the capability approach focuses on human life and not just on some detached objects of convenience, such as incomes or commodities that a person may possess, which are often assumed to be the main criteria of human success. Since the income-orientated approach is quite standard in economics in particular, the capability approach proposes a change – a serious departure – away from concentrating on the *means* of living, to the *actual opportunities* of living.

It is not hard to see the reasoning underlying the understanding that the departure in favour of capability can make a significant – and constructive – difference. For example, if a person has a high income but is also very prone to persistent illness (for inherited, acquired or environmental reasons), then the person need not necessarily be seen as being very well off, on the mere ground that their income is high. Certainly, they have more of one of the means of living well (that is, a lot of income), but they have difficulty in translating that into good living (that is, living in a way that they have reason to value) because of the adversities of illness and physical handicap. We have to look instead at the extent to which she can actually achieve, if they so choose, to be healthy and well, and to do various things they would value doing.

To understand that the *means* of satisfactory human living are not themselves the *ends* of good living helps to bring about a momentous extension of the reach of the evaluative exercise, especially for world justice. And the use of the capability perspective helps to pursue these extensions.

It is important to emphasise that the focus of the capability approach is not just on what a person actually ends up doing, but also on what he or she is in fact capable of doing, whether or not he or she chooses to make use of that opportunity. For example, in terms of being undernourished, a famine-stricken victim may be just as deprived of food and nourishment as a person who voluntarily fasts, for political or religious reasons (despite having the ability to buy and eat plenty of food). Their manifest undernutrition may be much the same, but the capability of the well-off person who chooses to fast to be actually well-nourished (if they were to choose to go that way, instead) is much larger than that of the person who starves involuntarily because of poverty and destitution. The idea of capability is, thus, orientated towards freedoms and opportunities (to wit, the capability to live the kinds of lives that people have reason to value), rather than being concerned only with the one particular life that the person chooses to live.

World justice and the rule of law

The focus of this chapter has been on linking the understanding of justice to the nature of the society and the kind of opportunities and freedoms that people actually have, not just to institutions and practices (that too, but not just that). In this sense my concentration has been on *nyaya*, rather than only on *niti*. Terrible things happen in the world in which we live – from illiteracy and starvation to torture and violence. They arise from a variety of causes, which demand investigation, but the ultimate test of success is not whether the rules or institutions we can dream up are plausible, but what opportunities, what real capabilities people actually have in the world in which they live, based on all the influences that work on society.

To conclude, I have argued against giving the theory of justice a transcendental form, concerned only with characterising 'the just society'. We have reason to try to address as many questions of

20 See, for example, Amartya Sen, *Commodities and Capabilities* (North-Holland 1985); and M C Nussbaum and A Sen, *The Quality of Life* (Clarendon Press 1993). There is a huge literature and extensive active research engagement on this and related subjects in many different countries in the world, with regular meetings organised by the Human Development and Capability Association (HDCA).

comparative assessment as we can. Agreement on many major issues of world justice can emerge even when there are other matters in which we continue to differ and disagree. When Adam Smith and Condorcet argued for the abolition of slavery, or for free public education for all, including for women, they were not claiming that these changes would make the world perfectly 'just', but only *more just* in an identifiable way, than the world they saw around them. A comparative perspective that makes use of incomplete rankings (with the discipline of using partial orders that modern social choice theory has extensively explored) has much more to offer to the understanding of the demands of world justice (strictly, removal of world injustice) than the transcendental approach of Hobbes and Rawls, which is forced to abstain from judgments of world justice to concentrate on the fluffy characteristics of 'minimal humanitarianism'.

I have also argued against considering the question of impartiality in the fragmented terms that apply only within nation states – never stepping beyond the borders. This is important not only for being as inclusive in our thinking about justice in the world as possible, but also to avoid the dangers of local parochialism against which Adam Smith warned more than two centuries ago. Indeed, the contemporary world offers much greater opportunity of learning from each other, and it seems a pity to try to confine the theorisation of justice to the artificially imposed limits of nation states. This is not only because (as I earlier quoted Martin Luther King as saying) 'injustice anywhere is a threat to justice everywhere' (though that is hugely important as well). But in addition we have to be aware how our interest in others across the world has been growing, along with our growing contacts and increasing communication.

Already in the 1770s, David Hume noted the importance of increased intercourse in expanding the reach of our sense of justice. He had put the issue thus:

> '... again suppose that several distinct societies maintain a kind of intercourse for mutual convenience and advantage, the boundaries of justice still grow larger, in proportion to the largeness of men's views, and the force of their mutual connexions. History, experience, reason sufficiently instruct us in this natural progress of human sentiments, and in the gradual enlargement of our regards to justice, in proportion as we become acquainted with the extensive utility of that virtue.'[21]

The search for world justice is a central challenge in the world today not merely because our lives are interconnected, but also because the very presence of our interconnections makes us inescapably interested in and involved with each other. The 'natural progress of human sentiments' and 'the gradual enlargement of our regards to justice', which David Hume saw in the 1770s, did not come to an end in the 18th century.

21 David Hume, *An Enquiry Concerning the Principles of Morals* (2nd edn, Open Court Publishing Complany, 1966), 25.

Chapter 5

Imperative to Realign the Rule of Law to Promote Justice[1]

Livingston Armytage[2]

Introduction

Justice is fundamental to human wellbeing and core to any notion of development.

In this article, I critique the global approach to promoting 'the rule of law' in official development assistance (ODA) – foreign aid – over the past 50 years. During this period, development agencies have spent billions of dollars around the world supporting reforms that grapple with the challenges of improving the rule of law for people, especially the powerless poor, who are routinely denied justice through impunity, corruption, abuse of power and the denial of rights. But the results of these endeavours have usually been underwhelming and sometimes dismal.

As evidenced most recently, the GFC has particularly affected the poor in developing countries, who are disproportionately vulnerable to injustice as well as economic hardship. The civic wellbeing of the poor and their access to equitable opportunities are placed under mounting pressure in times of financial crisis.

International efforts to promoting justice and the rule of law have traditionally failed to address these problems effectively – and in this sense, the rule of law enterprise is now poised on the brink of development failure. At its essence, the unmet challenge of development is to address mounting concerns about equity and distribution.

Building on research and new evidence based in Asia published in *Reforming Justice: A Journey to Fairness in Asia*,[3] I argue that there is an immediate imperative to reposition justice more centrally in evolving notions of equitable development. This will require the international community to realign these endeavours to promote justice as fairness and equity.[4]

The rule of law in international development

In this article, I argue that the rule of law and judicial reform should be realigned to promote justice that, at its essence, is the promotion of fairness and equity. This is a hard-edged, pressing concern for reform-minded jurists, which is neither abstract nor idealistic.

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1 This article extracts and adapts arguments from L Armytage, *Reforming Justice: A Journey to Fairness in Asia,* (Cambridge University Press, 2012). www.cambridge.org/gb/knowledge/isbn/item6658411/Reforming%20Justice/?site_locale=en_GB.

2 Livingston Armytage, The Centre for Judicial Studies, Sydney

3 *Ibid* 1.

4 In this article, I will focus in particular on the lack of any cogent theory with which to justify the purpose for promoting 'rule of law' reforms. In the book, I go further to examine the related lack of any established consensus on how to evaluate success, stemming in part from this confusion over purpose. These arguments are supported by three detailed case studies from the Asia Pacific experience. To address these shortcomings, I offer two solutions: first, the purpose of judicial reform should be to promote justice as fairness and equity. Secondly, the evidence of success should be measured using extant frameworks of law.

This argument focuses primarily on reforming justice in terms of rights that have been allocated in law – that is in the juridical sense – rather than in the executive sense of allocating political interests. While justice is clearly a political good, as much as it is juridical, I focus primarily on reforms that assist the judicial arm of the state – being the courts, judges and related personnel – to adjudicate the law and administer justice and, secondarily, more broadly on development as a whole.

There are infinite examples of injustices that blight people's lives, most recently as the result of the GFC. Too often, however, reform efforts have been blind to these injustices in developing countries. An analysis of the history of development practice indicates that judicial reform has most commonly been charged to alleviate poverty through the promotion of economic growth, good governance and public safety. These are certainly worthy goals. But the evidence of this practice shows that success has been elusive. This is not to suggest that these reforms have failed altogether; rather that judicial reform has not worked as well as expected, as is indicated by the mounting chorus of disappointment in the literature. The judicial reform enterprise has been misdirected. The core critique of this article is that these endeavours suffer from foundational conceptual, empirical and political deficiencies. Existing approaches are based on inadequate theory, selective evidence and insufficient evaluation. By realigning reform endeavour to focus on promoting justice, there is a much greater prospect of measurable improvement across all aspects of civic wellbeing.

The goal of development is to promote civic wellbeing, which is usually formulated in terms of reducing poverty. In order to achieve this goal, judicial reform must promote justice because justice is both foundational and constitutive to social wellbeing. Justice in development embodies fairness and equity. It involves the exercise of rights, which are the political allocation of interests in law. In this sense, reforming justice is primarily concerned with enabling the exercise of rights or civic entitlements. These rights are embodied in law, whether at the international, domestic or customary levels. Measurement of the success of these reforms is demonstrable through visible improvements in the access to and exercise of these normative rights.

Analysis of the disappointing experience of development agencies in promoting the rule of law indicates that there is now an imperative to realign their policy approach to invest in judicial reform for the purpose of promoting justice – that is, to promote outcomes that are more fair and just, rather than economic growth. By promoting justice, opportunities for economic growth and other benefits will improve. In a just society, there is equitable access to rights including the opportunity for economic wellbeing, accountable government and public safety. Crucially, the promotion of justice is as much the objective of development, where economic wellbeing may be seen as the consequence of equitable development, as it is a means of promoting it. This may not seem radical to the lay reader; but it will require a paradigm shift for those development agencies that have rendered justice as being instrumental to aggregate economic growth and indifferent to concerns about distribution to this point.

Context

An overview of the history of promoting the rule of law and, more specifically judicial reform, over the past 50 years indicates that it has grown from modest beginnings to become an increasingly substantial, though still exploratory, enterprise. This history starts after post-war reconstruction, and spans the postcolonial period of state-building, the thaw of the Cold War bringing democracy, and the 'Washington Consensus' era of free markets and structural adjustment, up to the current period of globalisation. This is a period of significant change in world politics and economic development, which saw massive increases in judicial assistance as a niche in international development assistance.

While niche – at some two per cent of total official development assistance – judicial and legal reform has nonetheless grown rapidly and substantially over the past 50 years – some hundred-fold in aggregate.[5] Some indications are illuminating. Carothers describes this assistance as having

5 Using OECD data, it is estimated that judicial and legal reform may represent about two per cent of total ODA, comprising US$2.6bn of US$119bn total ODA, see n 23 below. In 2009, total net ODA from members of the OECD Development Assistance Committee (OECD-DAC) rose slightly in real terms (+0.7 per cent) to US$119.6bn; OECD 2010a.

'mushroomed' in recent years, becoming a major category of international aid.[6] Hammergren notes that court assistance started in Latin America in the 1960s valued in hundreds of thousands of dollars, typically climbing to around US$5m by the mid-1990s.[7] By 2001, Biebesheimer reports that the Inter-American Development Bank (IDB) had conducted some 80 projects in 21 Latin American countries, valued at about US$461m. During the 1990s, it is estimated that almost US$1bn was spent in Latin America by the World Bank, the IDB and the United Nations Development Programme (UNDP).[8] In 2001–2002, I participated in implementing a single justice programme loan from the Asian Development Bank valued at US$350m.[9] In 2006, the global lending of the World Bank for law and justice and public administration was reported to be valued at US$5.9bn.[10] By 2008, the International Development Law Organization (IDLO) estimates that a total of US$2.6bn in aid was devoted to legal and judicial development assistance supplied mainly by bilateral donors, representing a 'remarkable' increase from the US$1.7bn, which it estimates was invested globally in 2007 and US$841.5m in 2006.[11] This is substantial growth on any measure.

Analysis of this history illuminates patterns of crisis, fragility, growth and stability, which provide some explanation about what drives judicial reform in its different renderings. Throughout this period, the global political economy – the early 1980s debt crisis, the 1992 end of the Cold War and the mid to late-1990s global economic crises, and most recently the events of 9/11 – provided the context for a huge sense of uncertainty, instability and most importantly 'threat' to the global–US economic order. In this context, the promotion of the 'rule of law' appeared as part of a suite of actions designed to instil a sense of certainty, not just in legal contracts, but at the highest levels of global policy-making. In a sense, this reform was largely US-hegemonic in its overarching liberal orientation. This historical perspective provides a framework for showcasing the work of two major development agencies, namely, the US Agency for International Development (USAID) and the World Bank, as exemplars in judicial reform. Each is among the largest and longest operating bilateral and multilateral agencies in judicial reform.

Judicial reform has evolved throughout this period. Trubek and Santos describe this evolution as comprising three iterations or moments. The first moment emerged in the 1950–1960s, when development policy focused on strengthening the role of the state in managing the economy, when law was seen as an instrument for effective state intervention in the economy. In the second moment in the 1980s, law moved to the centre of development policy, influenced by neoliberal ideas, which stressed the primary role of markets in economic growth, limiting the power of the state. They discern a third moment, which is still in a formative phase, containing a mix of policy ideas, for example, that markets can fail, and require compensatory intervention by the state, when development means more than just economic growth and must be redefined to include human freedom. The role of judicial and legal reform shifted profoundly during this period within the changing political and economic context of development and an evolving vision of the role of the state in supporting the market.[12]

A study of two development actors is illuminating regarding what is both characteristic and distinctive in approaches to promoting the rule of law. USAID and the World Bank serve as exemplars of this endeavour in terms of leading the field as well as the size of their support. While their approaches vary, analysis reveals that their reforms have acquired an orthodoxy that has predominantly focused on promoting 'thin' or procedural notions of reform – as distinct from the substantive, qualitative or 'thick' aspects, which are normative and value-based. These reforms have generally aimed to improve

6 T Carothers, *Promoting the rule of law abroad: in search of knowledge*, (Carnegie Endowment for International Peace 2006), 10.

7 L Hammergren, 'Latin American Experience with Rule of Law Reforms and its Applicability to Nation Building Efforts' (2006) 38 Case Western Reserve Journal of International Law 63-93; World Bank, *World Development Report* 2002 (2002a) Washington, DC, 34 and 55; R Messick, 'Judicial reform: the why, the what and the how' conference paper, 15–17 March 2002, Marrakech.

8 P DeShazo, and J Vargas, 'Judicial reform in Latin America: an assessment' (2006) policy papers on the Americas, xvii, study 2, Center for Strategic and International Studies, Washington, DC, 1; C Biebesheimer, and M Payne, *Inter-American Development Bank experience in justice reform: lessons learned and elements for policy formulation* (IADB 2001), 3; L Bhansali and C Biebesheimer, 'Measuring the impact of criminal justice reform in Latin America' (2006) in T Carothers (ed), 303.

9 See n 1 above.

10 World Bank, *Annual report* (2006b) Washington, DC, cited in Harris 2007.

11 IDLO (International Development Law Organization), *Legal and judicial development assistance: global report* (2010) Rome, 4 and 11.

12 D Trubek and A Santos, *The new law and economic development: a critical appraisal* (Cambridge University Press 2006), 7.

the efficiency of the judicial function and the administration of justice within the formal sector of the state, often featuring delay-reduction, for example. Their foundational rationale has most commonly been grounded in judicial reform providing a means to support economic growth. Over the past 20 years, in particular, this rationale has cast judicial reform in an instrumental role to protect the institutions of property and contract as a means of promoting a neoliberal (small state/free market) economic model of growth. This model is associated with the now largely discredited Washington Consensus. This instrumental approach to reform persists and has been variously conceptualised. More recently, the notion of promoting good governance through accountability has emerged in the political science discourse. The most recent rationales for reform aim to promote peace, security and civil empowerment. In sum, there has been an evolving range of justifications for judicial reform with various economic, political, social and humanistic renderings over this period. Sometimes these justifications are conflated, and occasionally they compete.

USAID's approach

The current phase of judicial reform commenced with American assistance to Latin American reform in the 'law and development' movement of the 1960s.[13] The guiding assumption of the law and development movement was that law is central to the development process. A related belief was that law was an instrument that could be used to reform society and that lawyers and judges could serve as social engineers.[14] The primary goal of 'law and development' was, according to Trubek and Galanter, to transform legal culture through legal education and the transplantation of select 'modern' laws and institutions, with an emphasis on economic or commercial law and the training of pragmatic business lawyers. They saw the movement as having rested on four pillars, all of which subsequently crumbled. These pillars were: a cultural reform and transplantation strategy; an ad hoc approach to reform based on simplistic theoretical assumptions; faith in spillovers from the economy to democracy and human rights; and a development strategy that stressed state-led import substitution. This potent critique of USAID's hegemonic approach was influential in causing the movement to wane for some years.[15]

In the ever-shifting political economy of the Latin American debt crisis, judicial reform was repackaged in the 1980s as a part of larger programmes of legal reforms, usually as a component of what became termed 'structural adjustment'. This described the fiscal and monetary policy changes that were implemented by the IMF and the World Bank to provide assistance to developing countries and promoted state disengagement from the economy. These policy changes were conditions, or conditionalities, for financial assistance to ensure that the money would be spent in designated ways with a view to reducing the country's fiscal imbalances. In general, these loans promoted 'free market' programmes aimed at reducing poverty by promoting economic growth, generating income and paying off debt.

As the years passed, there was mounting disillusionment at the lack of visible success of the 'structural adjustment' conditionality, which, in due course, was reframed in the early 1990s and emerged as what has become known as the 'Washington Consensus', a term attributed to Williamson.[16] It connotes a development approach based on a trifecta of neoliberal 'free market' policies of privatisation, fiscal rectitude and deregulation. The piety of the IMF, the World Bank and the US Treasury to these policies – which are now in turn largely discredited – was intrinsically hegemonic. The language of 'structural adjustment' evolved into a new discourse of poverty reduction, which increasingly became the raison

13 D Trubek, and M Galanter, 'Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States' (1974) 4 Wisconsin Law Review 1062–1102; H Blair and G Hansen, 'Weighing in on the scales of justice: strategic approaches for donor-supported rule of law programs', *USAID Program and Operations Assessment Report No 7* (USAID 1994).

14 R Messick, 'Judicial reform and economic development: a survey of the issues' (1999) 14,1 World Bank Research Observer 117–136, 125.

15 See above, n 13; D Trubek, 'Law and development: then and now' (1996) American Society of International Law Proceedings, 90: 223–226; Trubek 'The "rule of law" in development assistance: past, present and future' (2003) available at www.law.wisc.edu/facstaff/trubek/RuleofLaw.pdf ; J Merryman 'Comparative law and social change' (1977) American Journal of Comparative Law, 25: 457–491.

16 Williamson, J, 'What Washington means by policy reform' in Williamson J, *Latin American adjustment: how much has happened* (Institute of International Economics 1990 (updated 2002)) 5–20 www.iie.com/publications/papers/paper.cfm?researchid=486.

d'être of development, notably after the 'Asian Financial Crisis' of 1997/8.[17] Developing countries were now encouraged to draw up poverty reduction strategy papers, which were intended to increase local participation and greater ownership. A number of commentators, such as Porter, argue that the poverty reduction discourse of the 1990s was little more than the earlier structural adjustment 'in drag', referring to its lack of results and its top-down exclusion of participation.[18]

During this period, analysis of the history of USAID's approach to judicial reform shows that it was served as an appetiser of supporting efficiency-based improvements in the criminal courts and judicial independence within a broader menu of securing the state's function of good order and economic development. This approach rested on a particular approach to the 'rule of law' and is associated with promoting democratic notions of good government.

After some years, the US resumed engagement in judicial and legal reform in El Salvador in 1981 to help the democratic government prosecute human rights abuses. This political economy context explains why USAID assistance sought to advance democratic development by exposing human rights violations, increasing access to justice, strengthening justice sector institutions and decreasing impunity. This was due both to the political, social and economic conditions of the region, and to the chronically debilitated state of judiciaries across the region being, according to Hammergren, the 'Cinderella' institutions of government.[19] Biebersheimer describes this second wave of justice reform spreading 'like wildfire' across Latin America, usually centring on criminal justice reform linked to democratic institutions as much as to economic enhancement programmes in the region.[20]

The mantra of consolidating judicial independence became a focal point of USAID assistance at this time, being seen to lie at the heart of a well-functioning judiciary and the cornerstone of democratic society based on the 'rule of law':

> 'If a judiciary cannot be relied upon to decide cases impartially, according to the law, and not based on external pressures and influences, its role is distorted and public confidence in government is undermined. In democratic, market-based societies, independent and impartial judiciaries contribute to the equitable and stable balance of power within the government. They protect individual rights and preserve the security of person and property. They resolve commercial disputes in a predictable and transparent fashion that encourages fair competition and economic growth. They are key to countering public and private corruption, reducing political manipulation, and increasing public confidence in the integrity of government.'[21]

In a related move, USAID developed an anti-corruption approach as a part of its broader governance strategies, which focused on strengthening the capacity of the courts to serve as accountability mechanisms as well as to strengthen judicial integrity itself. USAID defined corruption as:

> '[T]he abuse of public office for private gain… Corruption poses a serious development challenge. In the political realm, it undermines democracy and good governance by subverting formal processes… Corruption also undermines economic development by generating considerable distortions and inefficiency… and generates economic distortions in the public sector by diverting public investment away from education and into capital projects where bribes and kickbacks are more plentiful… These distortions deter investment and reduce economic growth.'[22]

By the 1990s, USAID expanded its support for judicial and legal reform into the post-Soviet transitional economies of Europe in what has become termed the 'rule of law revival'.[23] This phase rested on what Carothers describes as the orthodoxy of two controlling axioms: that the 'rule of law' is necessary for economic development and necessary for democracy.[24] He defines the rule of law as:

17 See discussion below, n 38 onwards.

18 D Craig, and D Porter, *Development beyond neoliberalism: governance, poverty reduction and political economy* (Routledge 2006), 5 and 63–94.

19 L Hammergren, 'International assistance to Latin American justice programs: towards an agenda for reforming the reformers', (2003) in Jensen and Heller (eds) 290–335.

20 Bhansali and Biebesheimer, n 8 above, 306; see also, S Hendrix, 'USAID promoting democracy and the rule of law in Latin America and the Caribbean' (2003) Southwestern Journal of Law and Trade in the Americas, 49: 277–320.

21 USAID, *Guidance for promoting judicial independence and impartiality* (2002) Washington, DC, 6.

22 USAID, *Handbook on fighting corruption* (1999) Washington, DC, 5.

23 See n 6 above, 7.

24 T Carothers, 'Promoting the rule of law abroad: the problem of knowledge' working paper no 34 (Carnegie Endowment for International Peace 2003), 6.

> 'A system in which the laws are public knowledge, and clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the past half century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors and police, are reasonably fair, competent and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law abiding.'[25]

This relationship between development of the 'rule of law' and liberal democracy has been described as being profound:

> 'The rule of law makes possible individual rights which are at the core of democracy. A government's respect for the sovereign authority of the people and a constitution depends on its acceptance of law. Democracy includes institutions and processes that, although beyond the immediate domain of the legal system, are rooted in it. Basic elements of a modern market economy, such as property rights and contracts are founded on the law and require competent third party enforcement. Without the rule of law, major economic institutions, such as corporations, banks and labour unions, would not function, and the government's many involvements in the economy – regulatory mechanisms, tax systems, customs structures, monetary policy and the like – would be unfair inefficient and opaque.'[26]

This promise to remove the chief obstacles on the path to democracy and market economics during an era marked by massive transitions in the global political economy explains for Carothers why Western policy-makers have seized on the 'rule of law' as an 'elixir' for countries in transition.[27]

But what is the rule of law?

Despite the centrality of this concept, there is a peculiar conceptual abstraction inherent to the notion of the rule of law, which contributes to confused and ultimately disappointed expectations. This abstraction is examined by various commentators. Upham, for example, argues that aiming to develop a rule of law, in both developed and developing countries, is an unproven myth which, nonetheless, has acquired that status of evangelical orthodoxy. He defines the core elements of this orthodoxy:

> 'The rule of law ideal might be summarised as universal rules uniformly applied. It requires a hierarchy of courts staffed by a cadre of professionally trained personnel who are insulated from political or non-legal influences. The decision-making process must be rational and predictable by persons trained in law; all legally-relevant interests must be acknowledged and adequately represented; the entire system must be funded well enough to attract and retain talented people; and the political branches must respect the law's autonomy.'[28]

The notion of the rule of law is at its heart both politically evocative and yet so technically ambiguous as to sometimes become meaningless. Others have attempted to pin down what it is supposed to mean. Kleinfeld-Belton describes the rule of law as looking 'like the proverbial blind man's elephant – a trunk to one person, a tail to another'.[29] She discerns a range of definitions that serve different purposes: government bound by law; equality before the law; law and order; predictable and efficient rulings; and human rights. These purposes – which are manifold, distinct and often in tension – are usually conflated and confused in practice. She observes that development agencies tend to define the rule of law institutionally, rather than by its intended purpose, as a state that contains three primary institutions:

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25 See note 6 above, 4; see also, T Carothers, 'The rule of law revival' (1998) 77, 3 Foreign Affairs, 96.

26 See n 6 above, 4–5.

27 *Ibid*, 7; see also n 25 above, 99.

28 F Upham, 'Mythmaking in the rule of law orthodoxy' in Jensen & Heller (eds) (2006) pp 75–104, 83. Upham also observes: 'If such a model exists, however, I have not found it,' F Upham 'Mythmaking in the rule of law orthodoxy' (2002) working paper no 30, Carnegie Endowment for International Peace, Washington, DC, 8. For a more juristic discussion, see: Bingham, T, *The Rule of Law*, (Penguin 2011).

29 R Kleinfeld-Belton, 'Competing definitions of the rule of law: implications for practitioners' (2005) working paper no 55, Carnegie Endowment for International Peace, Washington, DC, 5–6; and, 'Competing Definitions of the Rule of Law' in Carothers, T (ed), (2006) 31–74.

laws, judiciary and law enforcement. This conceptual confusion has encouraged a technocratic and sometimes counterproductive approach to reform:

> 'By treating the rule of law as a single good rather than as a system of goods in tension, reformers can inadvertently work to bring about a malformed rule of law, such as one in which laws that overly empower the executive are applied and enforced more efficiently.'[30]

Others, like Kennedy, go further to observe that this ambiguity is no accident. It is precisely the vagueness inherent in this notion that renders it readily and conveniently amenable as a device to bridge over differences in the interests of development partners.[31]

This conception of judicial reform – embedded as it was in USAID promoting the political economy notions of the free market, democracy, good governance and the rule of law – is to be compared with that of the World Bank.

World Bank's approach

The approach of USAID is to be compared and contrasted to that of the World Bank (the 'Bank'). The Bank's current justice sector assistance and reform portfolio comprises nearly 2,500 justice reform activities with new lending valued at approximately US$304.2m in 2008.[32]

The Bank started to support judicial reform later than USAID in Latin America in the 1980s. It initially framed its approach narrowly to conform to its mandate as a state-centric means of enabling economic development. This approach has subsequently expanded to become more comprehensive, embodying related notions of governance, institutions, safety, security, equity and empowerment.

As the Bank's chief counsel at that time, Shihata was influential in conceptualising the initial approach to reform. He framed judicial reform within the rule of law, which he treated as a precursor to economic stability, and as the means of protecting property rights and honouring contractual obligations. He saw law providing credibility to government commitments, and the reliability and enforceability of applicable rules leading to favourable market conditions for investors. Law supported the broader economic policy framework that guaranteed free competition.[33] The Bank adopted this economistic approach because of the reading then possible of its charter. Shihata wanted to avoid drawing reform activities into what he described as the 'risky trap of politicising financial institutions'. Owing to these formal constraints, which he stressed prohibited engaging in 'political' activities, he directed the Bank narrowly to take 'only economic considerations' into account:[34]

> 'Included amongst these provisions are the notions that: [t]he Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article 1.'[35]

As a consequence, the Bank's reform strategy has historically been developed from a base of focusing tightly on promoting the rule of law in an instrumentalist, 'thin' procedural manner. This base defined the rule of law as: prevailing when the government itself is bound by the law; every person in society is treated equally under the law; the human dignity of each individual is recognised and protected by law; and justice is accessible to all. This concept of the 'rule of law' is built on the three pillars of rules, processes and well-functioning institutions. It comprised a well-functioning legal and judicial system that allows the state to regulate the economy and empowers private individuals to contribute to

30 *Ibid*, 28.

31 D Kennedy, 'The rule of law, political choices and development common sense' in Trubek and Santos (eds) (2006) 19–73.

32 World Bank, *Initiatives in justice reform* (2009a) Washington, DC, http://go.worldbank.org/C4VN5MWDU0.

33 See, eg, I Shihata, 'Legal framework for development: the World Bank's role in legal and judicial reform'; and 'Judicial reform in developing countries and the role of the World Bank,' in M Rowat, W Malik and M Dakolias (eds), *Judicial reform in Latin America and the Caribbean, conference proceedings* (World Bank 1995a), pp 13–15 and 219–233; I Shihata, 'The role of law in business development' (1997b) Fordham International Law Journal, 20:1577–1588.

34 I Shihata, 'Human rights, development and international financial institutions' (1992) 8, 35 American University Journal of International Law and Policy, 37.

35 *Ibid*, 30; also, *Articles of Agreement of the International Bank for Reconstruction and Development*, opened for signature 22 July 1944, 2 UNTS 134 (entered into force 27 December 1945).

economic development by confidently engaging in business, investments and other transactions. This concept was seen to foster domestic and foreign investment, create jobs and reduce poverty.[36]

The Bank's judicial reform strategy promoted three goals. These were: to establish an independent, efficient and effective judicial system, and strengthen judicial effectiveness; to support the processes by which laws and regulations are made and implemented; and to improve access to justice by expanding the use of existing services and providing alternative dispute resolution mechanisms.[37] In terminology reminiscent of USAID's earlier rhetoric, the Bank described the rule of law as being 'built on the cornerstone of an efficient and effective judicial system'.[38] This vision positioned judges as the key to an effective and efficient legal system. For such a system, judges had to be properly appointed, promoted and trained; observe high codes of conduct; and be evaluated and disciplined. Activities supporting such initiatives became common features in many of the Bank's projects.

While conceding its contestability, this institutionalist approach to justice reform was reaffirmed most recently by Leroy in 2011:

> 'Though the precise channels of causation are complex and contested, there is broad consensus that an equitable, well-functioning justice system is an important factor in fostering development and reducing poverty… The World Bank has supported the creation of robust investment climates, underpinned by a sound rule of law, in order to encourage investment, productivity and wealth creation as part of its *main* approach to combating poverty.' [emphasis added]'[39]

The Bank positioned judicial reform centrally in its emerging conceptualisation of good governance. As with USAID, it increasingly framed judicial reform within a larger governance dimension of development, usually hinging on notions of transparency and accountability. This dimension is relevant not just because judicial reform is a means of implementing governance policy by strengthening the capacity of the courts as accountability mechanisms. The notion of governance is integral to the prevailing institutionalist approach, which is concerned with the quality of relationships among the citizen, state and market.

The Bank's definition of governance is broad. It refers to the exercise of power through a country's economic, social and political institutions that shape the incentives of public policy-makers, overseers and providers of public services. Within this approach, judicial reform and strengthening is both instrumentally and constitutively relevant. The Bank's *Governance and Anticorruption Policy* of 2007 proclaims that good governance is positively associated with robust growth, lower income inequality and improved competitiveness and investment climate. This policy posits that a capable and accountable state creates opportunities for poor people, provides better services and improves development outcomes. This approach is explained by President Wolfowitz to support the Bank's mandate to reduce poverty:

> 'We call it good governance. It is essentially the combination of transparent and accountable institutions, strong skills and competence, and a fundamental willingness to do the right thing. Those are the things that enable a government to deliver services to its people efficiently.'[40]

This approach to governance is grounded in the vision of the capable and enabling state, articulated through the Bank's World Development Reports, first issued in 1978. These reports showcase the Bank's evolving policy approach and have, in the view of the *The Economist,* made 'histories in miniature of development'.[41] The World Development Report of 2002, for example, highlighted the role of institutions in reform endeavours. More particularly, it articulated the governance rationale of institutionalism within which it conceptualised the role of judiciaries in development:

> 'The judicial system plays an important role in the development of market economies. It does so in many ways: by resolving disputes between private parties, by resolving disputes between private and public parties, by providing a backdrop for the way that individuals and organizations behave

36 World Bank, *Legal and judicial reform: strategic directions* (2003) Washington, DC, 2 and 16–18.
37 *Ibid*, 6 and 19.
38 *Ibid*, 27.
39 A Leroy 'Rule of law and development' (2011) UN General Assembly Interactive Thematic Debate on the rule of law and global challenges, 11 April, New York.
40 P Wolfowitz, 'Good governance and development – a time for action,' speech, Jakarta, 11 April 2006 (World Bank 2006).
41 S Yusuf, K Dervish, K and J Stiglitz, *Development economics through the decades: critical review of thirty years of WDR's* (World Bank 2008).

> outside the formal system, and by affecting the evolution of society and its norms while being affected by them. These changes bring law and order and promote the development of markets, economic growth, and poverty reduction. Judicial systems need to balance the need to provide swift and affordable – that is, accessible – resolution with fair resolution; these are the elements of judicial efficiency… The success of judicial reforms depends on increasing the accountability of judges; that is, providing them with incentives to perform effectively, simplifying procedures, and targeting resource increases…'[42]

By 1999, the Bank elevated legal and judicial reform to one of the main pillars of its new Comprehensive Development Framework, as part of its evolving approach. This framework was introduced by President Wolfensohn as a reformulation of the Bank's strategy to poverty reduction. This strategy emphasised the interdependence of all elements of development – the social and human among the structural, governance, environmental, economic and financial:

> 'The Comprehensive Development Framework… highlights a more inclusive picture of development. We cannot adopt a system in which the macroeconomic and financial is considered apart from the structural, social and human aspects, and vice versa.'[43]

This new approach strove for a good and clean government, a social safety net and social programmes, and an effective legal and justice system in which judicial reform was reframed:

> '[W]ithout the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contract… laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system.'[44]

At that point, the Bank described its approach to judicial and legal reform as having 'evolved significantly' to emphasise empowerment opportunity and security in order to promote ways in which judicial programmes can 'distribute more equitably the benefits of economic growth' to the poor.[45] The potential significance of this emphasis on the social dimensions to development in the Comprehensive Development Framework should not be underestimated.[46] As we have seen, Shihata had earlier stressed avoiding use of the term 'human rights' because of the constraining effect of the Bank's mandate, which prohibited 'political' reform.[47] Less than a decade later, this position had evolved markedly when Danino, then chief counsel, saw judicial reform as an indispensable component of alleviating poverty through economic growth and social equity, which included a strong human rights dimension.[48] He built this argument on a broader interpretation of the Bank's 'evolving' mandate:

> 'While governance is a crucial concept, my personal view is that governance does not go far enough: we must go beyond it to look at the issues of social equity alongside economic growth… we should embrace the centrality of human rights to our work instead of being divided by the issue of whether or not to adopt a 'rights-based' approach to development.'[49]

The Bank's policy approach was further refined in the 2006 *World Development Report: Equity and Development*, which focused on the issue of inequality of opportunity as a new or more important dimension of poverty reduction. This report built on the 2000 World Development Report on poverty, and in particular on the work of Sen. It recommended addressing chronic 'inequality traps' by ensuring more equitable access to public goods, including improved access to justice systems and secure land rights among other initiatives. With a focus on 'equity gaps', this report highlighted the constitutive

42 World Bank, above n 7, 131–2.

43 J Wolfensohn, Proposal for a comprehensive development framework (1999) http://web.worldbank.org/WBSITE/DELETEDSITESBACKUP/0,,pagePK:60447~theSitePK:140576,00.html (archived), 7.

44 *Ibid*, 10–11.

45 World Bank, *Initiatives in legal and judicial reform* (2004b) Washington, DC, 5.

46 World Bank, *World Development Report 2001* (2001) Washington, DC; D Narayan, *Voices of the poor: can anyone hear us? Voices from 47 countries*, PREM, (World Bank 1999) available at http://go.worldbank.org/LOTTGBE9I0; M Woolcock and D Narayan, 'Social capital: implications for development theory, research, and policy' (2000) World Bank Research Observer, 15,2: 225–249.

47 Shihata, 'Democracy and development' (1997a) 46,3 International and Comparative Law Quarterly, 642.

48 R Dañino, Legal aspects of World Bank's work on human rights: some preliminary thoughts' (2006) in C Sage, and M Woolcock, (eds), 305.

49 R Dañino 'Legal aspects of the World Bank's work on human rights' (2007) 41:1 International Lawyer, 523.

element of equity in poverty. Most importantly, it also introduced the notion of redistribution to the current discourse:

> 'Given that markets are not perfect, scope arises for efficient redistribution schemes… Equity and fairness matter not only because they are complementary to long-term prosperity. It is evident that many people – if not most – care about equity for its own sake.'[50]

This report reviewed modern theories of distributive justice to address the lack of concern with the distribution of welfare, and to adopt a notion of equity that focuses on opportunities.[51] It distinguished equity from law and propounded that the overarching concept of fairness embodies a multicultural belief that people should not suffer before the law as a result of having unequal bargaining power.[52] This focus on equity is consolidated by Sage and Woolcock, who argue that a rules system that sustains an 'inequality trap' is a constituent element of such traps, and can perpetuate inequities.[53] The Bank's Justice for the Poor (J4P) programme is presently researching a more equitably-focused approach.[54] This focuses on:

> 'creating new mediating institutions wherein actors from both realms can meet – following simple, transparent, mutually agreed-upon, legitimate, and accountable rules – to craft new arrangements that both sides can own and enforce. That is, J4P focuses more on the process of reform than on a premeditated end-state'.[55]

Notions of safety and security provide another significant rendition of the rationale for the rule of law and judicial reform. While we have already seen that criminal justice has been a part of the reform menu since its inception in the law and development movement, concerns over state fragility, failing states, terrorism and the breakdown of the states' capacity to control crime have markedly grown over recent years. Most recently, the events of 9/11 have galvanised the attention of governments and donors to the relationship between security and conflict and the development of political, economic and social goals. This has led to reform efforts that consolidate the internal (criminal) and external (terrorist) capacity of the state to provide security. This rendition is evident in the *Guidelines on Terrorism Prevention* (2003) and the *Guidelines on Security System Reform and Governance* (2004) issued by the development's umbrella body, the OECD-DAC. These guidelines are directed to overcome state fragility and conflict by reducing armed violence and crime, thereby creating secure environments that are conducive to other political, economic and social developments. This approach aims at achieving four intermeshing objectives: (a) establishing effective governance; (b) improved delivery of security and justice services; (c) developing local leadership and ownership of the reform process; and (d) sustainability of justice and security service delivery.[56]

Most recently, growing recognition of the importance of improving justice reform is evidenced in the *World Development Report 2011* (WDR 2011), which repositions justice more centrally in development. WDR 2011 focuses on exploring the links between security and development outcomes. Its central message is that strengthening institutions and governance to provide citizen security, justice and jobs is crucial to break cycles of state fragility, conflict or violence. Institutions and governance, which are important for development in general, work differently in fragile situations. Investing in justice is now seen as essential to reducing violence. It links security, justice and economic stresses to violence prevention and recovery, and advocates integrating justice with military and policing assistance in fragile situations. Justice sector reform should focus on the connections between policing and civilian justice, strengthening basic caseload processing; extending justice services and drawing on community mechanisms. Curiously, however, WDR 2011 is abstemious in withholding any definition of justice. This

50 World Bank, *World development report 2006: equity and development* (2005) Washington, DC http://web.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTWDRS/0,,contentMDK:23062359~pagePK:478093~piPK:477627~theSitePK:477624,00.html, 74–75.

51 *Ibid*, 78.

52 *Ibid*, 175.

53 C Sage, and M Woolcock, *The World Bank legal review: law equity and development vol ii* (World Bank 2006), 11.

54 C Sage, N Menzies, and M Woolcock, *Taking the rules of the game seriously: mainstreaming justice in development* (2009) working paper no 51845, World Bank, Washington, DC, 1.

55 'Justice for the poor program: overview' (World Bank 2007); 'Justice for the poor program: Indonesia' (World Bank 2006d) available at http://go.worldbank.org/MHG1Y94BM0.

56 OECD-DAC, *Guidelines on terrorism prevention* (2003); and OECD, *Handbook on security system reform: supporting security and justice* (2007), 21.

is significant because it clears a space to admit justice to the pantheon of political economy, and opens the dialogue on the role of justice and its relationship to development.[57]

In sum, this history reveals first that judicial reform is at a formative phase of endeavour. Its growth has been recent, rapid and very substantial over the past 20 years, in particular. Secondly, this endeavour has been variously justified on the basis of economic, political, social and human rationales. These major justifications, which may be theoretically interconnected and conflated in practice, are on occasion ambiguous and sometimes in conflict:

Economic – the oldest and most pervasive justification has two manifestations: first, the creation of wealth, based on notions such as 'trickle down economics', which involves the state supporting the markets to lift all boats, even the smallest; and secondly, more recently, the reduction of poverty, based on an alternative notion of empowerment by assisting the poor and the disadvantaged.

Political – the promotion of democracy has been inextricably linked to enabling participation and inclusion in social affairs; freedom of opportunity; and self-destination; and more recently, to strengthening the governance and integrity of state institutions to oversee the polity through the 'rule of law', judicial independence, transparency and accountability.

Social – this justification emphasises consolidating state capacity to provide the fundamental public goods of civic order, safety and security to citizens from internal threats of crime and, notably after 9/11, external threats of terrorism and state failure, sometimes termed 'securitisation'.

Humanistic – this justification rests on the validation of promoting fairness and access to justice based on an emerging concept of poverty as deprivation of opportunity and the human rights of the individual.[58]

Nature of reforms

Analysis of the nature of reform activities undertaken during this period reveals what has been described as a 'standard package' of activities that support efficiency-based improvements to the formal administration of justice.

At their core, most activities have typically consisted of measures to strengthen the judicial branch of government. Messick describes these as having generally included: making the judicial branch independent; increasing the speed of processing cases; increasing access to dispute resolution mechanisms; and professionalising the Bench.[59] Dakolias agrees that reform programmes usually include: judicial independence; appointment and evaluation systems; discipline; judicial, court and case administration; budgets; procedural codes; access to justice; Alternative Dispute Resolution; legal aid and training.[60] Projects have commonly focused on training judges, introducing case management systems to the courts and occasionally establishing legal aid clinics and legal awareness programmes – in what Sage and Woolcock have described as generally being 'top-down technocratic solutions' to institutional deficiencies.[61] The World Bank, for example, presently allocates 66 per cent of the value of its 'standalone' justice reform projects to what it terms direct judicial process support, administering cases and caseloads, on court infrastructure, buildings refurbishment and related facilities, and just one-tenth of this (six per cent) on training judicial and legal actors.[62]

Judicial reforms are classified by Carothers as falling into a class of activities aimed at increasing government compliance with law. These involve institutional reforms that centre on: judicial

57 World Bank, *World development report: conflict, security and development* (2011b) Washington, DC http://web.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTWDRS/0,,contentMDK:23252415~pagePK:478093~piPK:477627~theSitePK:477624,00.html.

58 This configuration is articulated in various ways in the literature; see, eg, K Samuels, 'Rule of law reform in post-conflict countries,' social development paper no 37 (World Bank 2006).

59 R Messick, 'Judicial reform and economic development: a survey of the issues' (1999) 14,1 World Bank Research Observer, 117–136.

60 M Dakolias, 'A strategy for judicial reform: the experience in Latin America' (1995) 35 Virginia Journal of International Law 167, 187 onwards.

61 C Sage, and M Woolcock, *Breaking legal inequality traps: new approaches to building justice systems for the poor in developing countries* (World Bank 2005), 12.

62 'Directions in justice reform' discussion note (World Bank 2011c) available at http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/wb_jr_discussionnote.pdf, 3.

independence; increased transparency and accountability; and making courts more competent, efficient and accountable, often involving training.[63] In describing judicial and legal reform, Jensen refers to a 'standard package' of three elements: changing substantive laws; focusing on law-related institutions; and addressing the deeper goals of governance compliance with the law, particularly in the area of judicial independence. Donors have increasingly concentrated their assistance on making formal judicial institutions more competent, efficient and accountable, involving projects providing legal and judicial training.[64] Porter endorses this 'standard package' of court-centric reforms, which he notes remain heavily supply-driven, with the focus on training judges, building more courtrooms, providing new equipment and supporting case management. Training has often been treated as a cure-all for capacity-building, with little regard for educational effectiveness.[65]

Critique of practice

There is now a chorus of disappointment in the performance of these reforms emerging in the academic commentary. This chorus intones mounting concerns over the performance of promoting the rule of law, which have been described as being 'less than promised', 'elusive', 'in crisis', 'sobering', 'impotent', 'inconclusive' and 'in serious doubt'.

Commentators offer a number of explanations for this disappointment. In essence, these relate to the conflation of the goals of reform, discussed above, which has confused expectations, dissipated resources and frustrated implementation; and the need for a considerably more nuanced approach to managing the change process. This critique reflects two major features: first, the insufficiency of knowledge to guide and support reform endeavours and, secondly, the lack of any cogent theory or justification for reform endeavour. In effect, there is a mounting concern that despite the provision of ever-increasing resources, we don't really know what we're doing.

In a critique of judicial reform performance over 20 years in Latin America, Hammergren acknowledges substantial changes in the sector's resources, composition and activities. These reforms – which have provided improved salaries, enhanced independence, new governance systems and monies for computers and innovations – have transformed courts that were formerly the 'orphans' in what she calls the 'Cinderella branch of government'. But significantly they have not had any automatic impact on the quality of judicial output.[66] These judicial systems seem no closer to meeting citizen expectations of justice.[67] Change is one thing, but improvement is another. Her critique is essentially utilitarian, that is, these reforms have failed to improve the situation. Two decades of reform had delivered a great deal less than promised. Despite some gains, basic complaints such as delay, corruption, impunity, irrelevance and limited access have not dissipated. Public opinion polls indicate no improvement in the courts' public image. As for contributions to the goals of reducing crime or poverty, or increasing economic growth, the best that can be said is that things would have been much worse without the reform.[68] This disappointing performance arises from the 'purely deductive conclusion' that there is a supposed – but largely unproven – connection between market-based growth and commercial law.

Hammergren endorses Carothers' metaphor that judicial reform has become an elixir for curing an increasing number of extrajudicial ills: poverty and inequality, democratic instability, and inadequate economic growth and investment:

> '[I]t should be evident that (this) contains internal contradictions … Mix and match different objectives; goals relating to costs, access, efficiency, efficacy, and basic fairness at some point come into conflict with each other.'[69]

Anyone wishing to contest or even explore these assumptions risks attacking numerous sacred cows

63 See n 25 above, 99–100.

64 E Jensen and T Heller, (eds), *Beyond common knowledge: empirical approaches to the rule of law* (Stanford University Press 2003), 349.

65 D Porter, 'Access to justice revisited' conference paper, University of Queensland, 1–3 April 2005; see also, L Armytage, 'Training of judges: reflections on principle and international practice' (2005) 2.1 European Journal of Legal Education, 21.

66 L Hammergren, *Envisioning reform: improving judicial performance in Latin America* (Pennsylvania State University Press 2007), 279.

67 *Ibid*, 7.

68 *Ibid*, 306.

69 *Ibid*, 5.

and their associated lobbies.[70] The theoretical discourse on judicial reform is, Hammergren observes, dominated by economists who have a natural predisposition to emphasise courts' economic role by clarifying the rules of the game: enhancing predictability, reinforcing juridical security and reducing transitional costs. Political scientists have then focused on the role of courts in supporting existing power structures to emphasise their potential accountability function in providing checks-and-balances on that power.[71]

It is timely to observe how muted lawyers' voices have been in contributing to this discourse. While academic lawyers have clearly produced theories, their contribution seems largely ghettoised in academia. Consequently, it is bizarre that articulation of the prevailing theoretical model for judicial reform endeavour has been dominated by economists and political scientists to this point.

Many commentators endorse this critique of the dubious conceptual foundations of reform endeavour. Barron, for example, reviews the experience of the World Bank to argue that it would do well to temper its enthusiasm for promoting the 'rule of law', given that many of the factors affecting it seem to be either unreformable, or at least very difficult to reform.[72]

Some describe a crisis in law-and-development. They attribute this crisis to the inability of developmental theory to adequately account for reality. Tamanaha and Bilder believe its cause is the realisation that: the ideals of development theorists are less than perfect and less than perfectly realised; science does not have all the answers; and the law simply cannot solve many problems confronting developing countries, causing a sense of mounting impotence. After 30 years of law-and-development studies, they observe that: modern law is necessary, though not sufficient for economic development; the 'rule of law' is helpful, though not sufficient for political development; and beyond these minimums, the theoretical discourse is not of primary importance, beyond being 'largely a Western academic conversation'.[73]

Others debate the efficacy of the relationship between judicial and legal reforms and development, and challenge the utility of many reforms on empirical grounds. Trebilcock and Davis describe much of the empirical evidence as 'inconclusive' and argue that this explains why current endeavours are destined to have little or no effect on social or economic conditions in developing countries.[74] Others argue that given the diversity of competing definitions and concepts of 'rule of law', serious doubts remain about whether there is such a thing as 'a rule of law field'. Peerenboom critiques the law-and-development industry as having sought universal solutions to diverse local problems, which have often reflected the latest intellectual trend and adopted a 'magic-bullet' approach: first legal education, then legislative reform, now institutions and good governance.[75] What he terms the 'less than spectacular results' of promoting the rule of law, calls into question the reform function of the rule of law:

> 'Despite a growing empirical literature, there remain serious doubts about the relationship, and often the causal direction, between rule of law and the ever-increasing list of goodies with which it is associated, including economic growth, poverty reduction, democratization, legal empowerment and human rights.'[76]

The upside of this mounting disquiet is that it is spurring the current moment of reflection and impelling a process of reinvention of approach. This reinvention comprises three major renditions: (a) convergence with human rights and empowerment characteristically evident in initiatives of UN agencies; (b) engagement in the informal and customary sectors, characteristically evident in the Bank's J4P exploration; and (c) a more integrated political–economy approach, which is characteristically

70 *Ibid*, 308.
71 *Ibid*, 313–5.
72 G Barron, 'The World Bank and rule of law reforms' (2005) working paper no 05-70 (Development Studies Institute, LSE, London), 35; see also, n 6, n 24, n25 and n 64 above; and D Trubek, and A Santos, *The new law and economic development: a critical appraisal* (Cambridge University Press 2006).
73 B Tamanaha and R Bilder, 'Lessons of law-and-development studies' (1995) 89 American Journal of International Law, 484.
74 K Davis, and M Trebilcock, 'Legal reforms and development' (2001) 22:1 Third World Quarterly, 27.
75 R Peerenboom, 'The future of rule of law: challenges and prospects for the field' (2009) 1 Hague Journal on the Rule of Law, 13.
76 *Ibid*, 5.

evident in the Department for International Development's (DFID) approach to 'drivers of change'.[77]

This opportunity for reinvention is presently open, but the stakes are very high. It is no understatement to observe that the rule of law enterprise is poised at the brink of development failure. This is evidenced by the recent decision of the Asian Development Bank to 'mainstream' – that is, to dismantle – its law and policy programme after almost 20 years because the lack of visible results had rendered it under-competitive in the internal quest for funds.[78]

Purpose: what is justice – and why is it important?

Any notion of the rule of law in international development without a clear focus on promoting justice is incomplete. Justice is fundamental to human wellbeing and is indivisible from development. Since Aristotle, justice has been recognised as core to any civilised notion of the good life, government and society: government without justice is tyranny; and society without justice is anathema to its citizens. Civic wellbeing is unattainable without justice. Justice is nonetheless routinely subverted in many countries. Citizens, usually the powerless poor, are routinely denied justice through the abuse of power, impunity, corruption and inefficiency. These are the usual challenges of reforming justice.

To address these challenges, international development and the rule of law must define justice – something it has been loath to explicate to this point. While philosophers and political scientists may continue to debate the nature of justice and the role of judicial reform, even a four-year-old child will immediately recognise unfair treatment from its parents and know when justice is denied.[79]

Justice is the notion of rightness built on law, ethics and values of fairness and equity, which are foundational to civic wellbeing. The purpose of justice is to protect human wellbeing. Justice protects humanity from Hobbesian notions of anarchy, societal breakdown and the brutishness of life in nature.[80] It embodies an ordered community governed by the rule of law. While there are many renditions of justice, most of the principles of justice are universal. These renditions embody the norms enshrined in the Universal Declaration of Human Rights, which constitute the core covenants of the UN, among other international instruments.[81]

All societies comprise some basic structure of institutions that embody renditions of justice, whether formal or informal. These renditions may be *political* (governance, social affairs and the allocation of interests), *economic* (opportunities for livelihood), *social* (civic order and safety) or *humanistic* (fundamental individual rights). There are numerous expressions of justice. Justice may be primarily utilitarian – concerned with maximising social outcomes; egalitarian – concerned with equality of opportunity, individual rights and freedoms; distributive – concerned with allocating interests in wealth, power or privilege; retributive – concerned with punishing wrongdoing; or restorative – concerned with restoring social harmony. Justice may be variously seen in terms of equality, need, reciprocity or deserts. Expressions of justice are sometimes distinguished from social justice. Potentially tautological, social justice is invoked in secular contexts to emphasise primacy of principles of equality and human rights to advocate more egalitarian opportunities and outcomes that are similar to the distributive expression above.

77 DFID is the British aid agency. T Dahl-Østergaard, S Unsworth, and M Robinson, *Lessons learned on the use of power and drivers of change: analyses in development cooperation*, (OECD-DAC network on governance 2005), ii; S Unsworth, 'What's politics got to do with it? Why donors find it so hard to come to terms with politics, and why this matters' (2009) Journal of International Development, 21,6: 883–894; see also, M Moore, A Schmidt and S Unsworth, 'Assuring our common future in a globalised world: the global context of conflict and state fragility' (2009) DfID background paper.

78 ADB, IED, *ADB technical assistance for justice reform in developing member countries* (2009b) Manila www.adb.org/Documents/SES/REG/SES-REG-2009-06/SES-REG-2009-06.pdf, 24. See also: L Armytage, 'Judicial reform in Asia: case study of ADB's experience: 1990-2007' (2011) Hague Journal on the Rule of Law 3.1, 70–105.

79 Our innate sense(s) of justice may vary, which gives rise to the need to articulate a theory of justice precisely to bring reason into play in the diagnosis of justice and injustice.

80 T Hobbes, Leviathan 1651 J Plamenatz (ed) (Collins, 1962).

81 The principal UN treaties comprise: the Universal Declaration of Human Rights (UDHR); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention on the Rights of the Child (CRC), plus optional protocols. Other international standards include: Basic Principles on the Independence of the Judiciary; Bangalore Principles of Judicial Conduct, 2002; Basic Principles on the Role of Lawyers; Guidelines on the Role of Prosecutors; and Basic Principles for the Treatment of Prisoners.

Justice embodies values, which societies institutionalise through their laws and courts that administer those laws. Beyond the truism that law may not be just, promoting justice is concerned with enabling rights, which are the political dispensation of interests in law. These rights are vested across the spectrum of human welfare, that is: political, civil, economic, social and cultural. For the purpose of this chapter, justice is considered in two qualitative dimensions: judicial and developmental. In the judicial context, this argument focuses on the promotion of justice through the administration of law by the courts, being the rights-based or humanistic rendition above. In the developmental context, it focuses more broadly on the promotion of justice in its other political, economic and social renditions.

Justice in development should be concerned with bringing to life the rights that are enshrined in customary, domestic or international law. Development without a rights-based 'thick' concept of justice as fairness is not just insufficient, but perverse; focusing on improving the 'thin' efficiency of a captive court system does nothing more than accelerate the impunity of elite land-grabbing, as starkly evidenced in Cambodia.[82]

I have argued that even the allegorical four-year-old child knows that justice is important. But why is this so? This foundational concept of justice is universal, a priori, even visceral. Justice is essential to maintain civic harmony and resolve conflict, sustain peace and safety, secure growth and good governance, and enable rights. The importance of justice becomes apparent as soon as it is denied. Society without justice is the antithesis of any notion of equitable opportunity. Recognition of the importance of justice is only now entering the discourse in other than economistic terms, as evidenced in the *World Development Report 2011*.[83]

This recognition creates the space to admit justice to the development pantheon of political economy, and frames a vital debate on the role of justice and its crucial relationship to promoting the rule of law.

Debate between institutionalism and humanism

Close analysis of the journey of judicial reform exposes an unresolved contest for an overarching theory for judicial reform. This contest exists between an economic or political instrumentalist justification and a more recent human-centred justification. The prevailing economic or political justification is based largely on the thinking of Weber and North, notable among others, which constitutes the 'new institutional economics' model.

Weber has been directly influential on the formulation of judicial reform approaches. He stands for the key developmental proposition that the modern legal doctrines of property and contract enforced by a politically independent and technically competent judiciary are the best means of managing the risks of transactions with strangers.[84] North extends this thinking with the notion of the 'rules of the game'. He defines 'institutions' – not to be confused with organisations – as:

> 'the rules of the game in a society, or, more formally, the humanly devised constraints that shape human interaction. In consequence, they structure incentives in human exchange, whether political, social or economic.' [85]

82 'Thin' definitions of justice are formal, minimalist and procedural. Raz and Fuller are leading exponents of 'thin' formal concepts of justice and thereby judicial reform. They argue that rational people need a predictable system to guide their behaviour and organise their lives. The precepts of the 'thin' approach are that law should be prospective, open, clear and stable. J Raz, *The authority of law* (Oxford University Press 1979), 214–218; see also: L Fuller, 'Positivism and fidelity to law – a reply to Professor Hart' (1958) 71, 4 Harvard Law Review 630–672; and L Fuller, *The morality of law*, (New Haven, Yale University Press, 1964). 'Thick' notions, on the other hand, equate the 'rule of law' as being elemental to a just society and are linked to concepts of liberty and democracy. 'Thick' reforms address substantive goals such as enhancing individuals' rights, strengthening political institutions and stabilising the economy. This concept guarantees basic individual freedoms, and civil and political rights while at the same time, requires the power of the state to be constrained. Dworkin is a noted proponent of this 'thick' approach, arguing in essence that justice and the 'rule of law' include universal moral principles, and are linked to freedom. R Dworkin, *Taking rights seriously* (Duckworth 1978).

83 See n 57 above.

84 M Weber, 'Politics as a vocation' (1918) in H Gerth and W Mills (eds) 1948, From Max Weber: essays in sociology (Routledge 1948) 77–128 and M Weber, *Law in economy and society* in M Rheinstein (ed) and E Shils (tr) (Harvard University Press 1954), in particular.

85 D North, *Institutions, institutional change, and economic performance* (Cambridge University Press 1990), 3.

These rules of the game constitute the foundation for the school of institutionalism, which has been pervasively influential of development, particularly in governance, over the past 20 years. This is an elegantly powerful and influential theory that has spawned a generation of empirical inquiry to determine the economic determinants of growth.[86] This theory has been used to cast the state in the role of supporting the market through key institutions such as courts to secure property and contract, which are necessary for investment-based economic growth and to promote good governance.

But, *does it work?* At best, the available evidence is ambiguous. There is little consensus that this institutionalist approach to the rule of law leads to growth. To the contrary, Polanyi and Chang show that history reveals that growth leads to the rule of law, rather than vice versa.[87] While there is clearly some empirical evidence of correlation to show that institutions do indeed matter, correlation is not causation. Rodrik cautions that we have as yet little understanding of *how* they matter for the purpose of formulating development policy.[88] This goes some way to explaining the underwhelming performance of judicial reform to this point.

This 'institutionalist' approach to development is now under increasing challenge for failing to sufficiently meet the needs of the poor. Building on the thinking of Rawls and Sen in particular, a more recent human-centred theory now offers a rights-based alternative that focuses on the constitutive importance of promoting justice. This theory casts development in the role of providing capacity to the poor – people who have rights to freedom and opportunity.

The concept of justice as fairness is powerfully expounded by Rawls in *A Theory of Justice*. This concept builds on Aristotle's notions of justice, and more recently on the notion of the social contract of the Enlightenment philosophers, in particular, Locke and Rousseau. Rawls argues that the principles of justice form the basic structure of society and are, moreover, the object of the original social contract. In effect, questions of justice precede questions of happiness – that is, what is right precedes what is good. This he calls 'justice as fairness'. The notion of fairness may itself be variously defined in terms of equality, need, reciprocity or deserts.[89] For Rawls, justice as fairness is based on the idea that people were originally shrouded in a veil of ignorance, but were motivated by rational self-interest to collectively maximise opportunity to attain the good life.[90] This concept of justice as fairness is embodied in the 'difference principle':

> 'Each person has an equal claim to a fully adequate scheme of basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.
>
> Social and economic inequalities are to satisfy two conditions: first they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second they are to be to the greatest benefit of the least advantaged members of society.'[91]

Rawls' normative approach to rights is foundationally important in providing a contemporary notion of justice. Sen extends this thinking and is cardinally important for redirecting the development discourse away from the prevailing utilitarian paradigms with their economic concerns. He argues that the traditional economic focus on aggregate income and wealth shows a distributive indifference to notions of equality and a neglect of rights. An exclusive concentration on inequalities in income distribution cannot be adequate for an understanding of poverty and economic inequality. He treats

86 *Ibid.*

87 K Polanyi, *The great transformation: the political and economic origins of our time* (2nd edn, Beacon 2001); H Chang, *Kicking away the ladder: development strategy in historical perspective* (Anthem 2002).

88 D Rodrik, A Subramanian and F Trebbi, 'Institutions rule: the primacy of institutions over geography and integration in economic development' (2002) working paper no 97, Center for International Development, Harvard, 4. Problems of endogeneity and reverse causality plague any empirical researcher trying to make sense of the relationships among these causal factors (at 3). And, D Rodrik, 'Getting institutions right' (2004) DICE Report, Harvard 10–16 www.ifo.de/pls/guestci/download/CESifo%20DICE%20Report%202004/CESifo%20DICE%20Report%202/2004/dicereport204-forum2.pdf, 10.

89 See, eg, M Sandel, *Justice: what is the right thing to do?* (Farrar Strauss & Giroux 2009).

90 Rawl's veil of ignorance may be compared to Smith's notion of the impartial spectator. Smith asks instead, what would an 'impartial spectator',' someone observing from the outside, make of a particular state of affairs? Smith 1759.

91 J Rawls, *A Theory of Justice*, (first published 1971, OUP revised edn 1999), Oxford University Press, 13. See also, J Rawls, 'A theory of justice' in J Arthur and W Shaw (eds), *Justice and economic distribution* (Prentice Hall 1978); J Rawls, 'Justice as fairness: political not metaphysical' Philosophy and Public Affairs (1985) 14,3 223–251; and J Rawls, *Justice as fairness: a restatement* (Belknap Press 2001).

poverty as an inability to develop and exercise one's personal capabilities, which reflect the actual freedoms and opportunities of a person.[92] Hence, wellbeing is a function of how fully an individual exercises his/her human capabilities.

The ground-shifting significance of this thinking rests on its potential to go beyond the prevailing neoliberal, market-based rationale for judicial reform advocated by Weber and North. Sen's advocacy of rights-based development supplements the theory for judicial reform and places the human being – rather than the state, the market or the development agency – as the key actor in the development process. Economic development cannot sensibly be treated as an end in itself. Development must be more concerned with enhancing the lives we lead and the freedoms we enjoy.[93] For this fundamental proposition, he invokes Aristotle's rationale for the polis to contribute to the good life of its citizens:

> 'Pursuit of wealth is obviously not the good that we are seeking, because it serves only as a means – for getting something else.'[94]

In the seminal work, *Development as Freedom,* Sen initially builds on Rawls to position justice as a fundamental factor in improving the quality of life. This links closely with his view of the state's role to supply public goods such as health, education and effective institutions for the maintenance of local peace and order. In his latest work, *The Idea of Justice*, Sen expounds his theory of justice based on notions of liberty, equality and equity, which he emphasises are not confined to the Western 'enlightenment' canon. This consequentialist theory builds on a more recent critique of Rawls' theory of justice as fairness, in particular, as being overly concerned with just institutions, institutional libertarianism and what he terms the 'contractarian' mode of thinking. Sen argues that 'utopian transcendental institutionalism' or absolute perfect justice is unattainable in the absence of any agreement on universal concepts of justice or global sovereignty. Instead, it is better to focus on how society can be improved from its current state, given its actual pattern of injustices. This enquiry addresses actual realisations of justice, rather than getting just institutions right, by asking: what international reforms do we need to make the world a bit less unjust? Sen's idea of justice is measurable in terms of remediable injustice and comparative enhancement to human lives, freedoms, capabilities and wellbeing.[95] He integrates an imposing philosophic discourse, which acknowledges more globally pluralistic notions of justice to focus on assessments of social realisations and comparative aspects of enhancing justice. This powerful articulation may in part be understood as seeking to replenish the concept of justice from the hegemonic strictures of its neoliberal appropriation outlined above.

The major implication of this reasoning is to introduce a 'constitutive' justification for justice being core to promoting the rule of law, with the rights of the individual as its central focus. This reasoning is profound in reconsidering the theory of judicial reform. First, it provides an alternative paradigm to the institutionalist approach to judicial reform. Secondly, it visibly influences the evolution of endeavour in the rights-based and access-to-justice approaches such as that of UN agencies, and the more recent justice-for-the-poor initiatives of the World Bank. Underpinning both approaches is a reform rationale, which is based on the notion of empowerment, a notion now being taken up by numerous commentators.[96]

Economics cannot trump justice – though it is remarkable that this has been accepted in the discourse to this point. The tension between utility and aggregate wellbeing on the one hand, and equity and individual wellbeing on the other, lies at the fulcrum of reform policy. To the extent that emerging notions of equitable development may be superseding aggregate growth as the current mantra of development, it is clear that promoting the rule of law is now lagging the discourse.

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92 A Sen, 'As Biko Knew, Powerlessness in Actual Lives is the Hurdle Justice Must Clear' Guardian, 23 March 2010, available at www.guardian.co.uk/commentisfree/libertycentral/2010/mar/23/social-justice-philosophy-freedom.

93 A Sen, *Development as freedom* (Random House 1999), 14.

94 Aristotle, *Nicomachean ethics* (J Thomson tr, Penguin 1955 (revised 2004)) 9; 'The good life is the chief end, both for the community as a whole and for each of us individually.' Also, Aristotle, Politics, E Barker, (ed) (Oxford University Press 1958) Book 3, Constitutions, Chapter vi, at 111.

95 A Sen, *The idea of justice* (Penguin 2009), 6 and 25.

96 See, eg, M Anderson, 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs' (2003) working paper no 178, Institute of Development Studies, Brighton; S Golub, 'Legal empowerment: impact and implications for the development community and the World Bank,' in C Sage and M Woolcock (eds) (2006) pp 167–183; G Brown and F Stewart, 'The implications of horizontal inequality for aid' CRISE working paper no 36 (Department of International Development, University of Oxford 2006), among others.

Empirical evidence on economic determinants of growth

Passing reference is required to the scant empirical evidence that judicial reform has attained an economic purpose. While this does not indicate that past endeavours have been altogether dismal, it does highlight the pressing need for an improved approach. The fragility of this empirical evidence compels both further enquiry and a fundamental reframing of policy approach.

Close analysis of the available empirical evidence affirms only some elements of the instrumentalist policy for the rule of law serving economic or political goals. A synthesis of the empirical enquiry indicates that there is sufficient evidence to establish the following propositions:

- Aid is an important tool for enhancing the development prospects of poor nations;
- Institutional development may contribute to growth, and growth may contribute to institutional development, multi-directionally;
- Good governance contributes to investment and growth; however, aid erodes governance, and is not correlated with democracy; and corruption is associated with ineffective government and low growth;
- Growth and investment are increased in the presence of institutions that protect property and contract rights, and aid assists growth where there are good policies, though this relationship is described as small and fragile within the expert commentary;
- Efficient, independent and accountable judiciaries are associated with growth; in effect, there is a linkage between judicial reform and economic development, but on all accounts this is yet to be fully understood; and
- Domestic demand for change is more important than the origin of reform.[97]

For purposes of development policy-making, this evidence is however incomplete, qualified, often ambiguous and on occasion openly contested by its own adherents.

There is no consistent evidence available that judicial reform has attained its stated goal of alleviating poverty. Certainly, the global economy has grown. As many scholars including Stiglitz, Sachs and Collier emphasise, there has been unprecedented economic growth in many countries in the developing world.[98] But, equally, there is irrefutable evidence of a growing inequality gap, which is highlighted in the 2006 *World Development Report*.[99] The rich have got richer, but the poor have either not got richer or they have got richer at a slower rate. Once the measurement of growth has been disaggregated, it becomes clear that the promotion of economic growth has failed to alleviate poverty. Moreover, it has had the perverse effect of exacerbating inequality.

The prevailing economic justifications for development policy do not rest on firm empirical foundations. The evidence is incomplete and increasingly internally contested. This is revealed in the researches of Dollar and Kraay, Knack and Keefer, Djankov, Feld and Voigt, La Porta and North and Rajan, whose collective work has been particularly influential in the formulation of the development policy of the World Bank and other major donors.[100] Over recent years, there has been extensive

97 For a more detailed discussion of the empirical evidence see, in particular, L Armytage *Reforming Justice: a journey to fairness in Asia* (Cambridge University Press 2012), ch 5.

98 J Stiglitz 2000 and J Stiglitz, *Globalization and its discontents* (Penguin 2002); J Sachs, *The end of poverty* (Penguin 2005); and P Collier, *The bottom billion: why the poorest countries are failing and what can be done about it* (Oxford University Press 2008); in particular.

99 See n 50 above.

100 D Dollar and A Kraay, Growth is good for the poor (2000) World Bank, Washington, DC http://siteresources.worldbank.org/DEC/Resources/22015_Growth_is_Good_for_Poor.pdf; S Knack and P Keefer, 'Institutions and economic performance: cross-country tests using alternative institutional measures' (1995) Economics and Politics, 7,3: 207–227; S Knack and P Keefer, 'Does social capital have an economic payoff? A cross-country investigation' (1997) Quarterly Journal of Economics, 112,4: 1251–1288; S Djankov, R La Porta, F Lopez-de-Silanes, and A Shleifer, 'Appropriate Institutions' (2002) World Bank, Washington, DC; S Djankov, R La Porta, F Lopez-de-Silanes and A Shleifer, 'Courts' (2003a) Quarterly Journal of Economics, 118,2: 453–517. L Feld, and S Voigt, 'Economic growth and judicial independence: cross country evidence using a new set of indicators' (2003) 19 European Journal of Political Economy, 497–527; R La Porta, F Lopez-de-Silanes, A Shleifer and R Vishny, 'Law and finance' (1998) 106,6 Journal of Political Economy, 1113–1155; R La Porta, F Lopez-de-Silanes, A Shleifer and R Vishny, 'Quality of government' (1999) 15,1 Journal of Law, Economics and Organization 222–279, R La Porta, J Botero, F Lopez-de-Silanes, A Shleifer and A Volokh, 'Judicial reform' (2003) 18:1 World Bank Research Observer, 61–88; R La Porta, F Lopez-de-Silanes, C Pop-Eleches and A Shleifer, 'Judicial Checks and Balances' (2004) 112:2 Journal of Political Economy, 445–470; R La Porta, F Lopez-de-Silanes and A Shleifer, 'The economic consequences of legal origins' (2008) 46:2 Journal of Economic Literature, 285–332; among others.

investigation of the key relationships between aid, government, institutions of justice and growth. This enquiry validates the existence of some significant relationships between justice, good governance and economic growth. But, equally, it reveals that many important issues remain contested; much of the evidence is ambiguous; and there are numerous gaps in knowledge. As Rodrik stresses, fundamental questions over the chain of causation remain unanswered and centrally problematic.[101] While Kaufmann, for example, insists that good governance, as an institution, is a predeterminant of growth, others including Arndt and Oman directly challenge the integrity of this claim.[102] Chang persuasively presents the reverse argument that development causes good institutions, reminiscent of Polanyi's earlier thesis, which Stiglitz revisits. Evidently, much more empirical research is required before we can understand the key determinants of the good life, and the role of judicial reform in promoting it. Additionally, there is a stark lack of any corresponding research into the equitable and distributive dimensions of justice as a determinant of wellbeing, which is a missing dimension in the empirical inquiry of poverty alleviation.

Collectively, the lack of compelling empirical justification and record of underwhelming results create the imperative to realign our approach to the rule of law and promoting justice.

Way forward – realigning the rule of law to promoting justice

It is now clear that there are a range of unresolved philosophical, conceptual and technical challenges in judicial reform. The above survey of the literature and an analysis of practice, indicates that the prevailing approach to promoting the rule of law is manifestly insufficient.

I redress this insufficiency by proposing a fundamental realignment in the purpose of the rule of law to promote justice as fairness and equity. This requires the inclusion of a human-centred, rights-based approach to improving justice constitutively. This realignment supplements the deficiency in the prevailing instrumental approach to judicial reform with a more 'thick' conception, and provides the powerless and poor with the means to exercise their substantive rights.

As a practitioner, it is important to stress that this proposed realignment is actionable in practice. Let me illustrate how this approach may be put into practice using a taxonomy for just development, which is outlined below. This taxonomy is indicative of injustices from the 'real world' of development practice, which too often go unaddressed at the levels of either court-focused or broader development reform. It provides a sampling of common situations to illustrate their amenability to a justice-focused approach to development. It identifies rights and specifies indicators that measure justice across the major dimensions of development. These may involve crime (*social*), business and employment security (*economic*), good governance (*political*), and rights and opportunity (*humanistic*). It also nominates the data required to measure the relationships between justice-focused reform and its goal of improving civic wellbeing.

It provides examples of injustices affecting the rights of people – from Afghan girls, to Bangladeshi politicians, Nepali Dalit women, Vietnamese businessmen, Palestinian labourers and Pakistani taxi drivers – together with performance indicators. These indicators specify the means by which reform success can be measurable. These are variously measurable in terms of the enablement of rights, for example, to contract and title, physical safety and security, fair trial, resolution of disputes and bureaucratic caprice.

101 See n 87 above.

102 For example, D Kaufmann, A Kraay and M Mastruzzi, 'The worldwide governance indicators project: answering the critics' (World Bank 2007) http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/1740479-1149112210081/2604389-1167941884942/Answering_Critics, in particular; see also C Arndt, and C Oman, Use and abuse of governance indicators, (OECD Development Centre 2006).

Taxonomy of Just Development

Human situation	Injustice suffered	Right(s) to be exercised	Indicators of measurement	
			Development-wide	Court-focused
Nepali Dalit woman	Sexual assault	Actionable rights to physical safety and security of person – sources: domestic law, UDHR, ICCPR, CEDAW, CERD.[i]	Public standards of dignity, tolerance and respect for rule of law.	Access to legal aid; rates of crime, conviction, compensation.
Aboriginal Australian person	Police harassment and over-imprisonment	Actionable rights of Indigenous people to equal treatment and non-discrimination; sources – domestic law, UDHR, CERD.	Public / police standards of dignity, tolerance and respect for rule of law.	Access to legal aid, convictions, diversion from arrest/prison.
Vietnamese businessman	Breach of contract	Actionable rights to economic security, timely cost-effective redress; sources – domestic law, ICESCR.	Business productivity; business confidence.	Civil claims, compensation.
Pakistani taxi driver	Extortion by public officials	Actionable rights to good governance, integrity and non-harassment; sources – domestic law, ICESCR, CAC.	Administrative redress; and disciplinary proceedings.	Criminal prosecutions, compensation.
Cambodian farmer	Dispossession	Actionable rights to habitat and economic security; sources – domestic law, ICESCR.	Political, media advocacy; public perceptions of governance.	Access to legal aid, repossession, compensation.
Afghan girl	Barriers to education	Actionable rights to education; sources – domestic constitution / law, UDHR, ICESCR, CEDAW, CRC.	Educational enrolments; literacy; employment.	Judicial enforcement of constitution.
Azerbaijani journalist	Detention and torture	Actionable rights of freedom of speech; sources – domestic law, UDHR, ICCPR, CAT.	Press freedom; political media advocacy; public perceptions of governance.	Complaints; judicial review and redress.
Samoan villager	Banishment	Actionable rights to security of habitat; sources – domestic policy and law, UDHR, ICESCR.	Civic harmony, customary dispute resolution.	Complaints; judicial review and redress.
Bangladeshi politician	Unfair trial	Actionable rights to fair trial, due process; sources – domestic law, UDHR, ICCPR, Bangalore Principles.	Democratic freedom; public perceptions of governance.	Complaints against judicial integrity.
Palestinian labourer	'Closures' causing dismissal	Actionable rights to work and freedom of movement; sources – domestic law, UDHR, ICESCR.	Employment data.	Civil claims, compensation.

i Sample of principle UN treaties.

Each of us can readily identify other examples of injustices that blight people's lives. Rights-based remedies to these injustices exist across the economic, political, social and cultural dimensions of human wellbeing. This taxonomy is an analytic tool to help policy-makers see and address these injustices. Its purpose is to conceptualise development through the organising paradigm of promoting justice as fairness and equity. It can be used to focus on improving specific aspects of justice, address particular human situations of injustice and the rights to be enabled, and specify how the improvements will be measured. In doing so, it can address innumerable situations to promote developmental values of equality, efficiency, integrity, transparency, accountability, access and legitimacy, among others. It is *not* a litigators' guide to pro-poor claims; it is intended to illuminate how development can dynamically promote justice across the spectrum of civic wellbeing.

In sum, this article argues that judicial reform should promote justice and that justice must be centrally concerned with fairness and equity. The core purpose of judicial reform is to enable those rights that are constituted in international, domestic and/or customary law. These rights span the spectrum of civic wellbeing, comprising the economic, political, social and humanistic dimensions of any society. Reaching a consensus on which rights to promote may be difficult where the interests of power-holders are jeopardised, which has often required donors to make pragmatic compromises in practice. It is for this reason that justice reforms should focus on enabling those rights that have already been dispensed politically into law.

This theory of rights-based development reframes the approach to the rule of law in international development and casts the human being – rather than the state, the market or the development agency – as the key actor in this process. To realise this vision of placing justice at the centre of development, promoting social wellbeing, requires a shift in paradigm. The prevailing focus on primarily promoting aggregate economic growth has put the cart before the horse. By emphasising utilitarian notions of efficiency, it has shown a distributive indifference to notions of equality and a neglect of rights. Economic development cannot sensibly be treated as an end in itself; markets are instrumental in providing social opportunity for transactions. But the pursuit of growth or wealth cannot be the goal of development. Development must provide the means to enhance the lives of people and improve civic wellbeing. To do this, justice must lie at the heart of reform endeavour.

These propositions realign the rule of law to the immanence of justice and the quest to promote fairness – notably for the poor who are most vulnerable to events such as the GFC – which has been recognised as elemental to human society since Aristotle:

> 'Man, when perfected, is the best of animals; but if he is isolated from law and justice he is the worst of all… Justice which is his salvation belongs to the polis; for justice, which is the determination of what is just, is an ordering of the political association.[103]
>
> 'Justice and equity are neither absolutely identical nor generically different… This is the essential nature of equity; it is a rectification of law in so far as law is defective on account of its generality… It is now clear what equity is, and that it is just, and superior to one kind of justice.'[104]

103 Aristotle, *Politics*, E Barker (ed) (Oxford University Press 1958) London, (1253 a 15), 7.

104 Aristotle, *Nicomachean ethics* (J Thomson tr, Penguin 1955 – revised 2004), (1137a – 35) and (1137 b 25-35), 141.

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Chapter 6

The Global Financial Crisis: A Human Rights Meltdown?

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The GFC is affecting the world, but currently in a disproportionate manner the so-called 'Western' or 'developed' world. This is also the part of the world that has traditionally supported individuals' human rights as codified in international human rights treaties, and for the most part all human rights including civil, political, economic, social and cultural rights. The GFC has put significant pressure on states' finances, and powerful public and private actors strongly influence the way in which states react to this situation. This chapter will discuss how the GFC and the reactions to it disproportionately affect the human rights enjoyment of vulnerable groups such as women, indigenous populations and people living in poverty. Based on the relevant human rights treaties, most notably the ICCPR and the ICESCR, the chapter will then consider ways in which states can balance the pressure from the GFC and yet comply with human rights obligations. The article will finish with a consideration of the dangers of ignoring the adverse human rights effects of the GFC on such vulnerable groups.

'What began as a financial crisis is rapidly turning into a global human rights crisis. Just as greater poverty and misery are threatening the realization of economic and social rights, the repression of growing social protest is threatening civil and political rights. A rising tide of xenophobia and discrimination is also already threatening the wellbeing of migrants and minorities. Yet despite the human rights dimensions of the crisis, government responses have largely failed to take their obligations in this regard into account.'[2]

Introduction

The quote above introduces the work that the Center for Economic, Social and Cultural Rights has carried out concerning the human rights effect of the GFC. This echoes the often reiterated statement by Amnesty International and other human rights organisations, that it is in times of crisis that human rights become most important. It is relatively easy for states to comply with their human rights obligations in times of peace and prosperity. In the past decade, there have been two major international or global crises that have tested the commitment to human rights on a larger scale: that of the aftermath of 9/11 and the subsequent counterterrorism efforts, and that of the GFC, which had its first clear expressions in the summer of 2007, and still continues to challenge policy-makers in national, regional and global institutions.

There are many ways in which a commentary on the way in which human rights have been affected by the GFC could have been framed. This is an important issue for political scientists, economists, sociologists and moral philosophers, among others. However, international lawyers have not only an interest in such a commentary, in the opinion of the author, but also a responsibility to provide

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2 Center for Economic and Social Rights, 'Rights in Crisis' www.cesr.org/section.php?id=139 accessed 12 October 2012.

insight into how law may be relevant, both in terms of addressing the events and how these events may impact upon human rights enjoyment. Furthermore, it is important to determine whether the existing international legal structures may provide guidance to policy-makers as to how they can comply with their human rights obligations in times of crisis. International human rights lawyers are often criticised for being more interested in getting human rights standards approved (through adoption and entry into force of human rights treaties) than seek the implementation and compliance with these standards. In the current GFC, it is imperative that international lawyers live up to their responsibility to seek implementation and compliance.

In the context of the 'birth' of international human rights law through the adoption of the UN Charter in 1945, the drafters of the Charter clearly recognised the strong link between human rights protection and peaceful societies, or alternatively, the violation of human rights and conflict. The first two paragraphs of the Preamble of the Charter reflect the disdain for the 'scourge of war' and 'faith in fundamental human rights'. Moreover, Article 1 of the Charter lists four main purposes of the organisation, one being to maintain international peace and security,[3] another the promotion of respect for human rights.[4] This link was further recognised in the early 1950s with the adoption of the European Convention on Human Rights and Fundamental Freedoms, and subsequent human rights law developments through the UN and regional institutions. This recognition of the link between human rights violations and conflict should make alarm bells ring around the world currently experiencing a GFC: it is imperative to ensure that individuals and groups around the world do not suffer severe human rights violations in times of economic crisis, not only because of the immediate human suffering that this would entail but also for the potential conflict, at times violent, in which this may result.

Having said this, it is equally important that international human rights lawyers remain realistic and refrain from the temptation to become dogmatic. If a gulf develops between the politicians on the one hand and human rights lawyers on the other, the opportunity for much-needed constructive dialogue will be lost.

This chapter will be divided into three substantive parts. Part 1 will consider how human rights enjoyment is affected by the GFC; Part 2 will address the need to balance the pressure from the GFC with the duty to comply with human rights obligations, and finally in Part 3 some of the dangers of ignoring human rights concerns when dealing with the GFC will be considered.

The effect on human rights enjoyment by the GFC

The UN, Council of Europe, NGOs and others have in the past couple of years documented how the GFC affects individuals' enjoyment of human rights. In the winter of 2009, the UN Human Rights Council held a special session on human rights and the GFC, and adopted a resolution that clearly recognised the effect of the GFC on human rights enjoyment. Both in the Preamble to the resolution and in its substantive part it was confirmed that that 'the universal realization and effective enjoyment of human rights are challenged due to multiple and interrelated global economic and financial crises'.[5] Similarly, the Council of Europe's Commissioner on Human Rights has held that '[…] vulnerable people – who have a difficult time defending their rights in the best of times – have often been hit hardest by budget cuts in many European countries'.[6] NGOs have addressed the question in more detail, and several organisations have reported on specific human rights problems stemming from austerity programmes or other effects of the GFC. In particular, the Center for Economic, Social and Cultural Rights has considered the situation in Ireland, and held in a report that:

'A poorly managed recession, followed by a series of austerity budgets characterized by retrogressive cuts to social spending and an aversion to tax increases have markedly undermined the rights to

3 UN Charter (1945), Article 1(1).

4 *Ibid*, Article 1(3).

5 UN Human Rights Council, S-10/1 *The impact of the global economic and financial crises on the universal realization and effective enjoyment of human rights*, Para 1; 23 February 2009, available at: www2.ohchr.org/english/bodies/hrcouncil/specialsession/10/index.htm accessed 12 October 2012.

6 Council of Europe, Commissioner on Human Rights, 'National Human Rights Structures can help mitigate the effects of austerity measures', available at www.coe.int/t/commissioner/news/2012/120531hrc_EN.asp accessed 12 October 2012.

education, health, housing, work and an adequate standard of living. Poverty levels are rising fast, just as Ireland's already struggling health and education sectors are being stripped of their resources.'[7]

In relation to Greece, the UN Independent Expert on Foreign Debt and Human Rights, Cephas Lumina opined that, 'The implementation of the second package of austerity measures and structural reforms […] is likely to have a serious impact on basic social services and therefore the enjoyment of human rights by the Greek people, particularly the most vulnerable sectors of the population such as the poor, elderly, unemployed and persons with disabilities'.[8]

These and similar documentation of the negative effect of austerity measures on the enjoyment of human rights provide evidence that the GFC and measures taken as a result of it pose a real problem for millions of people around the world. While the immediate effect of such austerity programmes may be clearly demonstrated in terms of violations of economic and social rights, such as the right to food, health, housing and work, the underlying effects clearly also affect civil and political rights, such as freedom of expression, freedom of assembly and association, and the right to be free from discrimination on the basis of gender, disability, social status, etc.[9]

Thus, from the above examples it is clear that people are suffering human rights problems as a result of the austerity programmes and the GFC. The question becomes whether this represents violations of human rights on the understanding that violations only occur if an obligation is breached,[10] and it is therefore necessary to look at what obligations states have in times of crisis. For the purpose of this article, I will only base the discussion on the two Covenants on Human Rights: the ICCPR,[11] and the ICESCR.[12] These two covenants are widely ratified,[13] and therefore carry obligations for the large majority of states, including most of the OECD countries.[14]

International Covenant on Economic, Social and Cultural Rights

According to Article 2(1) of the ICESCR, states shall 'take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'. The key provisions to consider here are 'take steps', 'individually and through international assistance and cooperation, especially economic and technical' and 'to the maximum of available resources'. Article 2(2) should also be considered in this context, as it contains the non-discrimination provisions of the Covenant.[15]

According to the interpretation of Article 2(1), the requirement that states shall 'take steps' implies a) inaction would not be in conformity with the obligations, and b) retrogressive measures are not acceptable.[16] This means that states are under an obligation to take positive steps towards the full realisation of the rights in the Covenant, through all appropriate means, and through the maximum use of available resources.[17] In times of financial crisis, this general provision should guide states to

7 Center for Economic, Social and Cultural Rights, 'Mauled by the Celtic Tiger: Human Rights in Ireland's Economic Meltdown', Rights in Crisis Briefing Paper, February 2012, 4.

8 'Greek austerity measures could violate human rights, UN expert says', 30 June 2011, available at: www.un.org/apps/news/story.asp?NewsID=38901&Cr=austerity&Cr1 accessed 12 October 2012.

9 'Bringing Human Rights to Bear in Times of Crisis: A human rights analysis of government responses to the economic crisis', Report co-authored by a number of human rights NGOs, including ECSR-Net; Center for Economic, Social and Cultural Rights; and Center for Women's Global Leadership and Center of Concern, March 2010, 8.

10 International Law Commission, *Responsibility of States for Internationally Wrongful Acts,* Yearbook of the International Law Commission, (2001), Vol II, Part 2, Article 1 and 2.

11 Adopted by the UN General Assembly (1966), UN Treaty Series, Vol 999, no 14668; entry into force 1976.

12 *Ibid.*

13 As of August 2013, the ICESCR has 160 ratifications; while the ICCPR has 167. For up-to-date ratification information visit http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en.

14 The US has not ratified the ICESCR, but most of the other OECD countries have.

15 Article 2(2) reads: 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

16 Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 2, 166.

17 *Ibid*, 177.

consider the human rights consequences of austerity measures taken to relieve the financial problems. Indeed, in its recent concluding observation on the periodic report submitted by Spain, the UN Committee on Economic, Social and Cultural Rights (UNCESCR) recommended that Spain:

> 'review the reforms adopted in the context of the current economic and financial crisis to ensure that all the austerity measures introduced *uphold the level* of the protection attained in the realm of economic social and cultural rights and that, in all cases, such measures are temporary and proportionate and *do not negatively* impinge on economic, social and cultural rights'.[18]

Furthermore, the provision relating to international cooperation and assistance is of great significance in this context. While the question as to whether there is a firm obligation of financial transfers from richer countries to poorer ones is still debated,[19] it is reasonable to argue that this provision is a reflection of a sense of solidarity with states in need of assistance to implement economic, social and cultural rights, and therefore measures that are taken in one state that may have negative effects in another state will be a breach of these obligations. Furthermore, it has been argued that in times of crisis (normally related to natural or man-made disasters), the obligation to assist may be stronger.[20] The GFC is certainly a man-made crisis, and for some people (for instance, the Greek population), the measures taken to deal with the crisis may result in similar human rights results as natural disasters. This includes starvation, homelessness and an inability to access life-saving medical treatment. In such situations, states that are in a position to assist should do so,[21] and states that have influence over decisions that adversely affect the human rights situation have obligations to design the decisions in a manner that avoids such serious human rights problems.[22] The GFC is an international crisis and an internationally generated crisis that is responded to with international assistance through the IMF and/or the EU for some countries. This international assistance carries significant conditions as to how national policies are supposed to be designed and carried out.[23] In such situations, the international institutions that are responsible for the financial conditions of the assistance should also have responsibility related to the human rights effects of those policies. To leave such responsibility to the domestic state, which has for practical purposes lost much of its autonomy over budgetary decisions, would not reflect current understanding of international human rights law obligations of international organisations, including the international financial institutions and regional institutions in question.[24]

Another pertinent question in the present GFC relates to the understanding of the provision referring to 'maximum of available resources' in Article 2(1). This provision has not been clearly interpreted by the UNCESCR or other authoritative bodies. From the drafting of the article, and from the practice of the UNCESCR, it is clear that the resources referred to are both domestic resources and those available internationally.[25] However, in the GFC, it is difficult to argue that a significant increase in resources will be available for the implementation of economic and social rights (or other human rights for that matter). This does not mean that the provision of 'maximum of available resources' becomes 'null and void'. Quite the contrary: in situations where the resource base is severely limited, as it currently is in the global financial market, it becomes even more important that those resources that are available are used to their maximum for the benefit of all human rights, including economic and social rights. It is therefore a matter of strong priority to ensure that resources are used to protect the most vulnerable in society, and that the de facto outcome of austerity measures should not be discriminatory with respect to the weakest

18 UN Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States Parties under articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights – Spain, 18 May 2012; UN Doc E/C.12/ESP/CO/5, para 17 (emphasis added).

19 Magdalena Sepúlveda, 'Obligations of "International Assistance and Cooperation" in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) 24 Netherlands Quarterly of Human Rights 2, 274.

20 UNESCR, General Comment no 12 – Right to Adequate Food as a Human Right (1999), para 38.

21 UNESCR, General Comment no 14 – Right to Highest Attainable Standard of Mental and Physical Health (2000), para 39.

22 Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights, adopted by a group of experts meeting in Maastricht, September 2011, paragraphs 8 and 9.

23 'Spain and Italy criticise Berlin plan for EU to police budgets' *The Guardian* (29 October 2012), available at: www.guardian.co.uk/world/2012/oct/29/europe-divided-european-union-budgets accessed 1 November 2012.

24 Andrew Clapham, *Human Rights Obligations of Non-State Actors*, (Oxford University Press 2006), Chapter 4.2.

25 Limburg Principles on the Implementation of Economic, Social and Cultural Rights (1987) UN Doc. E/CN.4/1987/17, Principle 26; see also UNESCR, General Comment no 3 – Nature of States Parties' Obligations (1990), para 13.

parts of the population.

Article 2(1) of the ICESCR is thus not limited to times of prosperity. Even in times of austerity, states retain the obligations to ensure that their populations do not suffer violations of their economic and social rights.[26] This is both an obligation on the national level, and an obligation through international assistance and cooperation. When states act internationally – either alone or through international institutions, such as the international financial institutions or the EU, they need to consider the human rights effects of their measures and try their utmost to comply with the obligations in the Covenant. It is quite clear that the current GFC is the result of international action (or inaction) on the part of states to sufficiently regulate the financial activities of governmental and private actors in the international financial sector. Furthermore, the responses to the GFC are significantly coordinated through international actors such as the IMF and the EU. A consequence of this should be that these actors look beyond the financial or economic benefits of the measures taken to address the GFC to include a careful consideration of human rights effects of these measures.

International Covenant on Civil and Political Rights

Regarding civil and political rights, the situation is somewhat different. It may be thought that the GFC and the consequent austerity programmes only affect individuals' economic and social rights, as respect for civil and political rights would seemingly be unaffected by financial constraints. This approach is based on the opinion that the implementation of civil and political rights requires few or no public funds. However, while the question of financial resources for the implementation of civil and political rights is an interesting debate in itself, it lies outside the scope of this article. It is, however, notable that the responses by governments to the GFC are clear illustrations of the interdependence and interrelatedness of economic and social rights on the one hand and civil and political ones on the other. Civil and political rights have been affected by the GFC and by the responses that governments have taken in this regard.[27] It should be noted that the ICCPR does not contain direct reference to obligations of international assistance and cooperation; quite the contrary, the general obligations article of the ICCPR (Article 2(1)) provides that:

> 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

While the article does make reference to 'within its territory and subject to its jurisdiction', it has been recognised that the obligations pertaining to this Covenant are not uniquely territorial, but that they may extend beyond the State Party's territory in certain circumstances.[28]

However, in the national/territorial setting, the current GFC has resulted in significant threat to civil and political rights. To take Greece as an example, there are significant reports of increased xenophobia, discrimination and violence against immigrants, and maltreatment of asylum seekers.[29] Amnesty International has also reported that the reactions from the government (through police and security forces) include practices of severe human rights violations, such as the use of torture against asylum seekers and others.[30] More broadly, across Europe, there have been massive demonstrations against austerity measures introduced by governments and the EU. Often these demonstrations are reactions to breaches of economic and social rights, and the population exercises its right to assembly and freedom of expression to protest against the cuts and austerity measures. At times these protests have been met with excessive force by the

26 See n 18 above.

27 'Police Violence in Greece: Not just Isolated Incidences' Amnesty International Report, July 2012. Available at www.amnesty.org/en/library/asset/EUR25/005/2012/en/edbf2deb-ae15-4409-b9ee-ee6c62b3f32b/eur250052012en.pdf accessed 1 November 2012.

28 For an elaboration, see S Skogly, *Beyond Borders: States' Human Rights Obligations in International Cooperation*, (Intersentia 2006) chapters 4 and 6; see also Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, (Oxford University Press 2011).

29 Amnesty International report (2012), n 27 above.

30 *Ibid*, 17.

authorities, questioning the respect for these civil and political rights.[31]

It has been shown that in times of austerity, vulnerable groups are hit hardest by the measures that are taken to improve the financial situation. Immigrants and asylum seekers have already been mentioned. Research also shows that the gap between people already living in poverty and the better off is widening. Unemployment figures are skewed against women,[32] and services aimed at vulnerable children are often cut.[33]

If human rights shall retain any meaning in times of crisis, it is clear that states need to heed their obligation to protect vulnerable groups from attack and discrimination, both direct and indirect, such as disproportionate levels of unemployment among specific groups. The treatment of the most vulnerable, such as immigrants and asylum seekers, also need to be given the human rights attention merited.

Balancing the pressure from the GFC and complying with human rights obligations

It has now been established that economic, social, civil and political rights may be affected by the GFC and the subsequent measures taken by states and the international community to respond to the situation.

Does this mean that governments have no flexibility when it comes to the respect and promotion of human rights in times of GFC? It is important to recognise that while human rights law sets limits as to what states can legitimately do to individuals, it does not dictate policy. The state retains significant policy choices as to how to deal with the GFC as long as human rights standards are protected. In this regard, international human rights law should be considered a tool in policy decisions, rather than an obstacle. As such, human rights provisions set minimum standards for the treatment of individuals, and it sets priorities for the conditions applicable to those who are most vulnerable in society. It also provides very firm non-discrimination provisions that should guide policy choices.[34]

States will, however, often consider that human rights implementation demands too great an expenditure of resources of many kinds in times of crisis. In such situations, it is important both to assess whether there is some flexibility in the obligations and indeed to determine whether the perception of the existence of constraints on their implementation is real. In some severe situations, there are derogation possibilities in human rights law. This is specifically provided for in Article 4 of the ICCPR, and other human rights treaties contain such provisions as well.[35] Article 4 provides that:

> '1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
>
> 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.'[36]

For a state to use the derogation possibility in the ICCPR, it will have to proclaim a national emergency, which is of a severity that threatens the life of the nation. Furthermore, the specific details of derogations will have to be communicated to the UN Secretary-General.[37] As indicated above, some

31 'Policing Demonstrations in the European Union', Amnesty International Report September 2012, 2. Available at www.amnesty.org/en/library/asset/EUR01/022/2012/en/1e06df7d-6878-40e0-8e82-d07605e9a6e9/eur010222012en.pdf accessed 1 November 2012.

32 'Women over 50 hardest hit by austerity measures as their unemployment rises faster than any other group', Mail Online 29 September 2012, available at www.dailymail.co.uk/news/article-2210386/Women-50-hardest-hit-austerity-measures-unemployment-rises-faster-group.html accessed 1 November 2012.

33 'NGOs warns: Austerity brings more children in poverty', New Europe Online 9 October 2012. Available at: www.neurope.eu/article/ngos-warns-austerity-brings-more-children-poverty accessed 1 November 2012.

34 See Article 2(2) of the ICESCR, and Article 2(1) of the ICCPR.

35 For example, Article 15 of the European Convention on Human Rights and Fundamental Freedoms (1950).

36 These articles refer to the right: to life; to be free from torture; not to be held in slavery and servitude; imprisonment due to failure to fulfil contractual obligations; to non-retrospective criminal charges; to recognition as a person before the law; and freedom of thought, conscience and religion.

37 ICCPR, Article 4(3).

rights are considered non-derogable, and as such they can never be exempted from protection by the state. In determining whether the individual state's experience of the GFC is such that it 'threatens the life of the nation' it will be necessary to assess each state's position at any given time. There are states that have experienced the crisis of a magnitude such that an argument of the 'life of the nation' may be relevant. This could perhaps have been (or still is) the case for Greece, Ireland and Iceland. But the case would need to be made. Other states may be hard hit, but not quite reach the threshold required by Article 4.[38]

The ICESCR does not contain a derogation clause, and there has been debate as to whether this means that no derogation from the provisions of the Covenant is ever permitted.[39] According to Ssenyonjo, the absence of a derogation clause can be interpreted in two ways: that derogation from the provisions in the Covenant is never permitted as such an opportunity is not provided for in the Covenant; or that they may be permitted for non-core obligations as derogation is not explicitly prohibited.[40] The UNCESR held in its General Comment no 3 (1990), that States Parties have certain minimum core obligations.[41] According to this General Comment, these minimum core obligations imply that every State Party shall ensure 'the satisfaction of, at the very least, minimum essential levels of each of the rights'.[42] The Committee states that without such a minimum core obligation, '[the Covenant] would be largely deprived of its raison d'être.'[43] Yet, the Committee does include some consideration of reality in these arguments and holds that:

> '[i]t must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. […] In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.[44]

It has been argued that these minimum core obligations cannot be derogated from in situations of emergencies,[45] and in two of the General Comments on the content of substantive rights of the Covenant, the UNCESR has confirmed that such obligations are non-derogable.[46] The specific content of these obligations vary from right to right, but the UNCESR holds that 'at the very least, minimum essential levels of each of the rights is incumbent upon every State Party',[47] and they used examples to illustrate their meaning: 'a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant'.[48] Thus in situations where unemployment due to austerity measures result in inability to procure the basic necessities of food or healthcare, the state will have violated the obligations that are non-derogable.

The derogation clauses and the discussion on the derogable nature of obligations pertaining to economic and social rights provide a rather negative approach to 'escaping obligations'. It is more constructive to consider how human rights standards may provide guidance to governments when trying to determine the priorities within policy choices. Human rights standards do in a certain sense provide a checklist against which potential negative effects of responses to the GFC may be considered. In the determination of options, states should use the predicted human rights violation's effects as a measure by which priorities are set. This could, for instance, be done by the use of Human Rights Impact Assessments (HRIAs), which would reveal the potential positive and negative effects of different

38 To the knowledge of the author at the time of writing, no state has actually proclaimed such a state of emergency and derogated from their obligations under the Covenant or from the similar provisions of the ECHR.

39 Magdalena Sepúlveda, *The Nastier of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003), 293–309.

40 Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009) 40.

41 UNCESCR, General Comment no 3, n 25 above, para 10.

42 *Ibid.*

43 *Ibid.*

44 *Ibid.*

45 Ssenyonjo, 41

46 See notably General Comment no 14 (2000) (*Highest attainable standard of Health – article 12)*, para 47; and General Comment no 15 (2002) (*Right to water)*, para 40.

47 UNCESCR, General Comment no 3, n 25 above, para 10.

48 *Ibid.*

policy models. Such HRIAs may thus serve as a helpful tool for states to avoid human rights problems in the financial crisis.

Much of the existence of human rights obligations relates to achieving certain outcomes, namely an improved human rights situation for a state's population. This is commonly described as obligation of result.[49] However, human rights obligations also carry procedural duties ('obligation of conduct'),[50] some of which may be described as complying with principles of *due diligence*. Due diligence is not extensively defined in international human rights law. However, in relation to the rights of women, the then-UN Special Rapporteur, Yakin Ertürk, wrote a report in 2006, where the concept was considered in detail.[51] In this report, Ertürk refers to the Declaration on the Elimination of Violence against Women[52] and points to Article 4(c), in which states are urged to 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons'. She adds that 'as such, the concept of due diligence provides a yardstick to determine whether a State has met or failed to meet its obligations in combating violence against women'.[53] The concept of due diligence thus refers to the manner in which states behave to prevent human rights violations, and protect individuals against such violations by states or by other actors. Used analogously in a GFC situation, due diligence would provide a yardstick to determine whether a state has met or failed to meet its human rights obligations in times of economic crisis.

In terms of the GFC, the concept of due diligence could be very useful for states. While it is exceedingly difficult to predict all potential outcomes of policy choices, if states can demonstrate that they have exercised due diligence in their decision-making processes, they will to a large extent have complied with their obligations of conduct. HRIAs may be a tool in such due diligence processes. Clear processes for the consideration of human rights as part of the response to a GFC will in many situations provide alternative strategies that may help states to avoid significant human rights problems.

Dangers of ignoring the adverse human rights effects of GFC

What may the results be if states ignore the human rights effects of their GFC responses? It has been demonstrated that there is a growing disparity between rich and poor in the period since 2007–2008.[54] It has also been shown that the poorer segments of societies carry a disproportionate 'burden' of dealing with the financial crisis in terms of cuts in public spending, public sector jobs and social security for vulnerable groups.[55] Legally, if these effects result in violations of human rights for those affected by these measures, states have failed to comply with their obligations according to treaty law. There are, however, more sinister outcomes of ignoring the human rights effects. The disparities referred to may be very harmful in the long term, and may lead to unrest and conflict within and among societies. In Europe, there has been growing opposition to the political solutions that are being 'imposed' on the population. This opposition has resulted in large scale peaceful demonstrations, in more violent demonstrations, and perhaps even more worryingly in a sharp rise in 'far-right' or extremist groups that advocate a militant opposition and violence against immigrants, asylum seekers and people of a different colour in general.[56] These developments raise concerns from a human rights perspective in two different ways: what happens to the demonstrators in a tense environment; and what are the long-term effects on human rights enjoyment when societies become so divided? Furthermore, what will the

49 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 1997, Guideline 7. Available at: www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html accessed 15 October 2012.

50 *Ibid*.

51 *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, UN Doc. E/CN.4/2006/61 20 January 2006.

52 Declaration on the Elimination of Violence against Women, Adopted by the General Assembly 23 February 1994, UN Doc: A/RES/48/104.

53 Ertürk, 2006, 6.

54 Zanny Minton Beddoes, 'For richer, for poorer' *The Economist* 13 October 2012, available at www.economist.com/node/21564414 accessed 28 October 2012.

55 Ha-Joon Chang, 'The root of Europe's riots' *The Guardian* 28 September 2012, available at www.guardian.co.uk/commentisfree/2012/sep/28/europe-riots-root-imf-austerity, accessed 28 October 2012.

56 Benjamin Ward, 'Europe's Own Human Rights Crisis', Human Rights Watch, available at www.hrw.org/world-report-2012/europe-s-own-human-rights-crisis accessed 29 November 2012.

long-term prospect be for peaceful coexistence if human rights violations become more widespread and perhaps even tolerated by the majority of the population?

Human rights violations that become tolerated in times of crisis may lead to fuelling disparities in society; it may 'legitimise' xenophobia or violence against minorities and vulnerable groups; and it may lead to internal and regional conflict. There is a possibility that inaction in the face of human rights problems may lead to significant discontent and a potential 'political ticking bomb' fostering extremism and unrest.

Conclusion

To conclude, it has been shown that states retain their human rights obligations in times of a GFC. Furthermore, it has also been shown that those states that in more prosperous times generally support and comply with human rights requirements, are unable or unwilling to give priority to human rights compliance during the GFC and in their responses to it. This is also the case for international financial institutions and regional organisations, which put significant pressure on, and prescribe policy measures for, states in terms of how they would deal with their economies in the GFC.

The way in which society reacts to a crisis such as the GFC can be seen as an indication of the measure of humanity within our societies. It is important that today's politicians and other decision-makers are aware of their history. The UN Charter and the Council of Europe (with its European Convention on Human Rights) were adopted with the underlying premise that the full respect for human rights and fundamental freedoms was a precondition for peaceful and prosperous societies. It is of paramount importance that current political and financial measures are not seen in isolation, but that the lesson has been learnt from history that without full respect for human rights, and particularly protection of the most vulnerable in society, severe consequences may follow. In the words of UN High Commissioner for Human Rights, Navi Pillay, 'While it is imperative to respond to the current crises with a thorough review of the functioning of the international financial and monetary mechanisms, a human rights approach will contribute to making solutions more durable in the medium and long run.'[57]

57 'A Human Rights Response to the Global Economic Crisis', February 2009, available at: www.ohchr.org/EN/NewsEvents/Pages/humanrightsresponsetothecrisis.aspx accessed 12 October 2012.

Chapter 7

The Viability of the Welfare State[1]

James J Heckman

Introduction

The welfare state is a late 19th century invention. Its provisions for economic security are now accepted as rights in many countries. Franklin Delano Roosevelt proclaimed 'Freedom from Want' as one of his Four Freedoms. The Universal Declaration of Human Rights adopted by the UN goes further in guaranteeing the right to work, the right to a standard of living with adequate health and well-being, including food and medical care in the event of an emergency. Many perceive such social rights as an integral aspect of a well-functioning state, and covered under the rule of law.

The case for the welfare state that motivates these proclamations is that it protects its citizens against the consequences of risks beyond their control (Agell 1999). The case against the welfare state is that it blunts incentives and reduces productivity. Supporting this point of view is that the economic performance of many welfare states has been poor. There has been a rapid run-up in unemployment in most Western European welfare states in the past 20 years. When properly measured, many Western European welfare states have much higher rates of unemployment than are reported in the official statistics. Incentives to withdraw from work, to go underground, to evade taxes, to retire early and not to produce are high.

Immigration levels are also high in many European countries. There are serious problems with immigrant assimilation created in part by welfare state policies. There is slow growth in human capital – a vital ingredient for a modern economy. In addition, there are low rates of business formation, weak incentives for entrepreneurship and low levels of research and development. There are high taxes on labour and, in many countries, on capital. Poverty traps are often created that discourage work.

The forces creating the pressure on the welfare state are globalisation and an inability to tax internationally mobile factors of production. The increase in the unpredictability in trade and technology, the increasing openness of economies and the secular bias against unskilled labour in trade and technology are also the forces that create the demand for the welfare state as an insurer against risk, and as a protector against the reduced wages that the unskilled experience when the demand for their skills is reduced. As economies become more open, it is much more difficult to shelter workers and firms from the rigours of the market. And in fact, less-sheltered economies like the US and UK have shown substantial increases in wage inequality and social inequality due, in part, to these trends.

In the current environment, a premium has emerged for flexibility and responsiveness of economies. High levels of workforce skill and a regulatory environment that supports change allow economies to benefit from new opportunities. An economic order that was well adapted to the more stable and predictable environment of the 1950s and 1960s and that had a large role for unskilled labour to play

1 This research was supported by a grant to the World Justice Project from the Hewlett Foundation, Grant #2008-2244. This chapter draws in part from a paper presented at the OECD Conference in Toronto on the 2006 Jobs Report (Heckman et al 2006).

has become dysfunctional in the early 21st century. The opportunity cost of security and preservation of the status quo – whether it is the status quo technology, the status quo trading partner or the status quo job – has risen greatly in recent times. While reforms have been made in Europe, they have mostly been small-scale in nature. Europe has to run and not walk to keep up with the pace of global change, and it is barely even walking, although by European standards, it is rapidly reforming.

Not all welfare states have lagged, or at least they have not all lagged in the same way. It is fruitful to examine differences in economic performance among different welfare states. This is the topic of the chapter. The key to a successful welfare state lies in devising proper incentives to encourage actors at all levels of the economic system to respond to the new opportunities. In principle, a welfare state can provide the proper incentives for productivity and at the same time afford a measure of security and dignity for its citizens. But it has to respect incentives.

Themes of this chapter

This chapter develops five broad themes. First and foremost, people respond to incentives, and responses are often very strong. It is very dangerous when designing laws and regulations to underestimate the ingenuity of economic agents in pursuing their self-interest, the responsiveness of the economic system and the broader consequences of regulation on all members of society. Many advocates of the rule of law promote principles like universal economic security, the right to organise trade unions or the right to a minimum standard of living without accounting for the economic costs of such provisions. The rights granted to some, if they are enforced, often reduce the welfare of others. For example, trade unions often raise benefits to members at the cost of higher prices for consumers, lower profits for shareholders, and lower wages for non-union workers. The welfare state often benefits insiders at the expense of outsiders (Lindbeck and Snower 1989).

Secondly, the debate about the welfare state often poses a false dichotomy. It compares the US (or the Anglo-Saxon bloc of countries) to Europe. It frames the debate as a choice among systems in place. The US, Canada, the UK, Australia and New Zealand are, of course, welfare states. They have made their share of mistakes in devising incentives and protecting their workers. The relevant issue is not whether Europe should adopt the Anglo-Saxon model, or whether the Anglo-Saxons should adopt the European model, rather it is which features of the welfare state reduce inequality and provide insurance against uncertainty in an efficient way.

Thirdly, the term 'welfare state' is far too broad. At least four models are often mentioned (see Sapir 2006) and these categories are surely too crude.

(1) The Nordic/corporatist model (Scandinavia, Finland, Netherlands), which provides a high level of security for workers, heavy reliance on active labour market policies, low inequality, high levels of taxation of labour income, relatively low levels of taxation of capital income, very high levels of education and high levels of government activity, generous grants that are not means tested, high levels of wage compression, centralised unions and high levels of concentrated unions and wage setting.
(2) The Continental model (Austria, Belgium, France, Germany and Luxembourg). Its features are heavy reliance on insurance-based nonemployment benefits and old-age pensions, strong unions that are not all centralised, lots of regulation, inflexibility in labour markets and compressed wage distributions. It shows a marked inability to adjust to change.
(3) The Mediterranean model (Italy, Spain, Portugal, Greece). It is characterised by reliance on employment protection (lifetime jobs), with union-covered sectors with compressed wages, concentrated spending on old-age pensions and high segmentation of entitlements and status.
(4) The Anglo-Saxon model (US, Canada, UK, New Zealand and Australia). It is characterised by social assistance only in the last resort, low levels of job protection and minimum wages, high levels of cross-section wage inequality, considerable social spending on old-age pensions and high levels of segmentation of entitlements and status.

For close observers of the welfare state, these four categories are far too broad in many respects. For example, Ireland is a corporatist state often lumped into the Anglo-Saxon camp.[2] It has implemented

2 Ireland has centralised bargaining in trade unions.

strong incentives, especially for capital. It also has a lot of wage coordination. The four categories of welfare state are thus, at best, a rough cut.

Fourthly, comparing alternative economic systems is a dangerous practice. Different baseline and terminal periods can produce very different ratings of the performance of any economy. Yesterday's success is often today's failure. Recall the love affair with the Dutch Polder model ten years ago that still lingers on in some quarters. There was an even earlier fascination with Japan and, earlier yet, a fascination with the USSR.

Many European thinktanks and the OECD have embraced the 'Nordic model' or the closely related 'corporatist model'. For example, the 2006 OECD Jobs Report, which updated the influential 1994 OECD Jobs Report, trumpets the 'corporatist model' as being coequal in efficiency with the Anglo-Saxon model. An influential paper by Andre Sapir (2006) of the Bruegel Group made the same endorsement and has had a big effect on the European discussion. This praise is echoed by Jeff Sachs (2006) in a recent column in Scientific American:

> 'Half a century ago, the free-market economist Friedrich von Hayek argued that a large public sector would threaten democracy itself, putting European countries on a 'road to serfdom.' Yet the Nordic states have thrived, not suffered, from a large social welfare state, with much less public-sector corruption and far higher levels of voter participation than in the US. Von Hayek was wrong. In strong and vibrant democracies, a generous social-welfare state is not a road to serfdom but rather to fairness, economic equality and international competitiveness.'

Sweden's economic performance in the past decade has been impressive. So has that of Finland. Denmark's 'flexicurity' system promotes job mobility. It gives generous unemployment benefits and, at the same time, provides sanctions to promote rapid return to work among the unemployed. It has attracted a lot of attention among the policy pundits. The recent fascination with Scandinavia is typical of a mentality of many policy analysts who look to a working model as a system for adoption, rather than looking at basic principles that transcend any economy to explain the successes and failures of a particular model. This chapter looks at those basic principles to draw general lessons from many models rather than to extol the virtues of one system currently in place in comparison with any other system.

Fifthly, I make a basic methodological point that affects the way analysts should use and interpret the available evidence. A large literature on the European welfare state relies on arbitrarily constructed indices to examine incentive effects of different policies. Many of these studies claim to prove that the incentives ('institutions') that basic economic theory suggest should matter do not in fact matter. These conclusions are a statistical mirage. They are consequences of using bad data. When incentives are properly measured, they matter, and they matter a lot.

Students of Latin American labour markets have measured the costs of regulation more carefully than students of the European welfare state. Latin America has experienced more dramatic regime changes and policy shifts than any that have occurred in Europe. The Latin American data clearly shows strong adverse effects of perverse incentives.

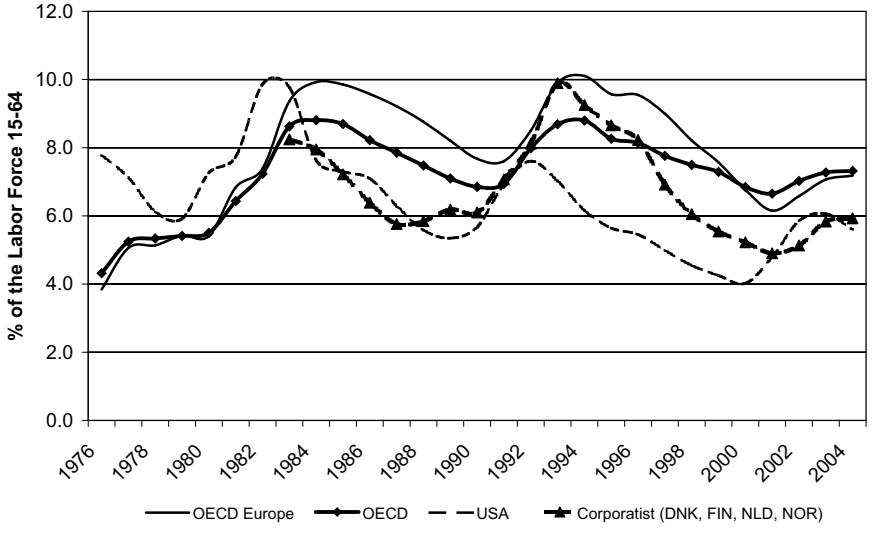
The plan of the rest of the chapter

The rest of the chapter proceeds in the following way. Given the current romance with Nordic and corporatist models, I look at their performance and the performance of welfare states more generally. It is useful to examine long-term trends to supplement the short-term time series that attract so much attention in policy discussions. Nordic performance is not impressive, especially if one looks at long-run trends. Policies in place often conceal rather than solve problems and create more for the future. Problems of flawed measurement create serious problems in making meaningful comparisons across alternative systems. Long-term trends in skill accumulation, attitudes toward work, research and development, adoption of new technology, benefit dependency, and dependence on government employment are not encouraging and portend serious problems in the future for many quarters of Europe, even for Scandinavian Europe.

The performance of the European welfare state in the past 20 years

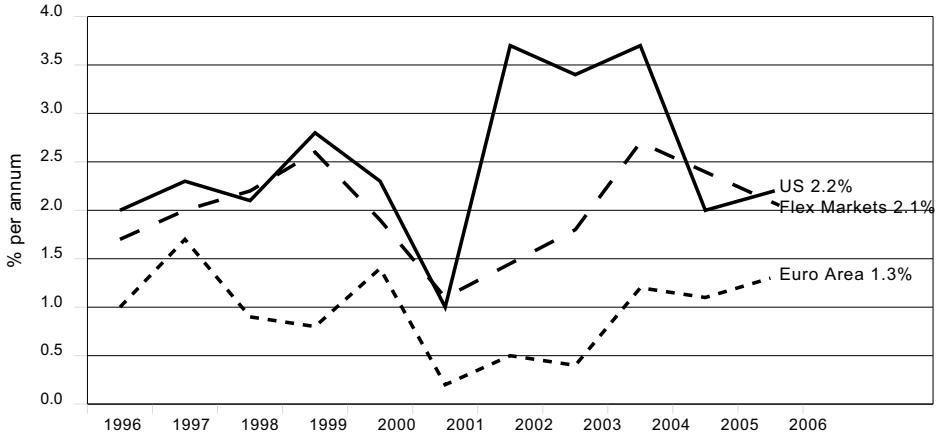
First consider the labour market. An OECD Jobs Report, released in 2006, shows that some of the reforms suggested in the 1994 Jobs Report (OECD 1994) have been implemented. It claims that those reforms partially account for the improved state of European labour markets. European unemployment rates post-1994 are lower but they are still very high. See Figure 1, which plots the 'open' (official) unemployment rates over time. Starting in the early 1980s, the overall Western European OECD unemployment rate rose. It has not fallen to its previous level. However, unemployment appears to be much lower in corporatist Europe. This has led to calls by some to adopt the corporatist model as a way to conduct economic policy.

Fig 1 Open Unemployment rates in the OECD.
Source: Author's calculations from OECD (2006a)



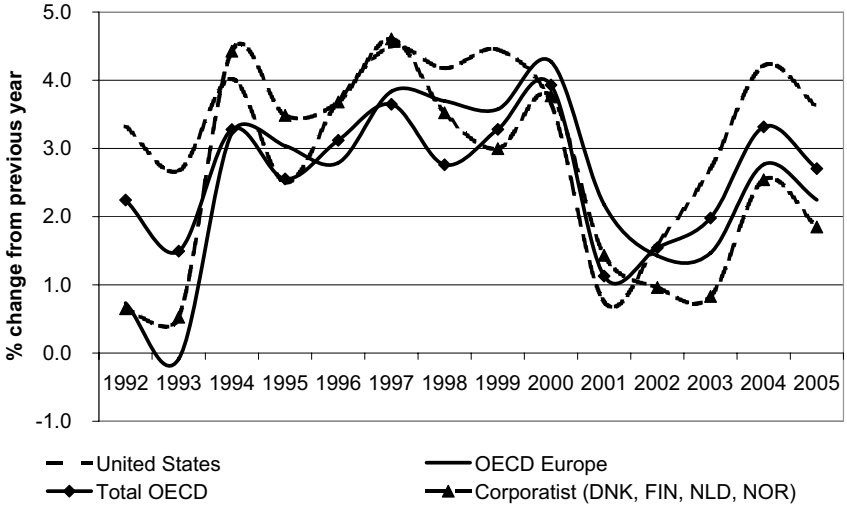
Average productivity growth is lower in the EU than in the US. However, it is high in the 'flex market' Nordic countries (see Figure 2).

Fig 2 Labour productivity growth in the business sector.
Source: Author's calculations from Organisation for Economic Co-operation and Development (2006a)



However, GDP growth is lower in the past five years in the EU than in the US. This is true even for corporatist Europe (see Figure 3).

Fig 3 Real GDP growth.
Source: Author's calculations from OECD (2006a)



Consider, in particular, the performance of one of the 'Nordic miracle' countries: Sweden, the Nordic country most often studied. It has recently seen improvement in its economic performance after the deep recession of the early 1990s. However, its recovery is not strong. Placed in historical perspective, the story of Sweden is one of relative decline and a mild recent recovery. Figure 4 shows the decline in purchasing power parity (PPP)-adjusted GDP per capita in Sweden as a percentage of the OECD average since the Second World War. Sweden has shown secular decline, which has only recently been arrested, and its recent boom is modest in historical perspective. Figure 5 reveals that, until recently, it was growth in government employment that fueled Swedish employment growth. Figure 6 shows that growth in employment, adjusting for population, lags the US and the OECD excluding the US.

Fig 4 PPP-adjusted GDP per capita in Sweden as per cent of OECD average.
Source: Davis and Henrekson (2006)

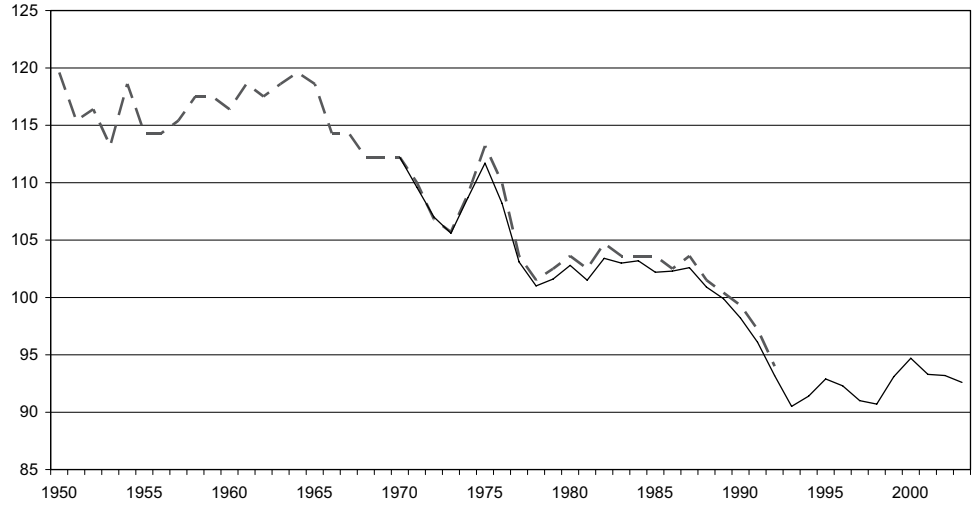


Fig 5 Cumulative employment and population change in Sweden, 1950-2004.
Source: Davis and Henrekson (2008)

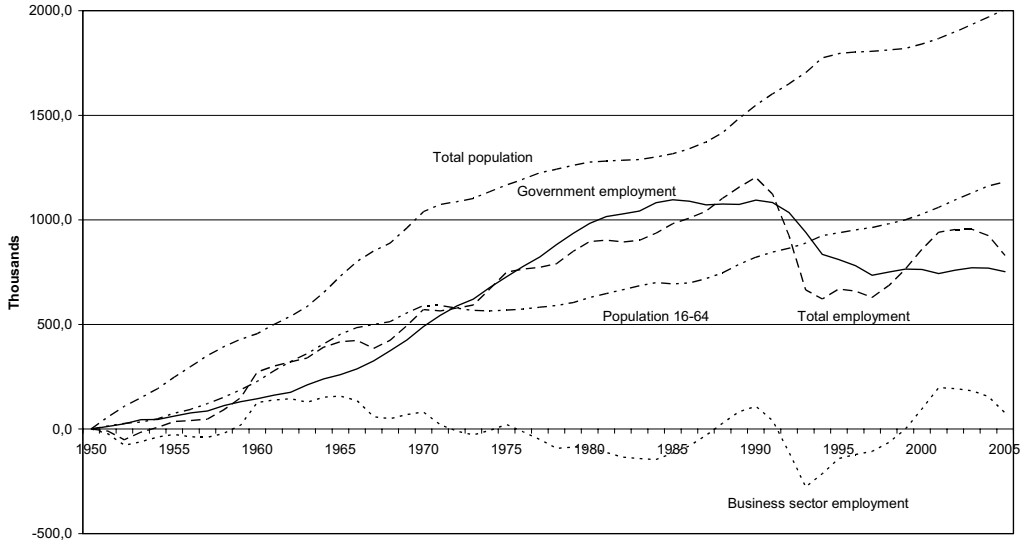
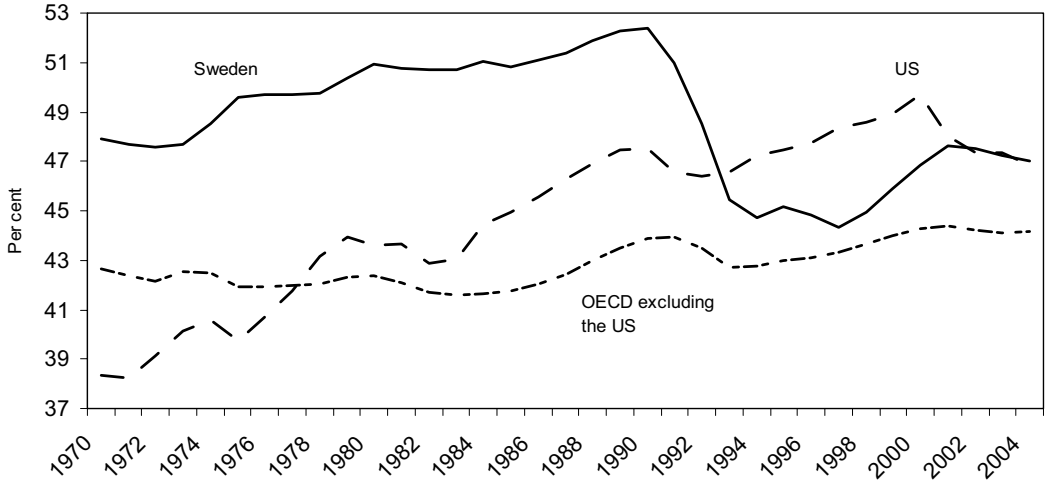


Fig 6 Employment as a share of total population in Sweden, the US, and the OECD, 1970–2004 (%).
Source: Davis and Henrekson (2006)



Sweden is far from being a basket case. Capital taxation there is relatively low and was cut substantially in the reform of the early 1990s. Levels of education are high. The international trade sector is competing effectively in world trade, especially in the Information and Computer Technology (ICT) sector, though it is dominated by a few big successful companies. Sweden's world leadership in information technology comes largely from the success of a few established firms.

The partial reforms instituted in the Swedish economy in the past decade were effective. A lot of Swedish (and Finnish) growth is recovery growth – a rebound from a depression as deep as anything in the 1920s and 1930s. However, since the crisis of the early 1990s, Sweden has moved toward increasing incentives. This has helped to fuel growth.

Sweden has moved towards a more incentivised state. The introduction of incentives is an important

ingredient of recent Swedish performance. However, a recent study concludes that there is still a lot of scope for reform and improvement in Sweden (Freeman et al 2006).

Focusing on Sweden or the Nordic countries neglects the most vibrant European economy: Ireland. Compared to Ireland, a country not often mentioned as a model for Europe by policy pundits, but much admired by many smaller Eastern European countries, the growth in employment in Sweden has been very limited. See Figure 7, which contrasts the GDP per capita growth of Ireland with that of the Nordics, and Figure 8, which contrasts Irish and Nordic civil employment growth, and Figure 5.9, which compares Irish and Nordic productivity growth rates.

Fig 7 Prosperity levels 1970-2003 (OECD = 100) – GDP per capita using current prices and current Purchase Price Parities.
Source: Author's calculations from OECD (2006a)

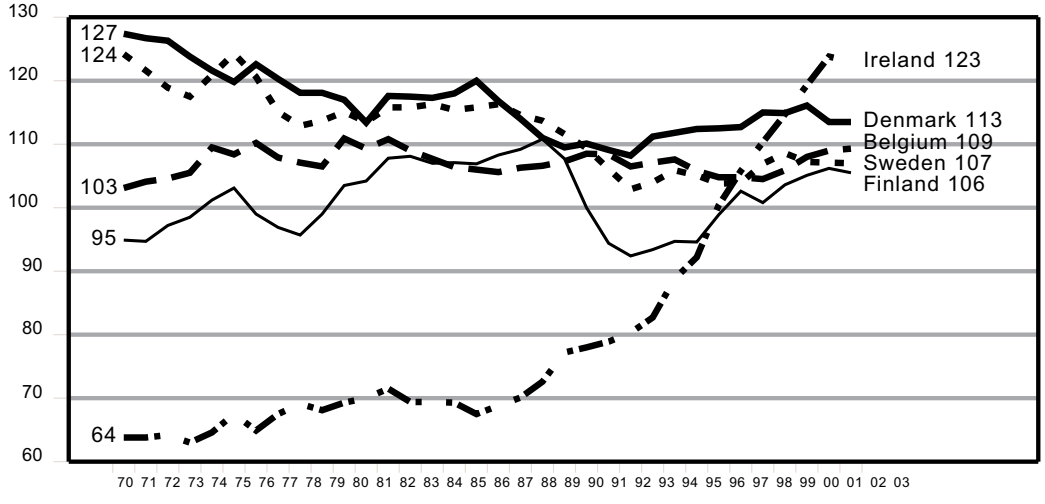


Fig 8 Job creation – total civil employment (1981 = 100).
Source: Author's calculations from Organisation for Economic Co-operation and Development (2006a)

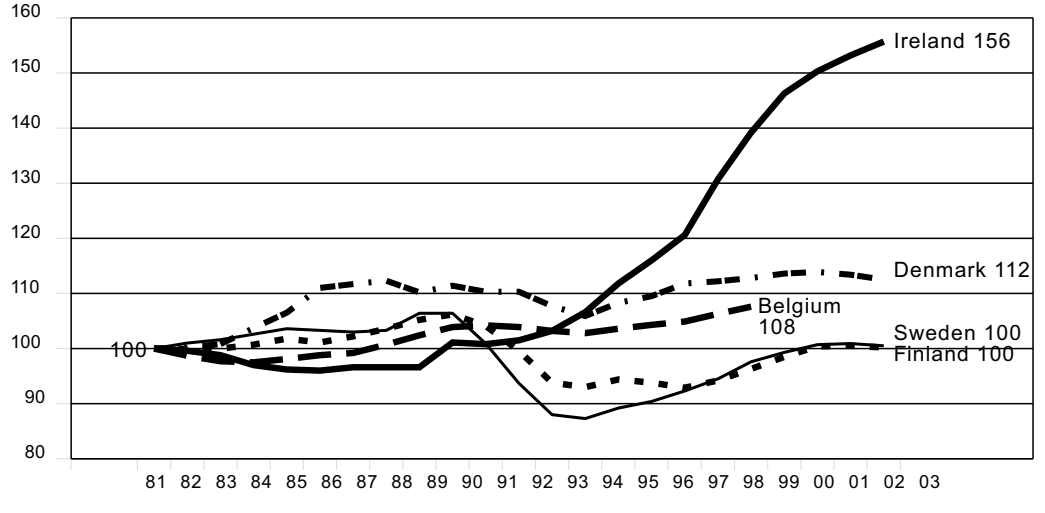
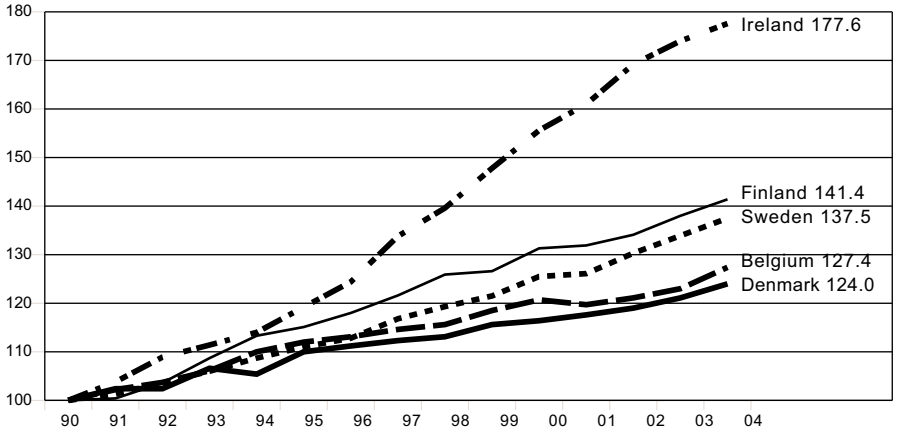


Fig 9 Productivity per working hour (1990 = 100).
Source: Author's calculations from OECD (2006a)



Put in context, the Swedish miracle is not so miraculous. Ireland substantially reduced taxes on capital, raised its educational stock and opened itself up to world trade. It is heavily unionised and follows a corporatist model. It was proper attention to incentives that produced the Irish miracle. Unlike the recent economic recoveries of Finland and Sweden, the Irish experience cannot be interpreted as a rebound from a deep depression in the 1980s. The Irish economy was stagnant for decades before the 1980s. As occurred in the reforms in Sweden, the UK, New Zealand, Australia, Chile and Ireland, social partners cooperated in a time of crisis. It is important not to underrate the value of crises in producing reforms. The question is, can one avoid crises and still make meaningful reforms? I return to this question but I first examine the official statistics that are the basis for the recent praise of the Nordic model more closely.

Understanding what the statistics reveal and conceal

The official statistics on Nordic welfare states are highly distorted. The lower levels of unemployment found there are misleading and conceal deep problems in those societies. Consider active labour-market programmes (ALMPs), which are widely regarded in policy circles as a source of success of Nordic (and other) economies. There has been a substantial commitment to expenditure on ALMPs in many European countries and especially in corporatist Europe. Figure 10 shows that ALMPs account for more than four per cent of GDP in some corporatist economies. The OECD (2006b) and many commentators have endorsed these programmes in their official publications. They attribute lower unemployment in the Nordic areas in part to ALMPs.

A large array of studies surveyed in Heckman et al (1999) and Martin and Grubb (2001), as well as more recent studies, show that ALMPs at current levels of funding have at best minor long-term effects on wages and employment. Most do not survive a cost–benefit test. Few programmes lift most participants out of poverty. A recent paper by Forslund and Krueger (2008) shows that none of the recent recovery of the Swedish economy can be attributed to ALMPs.

ALMP accounting boosts reported Swedish GDP in a spurious way. Persons in training programmes are counted as government employees and their wages are counted in Swedish GDP. This artificially inflates employment figures. Adjusting 'open' unemployment by disguised unemployment produces a very different image of the performance of corporatist Europe compared to the performance of the US than is given in the official account of the success of the Nordic model. Figure 5.11 shows that adjusting the padded statistics boosts corporatist unemployment rates by a full four percentage points. Adjusting European unemployment rates for ALMP substantially increases true European unemployment rates (Figure 5.12).

Fig 10 Total expenditure on training and passive labour market programmes (% GDP).
Source: Author's calculations from OECD (2005a, 2005b, 2006a, 2007a, and 2007b)

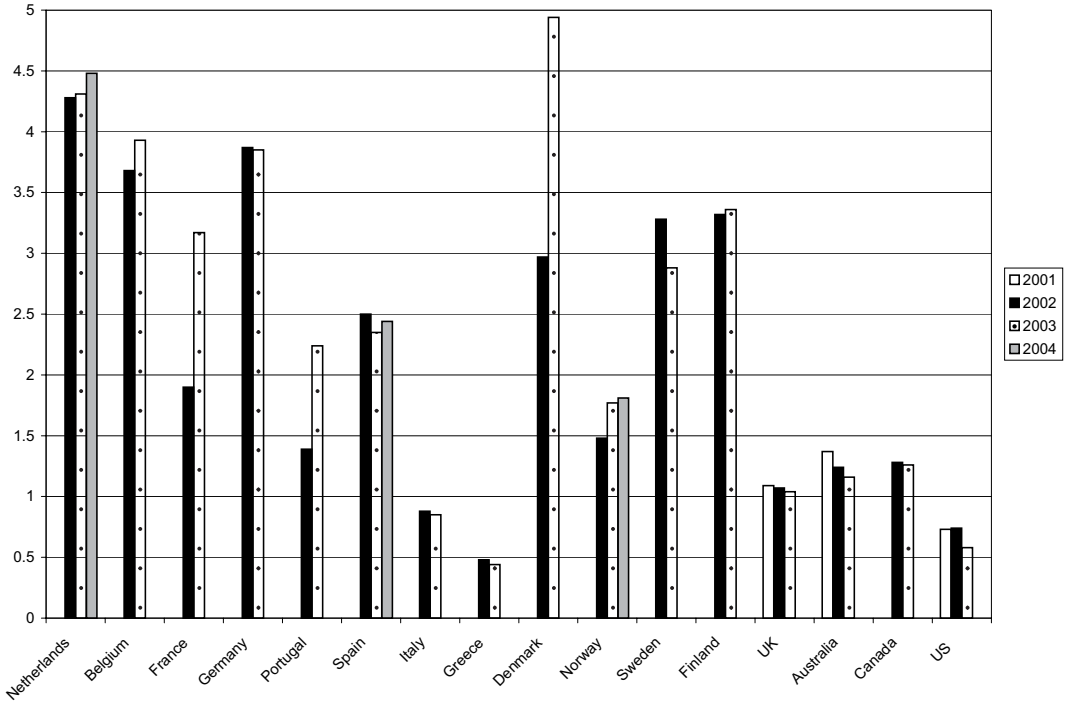


Fig 11 Open and full employment.
Source: Heckman, Ljunge, and Ragan (2006)

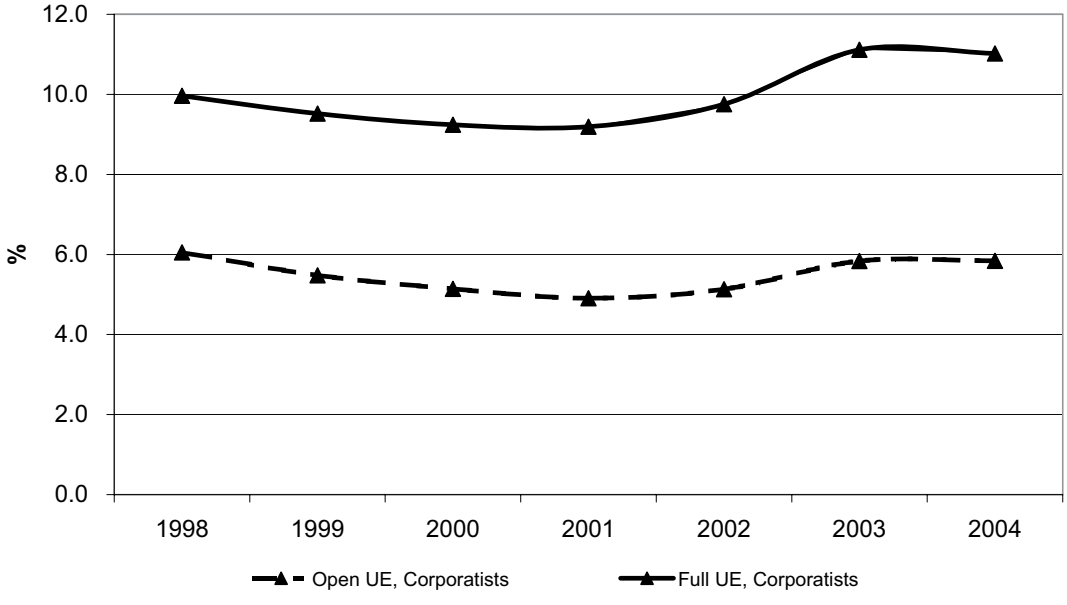
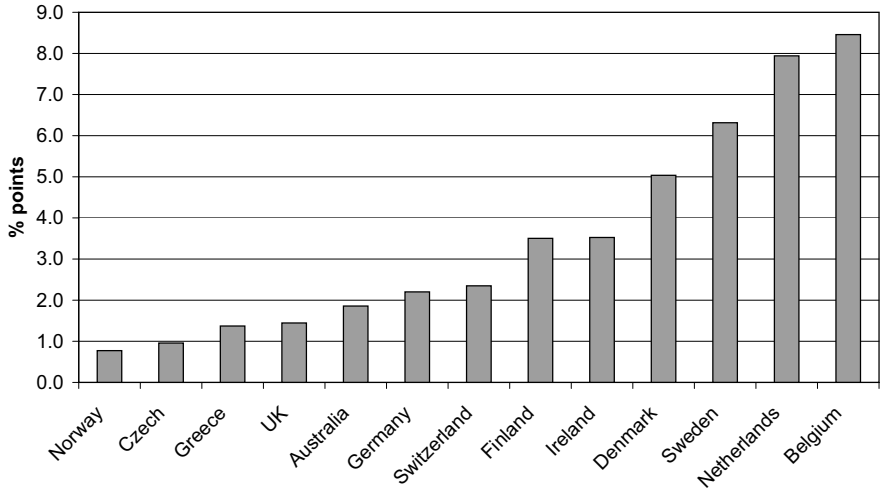


Fig 12 Differences between open and full unemployment, 1998-2004 averages.
Source: Heckman, Ljunge, and Ragan (2006)



ALMPs that conceal unemployment are only part of the reason for lower 'open' Nordic unemployment rates. Europe, and Nordic Europe in particular, has many more persons dependent on government programmes than the US. Consider just one programme. Expenditure on disability is much higher in the EU than in the US. In Holland, at its peak, some 14 per cent of all potential workers were collecting disability insurance. On top of the high expenditure on ALMPs, expenditure on disability commands a substantial chunk of OECD expenditure (see Figure 13). The data for 2004 shows that disability take-up rates among potential able-bodied workers reach levels as high as ten per cent in many countries (see Figure 14).

Fig 13 Disability-related expenditures (% GDP) in 1990, 1999.
Source: Author's calculations from OECD (2005a, 2005b, 2006a, 2007a, and 2007b)

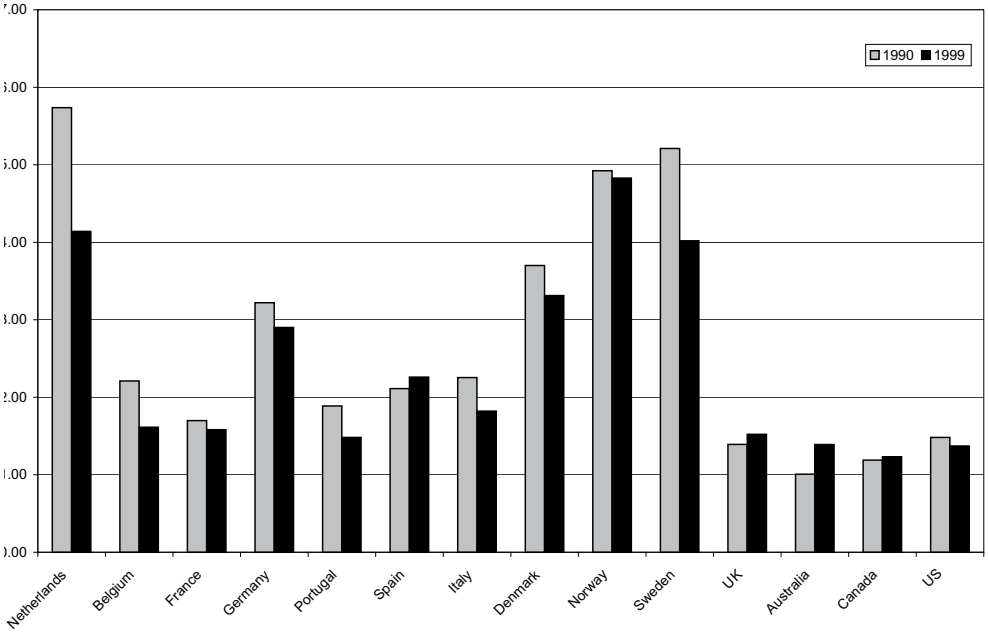
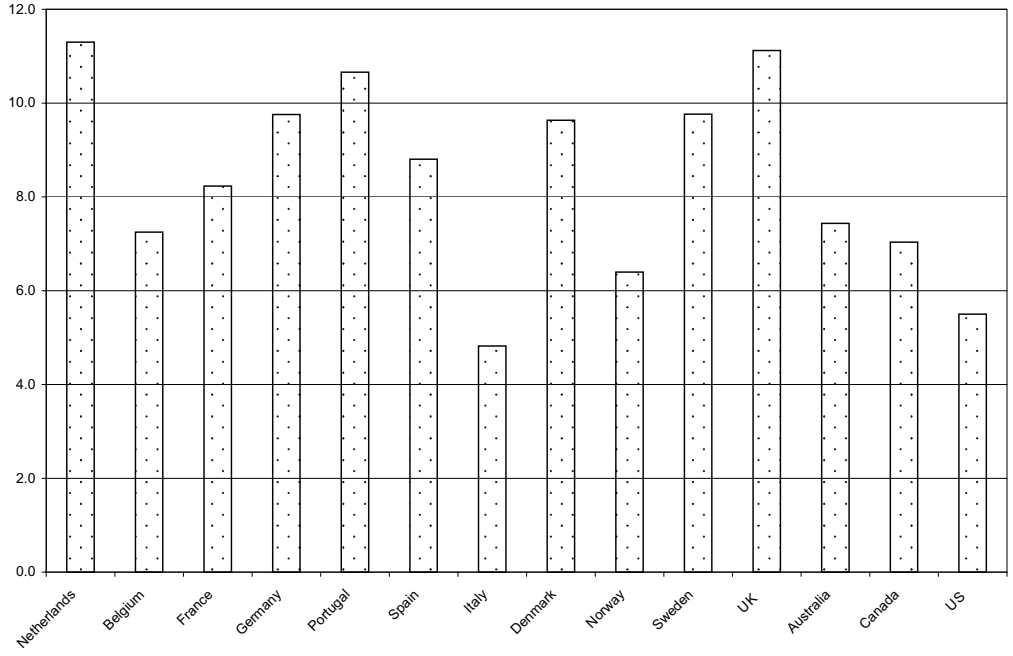


Fig 14 Non-employed disabled workers (% of labour force).
Source: Author's calculations from OECD (2005a, 2005b, 2006a, 2007a, and 2007b)



More generally, dependency rates for social programmes are much higher in the EU and the structure of dependency is different. Participation in welfare and transfer programmes in the EU tends to be much more long-term than in other welfare states. In many EU states, the rate of dependency on transfers is high, and has increased. Participation in a variety of welfare state programmes has produced lower rates of employment in many OECD countries. They reduce unemployment by buying people out of the workforce. When the data is adjusted for employment subsidies, the true employment rate of the corporatist states substantially declines (see Figure 15). The effects on Western welfare state employment rates are substantial (see Figure 16).

Fig 15 Open and adjusted employment rates in a subset of European countries.
Source: Heckman, Ljunge, and Ragan (2006)

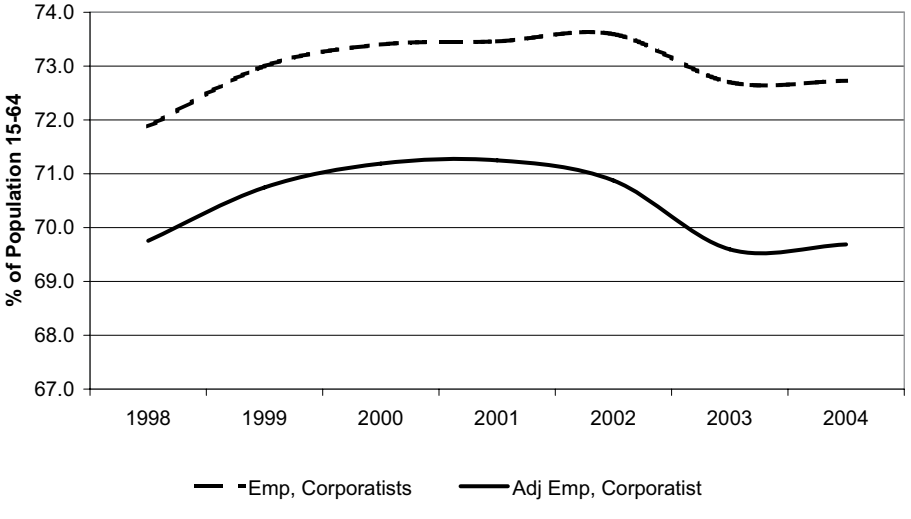
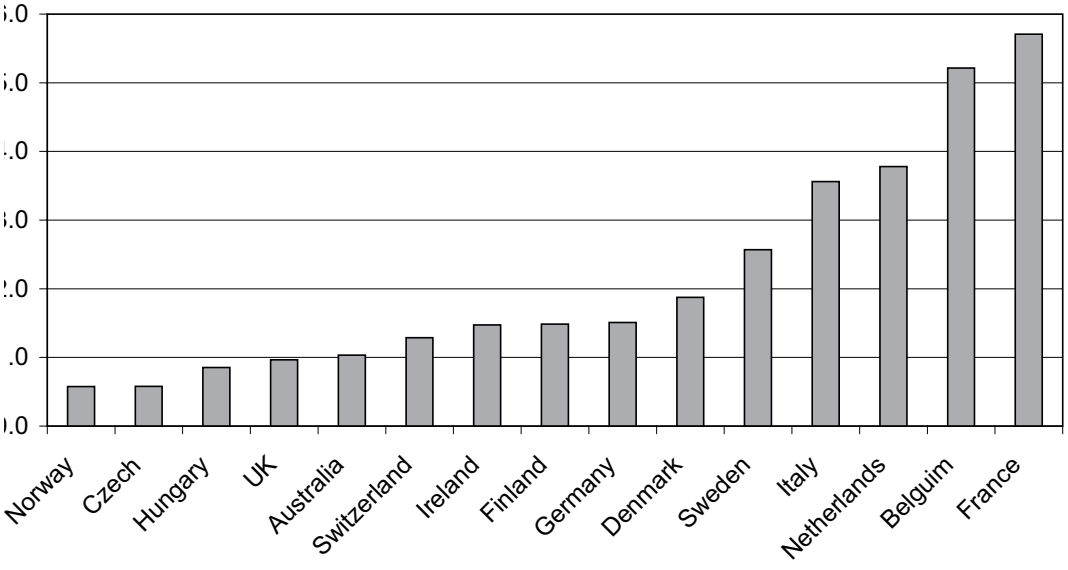
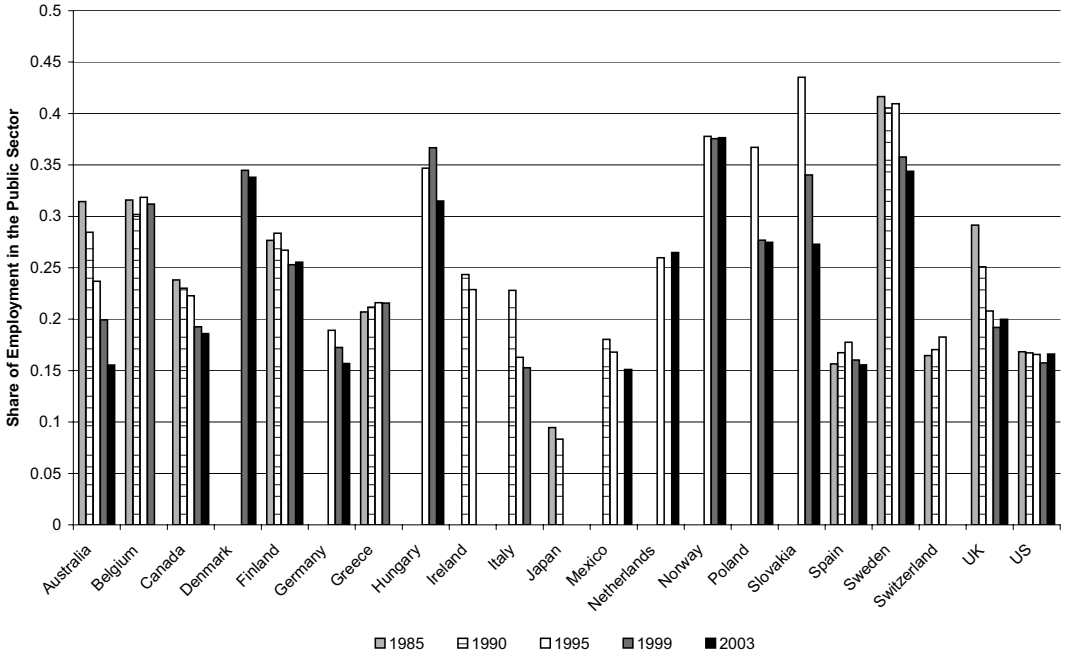


Fig 16 Differences between open and full employment rates, 1998-2004 averages.
Source: Heckman, Ljunge, and Ragan (2006)



A larger fraction of employment in the EU – especially corporatist EU – is in the government sector (see Figure 17). Government employment is an index of regulatory activity and in most sectors, government employment is not productive, although measurement of productivity in governments' activity is a tricky issue.

Fig 17 Public sector employment share.
Source: Heckman, Ljunge, and Ragan (2006)



The growth in dependency on government creates a serious problem of political economy in democratic welfare states. If one adds current dependents to government workers, one sees that there is considerable inertia to protect the status quo. Moreover, to finance the high level of benefits and the ALMPs, tax rates are high (see Figure 5.18). The total share of spending on government is substantial, although it has begun to decline (see Figure 5.19). The disincentives for work and the timing of work over the life cycle and investment in human capital are substantial. Retirement benefits are perverse at a time when the population is ageing. It has been estimated that in Denmark, for the median person, 75 per cent of the taxes are repaid in benefits but both taxes and benefits distort margins throughout the life cycle at many margins (see Bovenberg et al 2008). Incentive schedules often create poverty traps.

Fig 18 Total marginal tax wedge on personal income, including consumption taxes (% of income) for a single worker earning the average production wage without children (US: no cons. taxes available).
Source: Author's calculations from OECD (2005a, 2005b, 2006a, 2007a and 2007b)

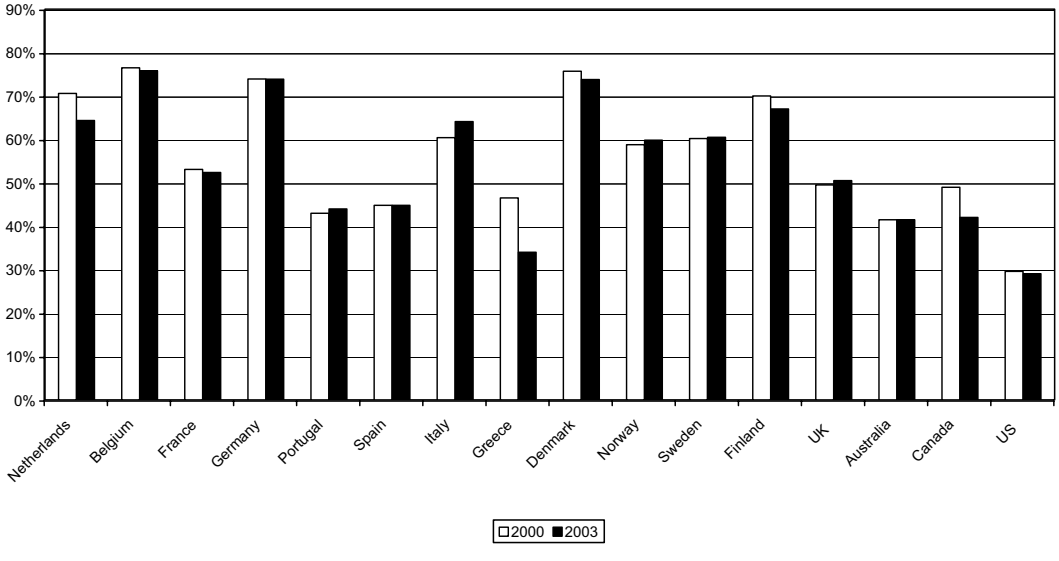
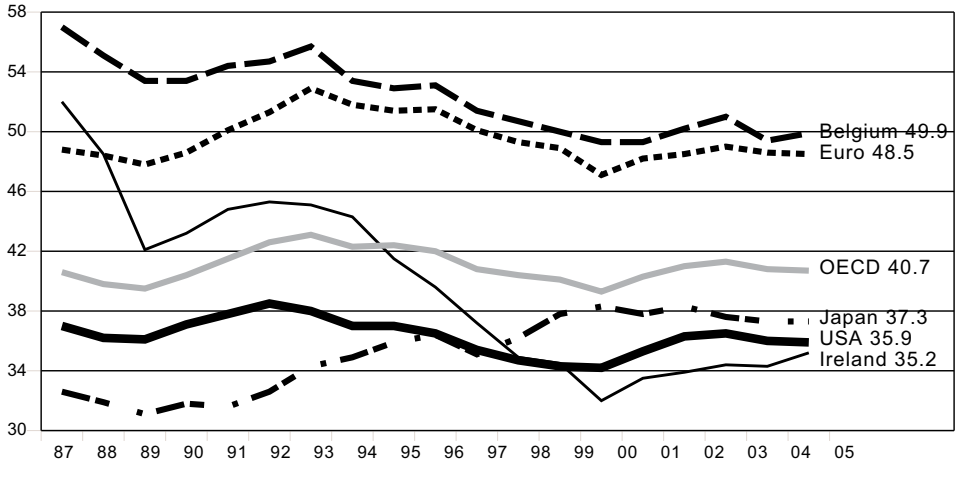
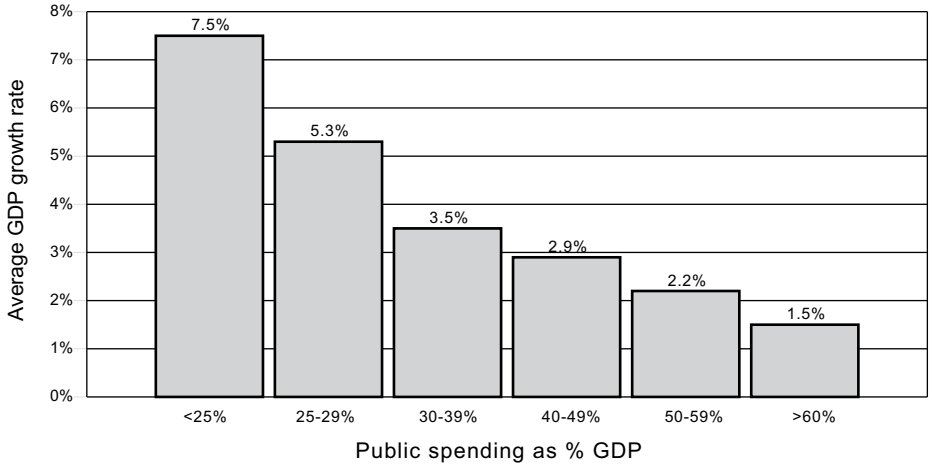


Fig 19 Public spending as a percentage of GDP.
Source: Author's calculations from OECD (2006a)



There is an inverse relationship between the size of the government sector and the growth of GDP (see Figure 20). It turns out on closer analysis that transfers are the culprit and not government expenditure per se. Recognition of the often harmful role of a large government sector has led to trends in the OECD against public spending as is evident in Figure 19.

Fig 20 Correlation of growth and public spending – 30 OECD contries, 1960-2005.
Source: Author's calculations from OECD (2006a)



Education is a major determinant of long-term employment and unemployment. More educated workers are more adaptable, innovative and easily employed. Educational expenditure per student in tertiary education (college) is much lower in the EU than in the US. The relatively low rate of educational attainment in the OECD countries is due to high progressive taxation of income with reduced incentives to acquire skills. In addition, there is exclusive dependence on public sector resources to support education in a period when government resources are limited. Fees are not charged and there is little reliance on the private sector as an engine of revenue, unlike the case in the US. Student fees are a source of revenue and screen into schooling students with high demand for it. Joint ventures with business are limited. Sweden partially offsets this disincentive through generous subsidies to education. However, this policy runs the risk of training people for UK, US and Canadian jobs (see Figure 21, Figure 22).

Fig 21 Proportion of 25-34 age group with university education.
Source: Author's calculations from OECD (2005a, 2005b,2006a, 2007a, and 2007b)

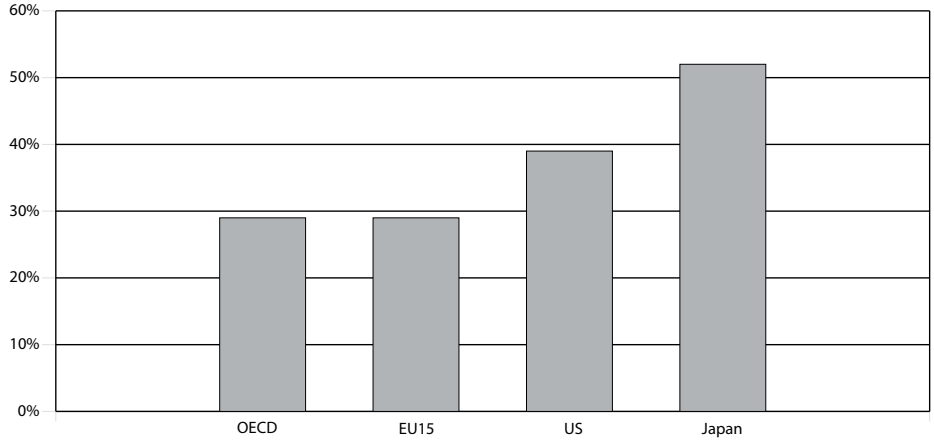
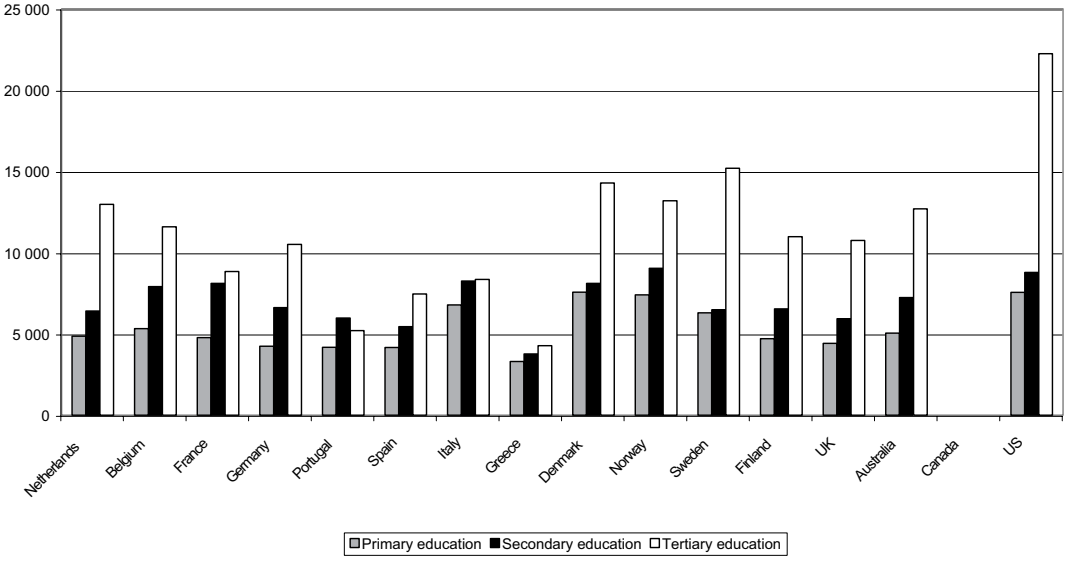
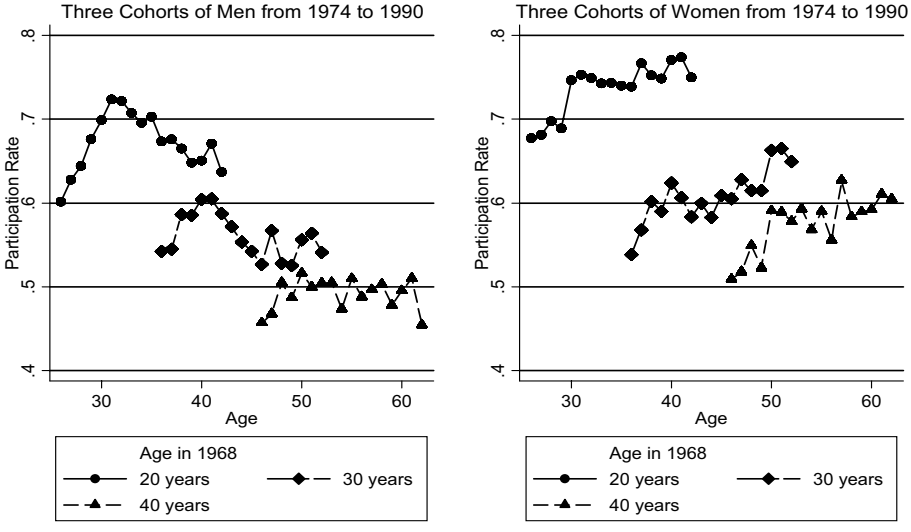


Fig 22 Real expenditure per student in US$.
Source: Author's calculations from OECD (2006a)



Participation in generous welfare states leads to erosion of the work ethic and withdrawal from participation in the social compact. There is evidence of cohort drift in welfare participation. Those cohorts who have lived a greater fraction of their lives under the generosity of the welfare state come to accept its benefits and game the system at higher rates. Martin Ljunge (2006) studied the use of sick leave for three cohorts of Swedes. The incentives to use the system have been the same for 40 years. Yet, as Figure 23 reveals, the take-up rate at the same age has increased for recent cohorts. This is a serious long-term problem for the European welfare state. Problems of an eroding work ethic are compounded by the lack of assimilation of many immigrant populations. In truth, the welfare state creates inequality and has self-perpetuating features.

Fig 23 Sick leave participation for men and women.
Source: Ljunge (2006)



Sample: Labour force participants, ages 26-62.

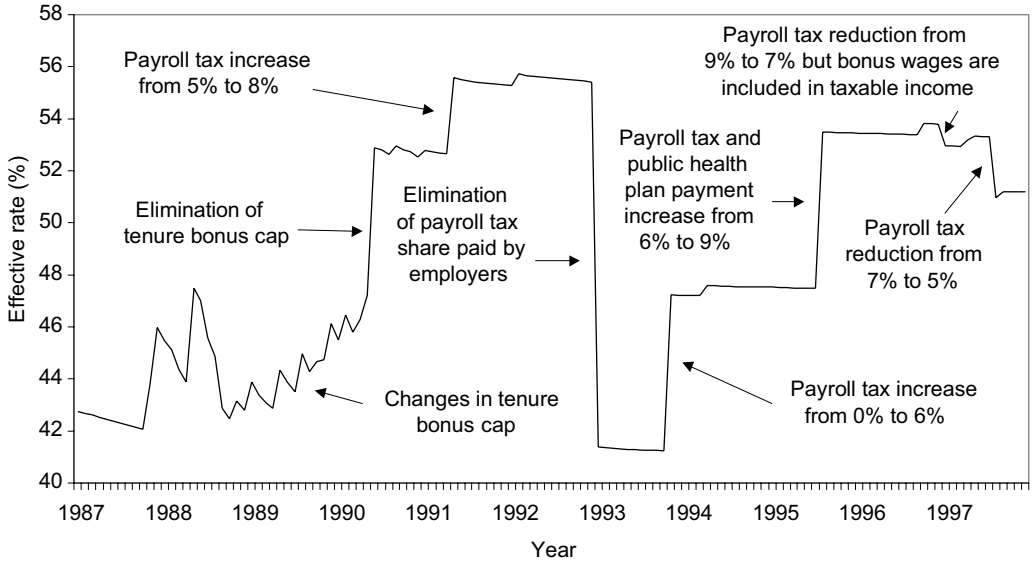
Bad measures lead to weak conclusions; good measures lead to strong conclusions

The OECD and many students of European economic performance analyse the effectiveness of alternative economic systems by relating performance to various ad hoc measures of the incentives created by institutions. There is a large literature on cross-country panels that uses these measures to explain variation in European unemployment and other issues (see, for example, Blanchard and Wolfers 2000; Layard et al 1991). The countries studied are very heterogenous and the time series analysed are typically very short. Many measurements of institutions are indices formed for entire countries. These studies do not analyse incentive effects on firms and workers at the levels at which the incentives operate. The analysis is conducted at aggregate levels using a 'representative agent' framework that ignores basic heterogeneity in society. Such evidence is fragile and unreliable.

It would be fruitful for students of OECD labour markets to follow the lead of students of the Latin American labour market and quantify the costs and incentives of institutions governing labour markets.[3] Such studies would reveal the quantitative insignificance of the reforms made in Europe in the past decade. Scholars of Latin America have collected micro data on costs, employment, wages and turnover in their countries. Policy instability in the region produces some radical economic experiments with much greater variability than any natural experiments or policy experiments that have been observed in Europe. Many of these natural experiments are plausibly exogenous. From these experiments we can learn about the basic economics of incentives that applies universally even if the details of the policy environment vary from episode to episode.

Consider the substantial variation in labour costs in Peru in the last decade associated with various Fujimori governments. Figure 24 shows the range of variation in non-wage costs due to policy shifts in Peru from the first quarter of 1987 to the first quarter of 1997.

Fig 24 Evolution of nonwage costs paid by employeyers – Peru.
Note: Non-wage costs paid by the employer include payroll tax, tenure bonus, public retirement plan payments, and public health plan payments. Vacations and holiday bonuses are included in the effective rate, although they were not modified during the period and stand for 25 per cent of non-wage costs paid by the employer (two bonus wages and one month of paid vacation per year).
Source: Saavedra and Torero (2004)



Using these and other data, the costs of institutions (unions, labour market regulations, severance payment schemes, minimum wages) can be quantified and estimated on microeconomic models of firms. Translating regulations into costs allows analysts to summarise a variety of features of labour

3 See the papers in Heckman and Pagés 2004.

market institutions using an interpretable cost schedule. The cost data can be used to estimate the impact of regulation on the labour market. In the best studies, the analysis is highly disaggregated and applied to the firm or industry level.

Studies that measure labour cost precisely establish that labour demand curves are downward sloping, that is, higher labour costs mean fewer workers demanded. This relationship has been found for economies around the world. The elasticity of demand for labour with respect to wage is 0.7 (Hamermesh 2004). Regulations and unions raise labour costs and reduce employment. A ten per cent increase in labour costs leads to a seven per cent reduction in employment. Contrary to a folklore that many embrace because it is politically convenient to do so, binding minimum wages reduce employment as do payroll taxes that are imposed in countries without wage flexibility. The current practice of using ad hoc measures of the costs of institutions on highly aggregated statistics from very heterogenous countries is guaranteed to produce the finding that 'institutions don't matter' when in truth they do.

Payroll taxes

Payroll taxes are a substantial fraction of total labour cost in most modern welfare states. The disemployment effects of payroll taxes depend on what economists call 'pass-through'. The proportion of the cost of the payroll tax that is borne by firms and, therefore, the extent of disemployment, depends on how flexible wages are and on how wisely funds are spent (do workers value the benefits?). One cost of corruption and bad governance is that firms bear a greater share of their payroll tax. This reduces employment.

Studies of union reforms corroborate the value of disaggregated studies

Consider the benefits of redefining the role of unions. Reforms of this sort have been put in place and analysed using data at the individual plant level (see Pencavel 2004; Nickell et al 1992). Studies show the value of exploiting local knowledge and incentives. The more decentralised the locus of collective bargaining, the more economically productive is the worker–firm relationship and the less rent-seeking behaviour there is by unions. Public policy toward unions should be even-handed and not favour one party over another. Governments should allow parties to set the rules and not impose uniform rules on all bargaining pairs.

One important exception to this rule is that in times of crisis, it is possible – as in wartime – for centralised unions to act in the public interest and hold down wage demands. This observation motivates in part the claim of a 'U' shape in optimal union density, that is, that the best social arrangements are zero per cent union or 100 per cent. Studies of unions find little evidence that monopoly unions operate in an enlightened fashion in the long term (see Pencavel 1999). They can operate constructively in the short term in times of crisis but maintaining the cooperation in a period of sustained success has proved to be difficult.

Pencavel (1999) documents the effect of union reforms in the UK that moved bargaining to the local level. They raised productivity of firms, both union and non-union. The moral of Pencavel's study is not to eliminate unions, but to change the union–firm relationship to focus on creating incentives to enhance productivity locally. Reforms in the union sector were complementary with product market reforms (see Pencavel 1999). Uniform wage setting – such as in Italy (south and north), East Germany and Northern Sweden – that is not sensitive to local demands leads to high rates of unemployment in lower productivity regions.

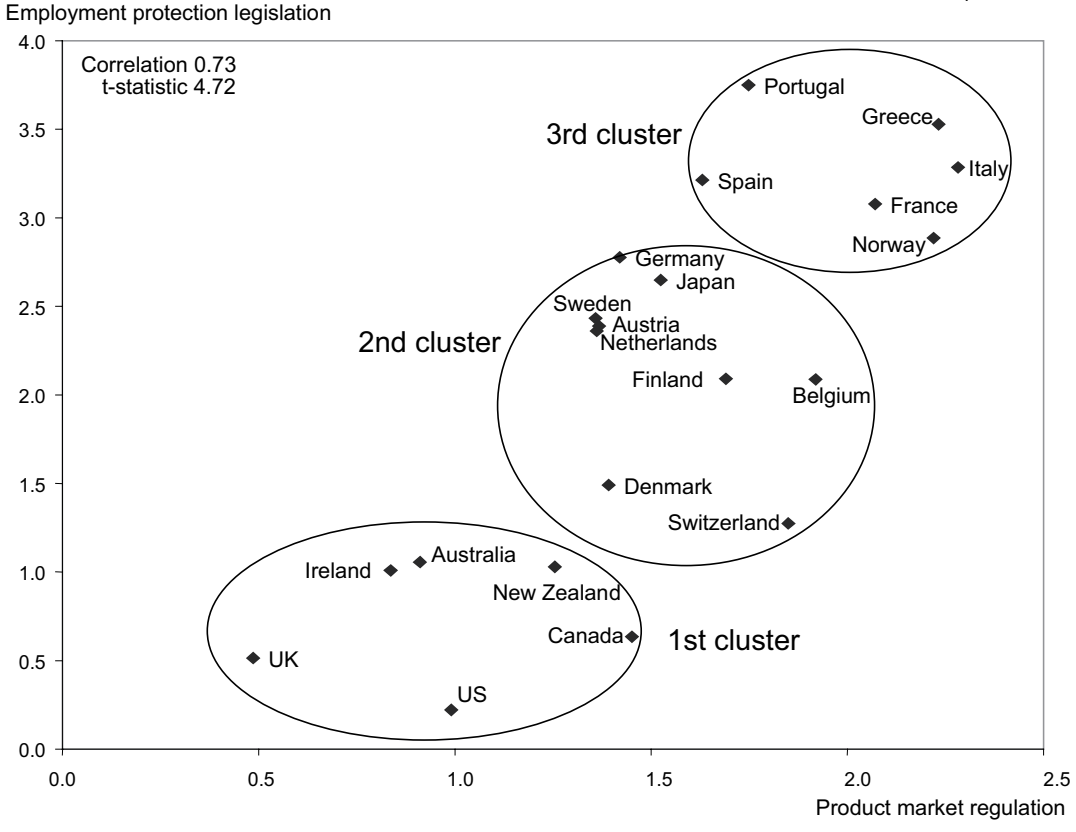
The burden of regulation

Many economies around the world operate under a heavy burden of regulation. These regulations raise adjustment costs of labour and promote inflexibility. Regulation leads to sluggish employment responses. Employment protection laws that are popular in least developed countries (LDCs) and in the Mediterranean welfare states reduce labour mobility. Deregulation raises mobility and flexibility.

Regulation reduces employment overall, but raises employment for protected workers. It produces a protected enclave of insiders (see Lindbeck and Snower 1989).

Moreover, as noted by Nicoletti and Scarpetta (2001), product market and labour market regulation are highly correlated (see Figure 25). This array of regulations reduces innovation and impairs adoption of technology (see Figure 26). Regulation reduces entry of firms (see Djankov et al 2002; Freeman 2002) (see Figure 27). These barriers have substantial long-term, perverse effects on growth in productivity.

Fig 25 Product-market regulation and employement-protection legislation.
Source: Nicoletti and Sarpetta (2001)



The inequality argument for the welfare state re-examined

A principle argument in support of welfare states is that they reduce inequality and promote social inclusion. In practice, the welfare state often excludes people, creates inequality, and reduces competitiveness (see Heckman and Pagés 2004). Incentives in place often slow immigrant assimilation and reduce inclusion.

Incentives that protect the status quo reduce mobility over the life cycle.The rigidities of the welfare state raise lifetime inequality. Cross-sectional inequality (over people at a point in time) is much larger in the US than it is in Italy. However, in Italy, jobs are protected for life. Mobility out of a bad starting job is much lower than in the more flexible US labour market. The gap in lifetime inequality between the US and Italy is much less than the cross-section gap (see Flinn 2002).

Fig 26 Internet usage and employement protection.
Source: Samaniego (2006)

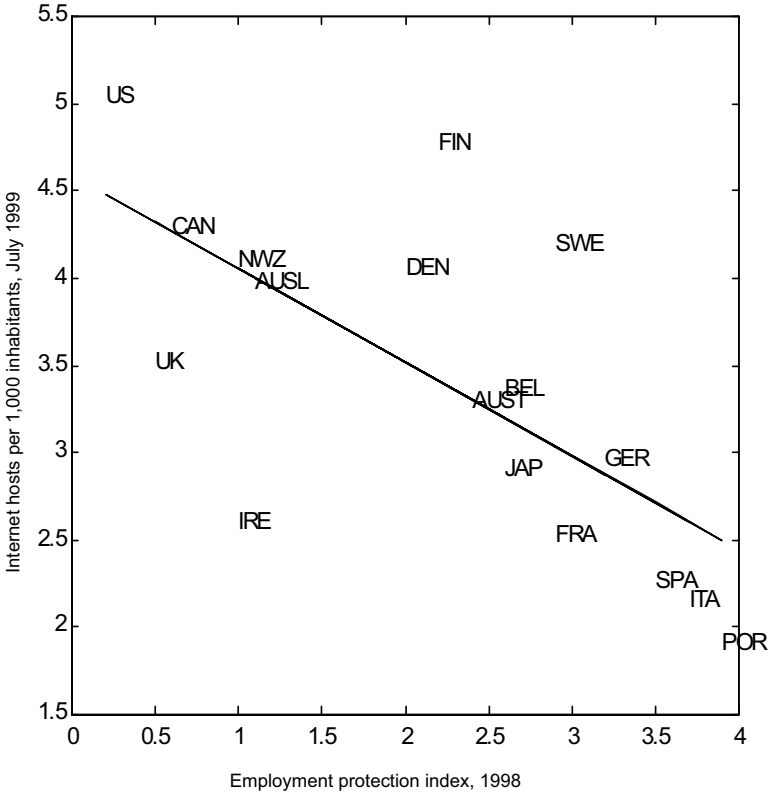
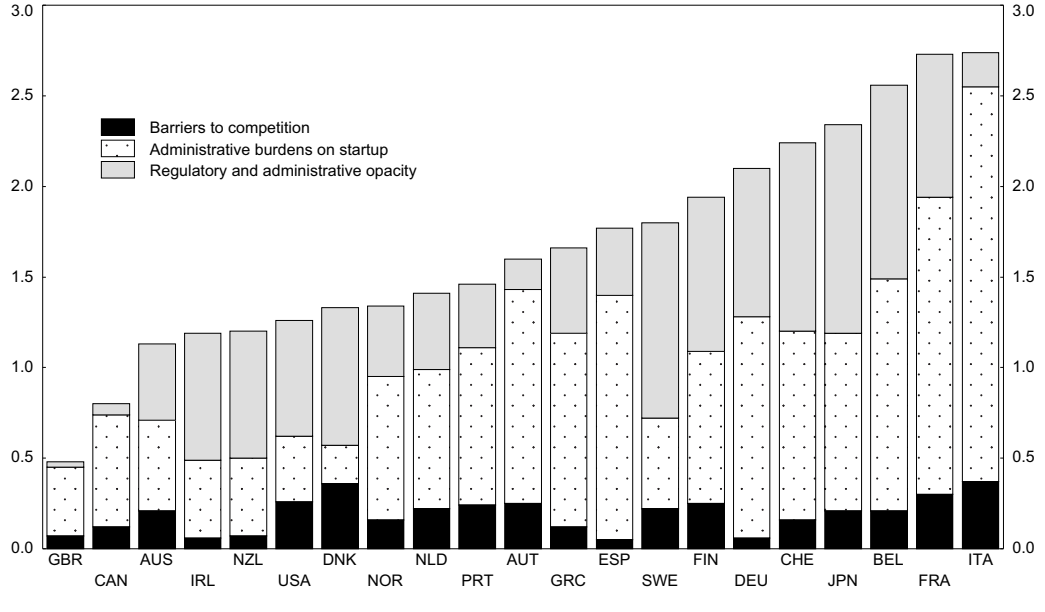


Fig 27 Barriers to entrepreneurship: cross-country comparison based on 1998 data.
Source: Nicoletti and Scarpetta (2001)



Crisis is the mother of all welfare state reforms

The political economy of the welfare state is rigged against reform because so many persons are its beneficiaries. Reforms that have occurred in most welfare states have been quite modest. Most reforms have come in the wake of an economic crisis. There is little internal capacity for democratic societies to reform themselves without a crisis.

Summary

Provisions of the welfare state, such as the right to economic security, are often interpreted as basic human rights that implement the rule of law. Rights that improve the lot of all or most in society should be distinguished from rights that benefit some at the expense of many. Many provisions of modern welfare states favour some while harming others. Programmes that pay workers to withdraw from economic activity while others work to support them are examples of such provisions.

This chapter elevates the discussion of the welfare state beyond the level of endorsing one system over another. I have presented the essential features that underlie the success of aspects of many different systems. Systems that respect the basic incentives of economic life are the most successful. These incentives provide restraints on the freedoms possible under a welfare state.

Incentives include:

- rewards for production of output, for creation of new ideas and institutions;
- for work rather than politicking;
- incentives to seek jobs when economic conditions favour reallocations (eg, sanctions in the Netherlands and Denmark);
- incentives to invest as opportunities arise, to venture, to build for the future; and
- incentives to move when economic conditions call for it (as in the flexicurity system).

Long-run trends in Western welfare states are not favourable even in the Nordic countries. This is especially clear once the distorted nature of the published statistics is exposed. High levels of taxation, protection and generosity of benefits erode the dynamism of any society. They build a culture of dependency that erodes innovation. They create a level of complacency that erodes the work ethic and mutes incentives to invest in skills and in the larger society. They create a system that protects the status quo and is very difficult to change except when a crisis emerges. Most reforms of welfare states (eg, Ireland, Finland, the Netherlands and Sweden) came in moments of crisis.

There is much room for creative policy innovation. One can create incentives for mobility, but at the same time give workers some security as in the Danish 'flexicurity' system. One can create incentives to work (working tax credits in the UK, earned income tax credits in the US) and not participate in welfare. Such incentives boost productivity and raise levels of well-being and social integration. One can use social insurance accounts that insure, but at the same time introduce flexibility into the system.

The welfare state is a relatively new creation. It is not surprising that early versions of it sometimes created perverse incentives. Such perverse incentives are not intrinsic to it. Innovation, reform and experimentation will improve it. Attempts at reform and regulation should respect the power of incentives and promote efficient social insurance.

Chapter 8

The Global Financial Crisis: Impact on Labour and Employment Law

Diamond Ashiagbor[1]

This paper examines the negative social effects of the GFC, with a focus on the impact of the crisis on labour and employment laws and, conversely, how such laws may be utilised to mitigate or ameliorate the negative consequences of the crisis, and of related retrenchment or austerity programmes.

Introduction

It is clear that the 2008 GFC is continuing to have major repercussions for the world economy, and for labour markets. Studies of the impact of the crisis on developing countries (for instance, the multi-country study coordinated by the UK Overseas Development Institute)[2] have shown that, contrary to initial assumptions, developing countries have not been shielded from the financial crisis. Oxfam has identified the ripple effect of the 'financial earthquake' affecting the banking centres of Europe and North America, as having been transmitted to the 'real economies' of poor countries along a number of fault lines, the ones of particular importance to the labour market and employment outcomes being: falls in (export) demand, in gross domestic product (GDP) and in domestic demand and consumption, leading to declining output, employment, enjoyment of rights and increased competition in the informal economy.[3]

With regard to industrialised economies, it was already the case prior to the GFC that the 'grand social bargain' in many, wherein 'economic liberalization was embedded in social community'[4] was already beginning to unravel for a number of reasons: market economies, such as those within the OECD, found that their welfare states and systems of social citizenship and labour rights had come under increased pressure since the 1990s, with challenges to their sustainability becoming more acute in the wake of the current global economic crisis.

Even prior to the current crisis, international institutions expressed concerns that the social dimension of trade liberalisation was insufficiently developed. A key message of the 2004 report of the World Commission on the Social Dimension of Globalization (an enquiry commissioned by the

1 Diamond Ashiagbor, Professor of Labour Law, School of Oriental and African Studies, University of London.

2 Overseas Development Institute, 'The global financial crisis and developing countries Phase 2 synthesis', Working Paper 316, London: ODI, March 2010 (study of Bangladesh, Bolivia, Cambodia, Democratic Republic of Congo, Kenya, Mozambique, Ethiopia, Tanzania, Uganda and Zambia).

3 Duncan Green, Richard King and May Miller-Dawkins, 'The Global Economic Crisis and Developing Countries', Oxfam GB and Oxfam Australia, 28 May 2010, 9. In terms of employment effects of the crisis, the ODI study noted these were mostly apparent in garment and mining sectors: ODI, n 2 above, vii.

4 John Gerard Ruggie, 'Taking Embedded Liberalism Global: The Corporate Connection', Institute for International Law and Justice Working Paper 2003/2, New York University School of Law.

International Labour Organization – ILO), concerned the need for institutions to govern or 'tame' globalisation and to ensure a more equitable distribution of its benefits, since '[g]lobal markets have grown rapidly without the parallel development of economic and social institutions necessary for their smooth and equitable functioning'.[5]

The World Commission highlighted the need for *adjustment mechanisms*, in both developed and developing countries. In the former, industrialised nations, there is the recognition that greater market access for developing country exports may impose high social costs on developed country workers, necessitating adjustment assistance to affected workers.[6] In the latter, there is a need for donors and international and regional financial institutions to support nascent national social protection systems in order to ensure a fairer distribution of the gains from globalisation.[7]

Within some states, and within some instances of regional market integration (such as the EU) interventionist states have in the past been able to engage in redistribution or trade adjustment – to ensure the losers from globalisation are compensated. Such trade adjustment mechanisms may take the form of redistribution, education policies or labour market policies – such as policies insuring workers against adverse events,[8] for instance, job security regulation, to make it harder for employers to dismiss workers; and unemployment benefits, which grant workers income replacement during unemployment.

However, such adjustment mechanisms are lacking at the global level, from regional trade groupings of less industrialised nations, and from the individual developing states themselves. Clearly, developing countries have never enjoyed adjustment mechanisms of the sort existing in industrialised states. They do not have the 'privilege of cushioning the adverse domestic effects of market exposure in the first place [since the] majority lack the resources, institutional capacity [and] international support'.[9]

Accordingly, in examining the social impact of the current crisis, this chapter will take into account the differing starting points of industrialised and developed nations and regions – their differing ability to make use of labour and employment law to cushion the impact of trade and the opening of markets, and their divergent responses to the GFC. The chapter will examine three main areas of labour market regulation:

- labour and employment law in times of austerity;
  - the impact of the GFC on individual employment law;
  - the impact of the GFC on collectively determined terms and conditions;
- the right to equality in times of austerity; and
- the use of human rights norms in times of crisis.

Labour and employment law in times of austerity

In 2012, the ILO noted that all major forecasters had reduced projected global growth rates, with a high risk of a further slowdown in 2013. The result is a high risk of 'little or no improvement in labour market conditions in most countries and deterioration in those experiencing recession or effective stagnation'.[10] This has led to a rapid rise in unemployment most marked, for example, among the under-25s in the EU. There is an important interconnection between industrialised and developing economies: the former, which account for 52 per cent of global output, are dragging down world growth and the performance of emerging and developing countries.[11]

Addressing the European Parliament on 14 September 2011, the ILO Director-General Juan Somavia noted:

5 World Commission on the Social Dimension of Globalization (WCSDG), *A Fair Globalization: Creating Opportunities For All*, ILO 2004, xi. Hamish Jenkins, Eddy Lee and Gerry Rodgers, 'The quest for a fair globalization three years on: Assessing the impact of the World Commission on the Social Dimension of Globalization', International Institute for Labour Studies/ILO Discussion Paper Series No 175, 2007.

6 See n 5 above, 82.

7 *Ibid*, at 109.

8 Marion Jansen and Eddy Lee, *Trade and employment: Challenges for policy research*, ILO/WTO, 2007, 7–10 and 55–80.

9 John Gerard Ruggie, 'Taking Embedded Liberalism Global: The Corporate Connection', Institute for International Law and Justice Working Paper 2003/2, New York University School of Law, 2.

10 ILO, Governing Body 316th Session, Geneva, 1–16 November 2012, 'Global economic prospects and the Decent Work Agenda', para 1.

11 *Ibid*.

> 'Respect for fundamental principles and rights at work is non-negotiable: not even in times of crisis when questions of fairness abound. This is particularly important in countries having to adopt austerity measures. We cannot use the crisis as an excuse to disregard internationally agreed labour standards.'

However, many industrialised nations, in particular within the EU, are making large-scale changes to labour law regimes on the grounds that making labour markets more 'flexible' is one of the best responses to the crisis.[12] In the EU context, at least, this trend towards policies of labour market flexibilisation – for the most part, policies of labour law deregulation – has been of long standing. But the dilution or reform of labour standards has taken on a perceived urgency in the context of economic crisis.

The impact of the GFC on individual employment law

The GFC is influencing regulation of the employment relationship, in particular in terms of:

- pressures on the regulation of employment relationships through the contract of employment;
- greater informality of labour markets and employers' increasing use of non-standard, flexible labour or precarious labour;
- the gendered nature of non-standard labour; and
- national and international policies and regulation to combat precarious work.

There is a symmetry between the impact the GFC is having on individual and collective labour law within industrialised countries (which are experiencing the crisis predominantly as a sovereign debt crisis) and the effect of structural adjustment programmes implemented by the IMF and the World Bank on labour markets in developing states from the 1970s onwards. The 'Washington Consensus' underpinning the structural adjustment programmes promoted, inter alia, trade liberalisation, or lifting import and export restrictions, and privatisation of state-owned industries and resources. The impact on employment rights was negative, given that the orthodox economic thinking underpinning structural adjustment policies tended to view labour market institutions and protective regulations as 'rigidities', which need to be deregulated to make markets more efficient.

A similar pattern can be seen in the responses to the current crisis. Taking the EU as a regional case study, governmental – and supranational – responses to the current crisis, in particular the crisis in sovereign debt, have placed labour and employment law centre-stage in the array of policy mechanisms. In particular, as Simon Deakin notes '[r]adical, deregulatory labour law reforms have been demanded of EU member states receiving financial support from the financial "Troika" of the European Commission, European Central Bank and IMF'.[13]

Catherine Barnard identifies the direct and indirect impact on labour law of the various responses to the crisis – the Euro Plus Pact of March 2011, the 'bailouts' granted to Greece, Ireland and Portugal and the accompanying Memoranda of Understanding (MoU), and the European financial stabilisation mechanism – as effectively amounting to EU or EU/IMF-sanctioned deregulation of employment rights at national level.[14] For example, Ireland committed itself in the MoU governing its bailout to reducing its minimum wage by one euro an hour. Portugal committed itself to cuts including reductions in bonus salary payments for civil servants and pensioners, to reductions in the generosity of severance payments, and placing restrictions on dismissal rights and compensation for dismissals.[15]

Elsewhere in Europe, other countries have similarly reformed or considered a loosening of restrictions on termination of employment at the initiative of the employer.[16] A review of the regulation of collective dismissals for economic reasons in 125 countries, including changes in the obligations

12 EC, Communication on 'An Agenda for new skills and jobs: A European contribution towards full employment' COM(2010) 682 final.

13 Simon Deakin, 'Editorial: The Sovereign Debt Crisis and European Labour Law' (2012) Industrial Law Journal, 251–253.

14 Catherine Barnard, 'The Financial Crisis and the Euro Plus Pact: A Labour Lawyer's Perspective' (2012) Industrial Law Journal, 98–114.

15 *Ibid,* 110–111. See also Catherine Barnard, '"Equality, Solidarity and the Charter in time of crisis" a case study of dismissal' paper presented at the conference on 'Resocializing Europe and the Mutualization of Risks to Workers' 18–19 May 2012, University College London.

16 David Tajgman, Catherine Saget, Natan Elkin and Eric Gravel, 'Rights at work in times of crisis: Trends at the country level in terms of compliance with international labour standards', ILO Employment Sector, Employment Working Paper No 101(2011), 6.

of enterprises showed that eight countries adopted more flexible regulations, while six countries introduced new obligations for enterprises.[17]

The impact of the GFC on collectively determined terms and conditions

On the collective side: the three above-mentioned countries subject to the EU economic adjustment programme – Greece, Ireland and Portugal – have contracted sharply since 2008 leading to increased unemployment. Regular reviews by the Troika linked to the release of bailout funding have called for increased efforts to reduce budget deficits alongside major structural reforms, including the reform of pay determination systems and employment protection legislation.[18] For instance, in Ireland, the Registered Employment Agreements or Employment Regulation Orders – collective agreements in the agricultural, catering, construction and electrical contracting sectors – have been repealed.[19]

More broadly, alongside such governmental and regulatory responses to the GFC – by means of wages policies, adjustments to minimum wages, dismissal protection – the crisis is interacting with the steady decades-long global decline in trade union membership and in the coverage of collective agreements.[20] While orthodox economic theory assumes that trade unions tend to raise wages, and in so doing raise unemployment, one can, on the contrary, find strong (new institutionalist) economic arguments for labour market institutions, such as collective bargaining systems – for instance, as a form of regulation to make up for market failure which, together with labour law, can reduce transaction costs, provide stability in long-term relationships and facilitate a higher degree of functional flexibility and acceptance of technological change.[21] And in the context of crisis, as Hayter et al note: 'well-developed industrial relations institutions can be a critical resource for steering a country, a sector and/or an enterprise through an economic crisis and managing change'.[22] Ironically, however, a key effect of the GFC has been the sharp decline of such cooperation or corporatism, with the 'collapse of consensus approaches to social and economic policy making', seen most sharply in Ireland.[23]

Nevertheless, there are some collective bargaining strategies and resistance to austerity programmes. There is also a role for international labour standards, in particular in the ILO that, significantly, does not share the deregulatory discourse of some nation states or supranational bodies. While some governments unilaterally reformed collective bargaining arrangements at the height of the economic crisis, the ILO argues that reversing those decisions and providing policy support for collective bargaining would be key to recovery.[24]

The right to equality in times of economic crisis and austerity

Some commentators, such as Brendan Barber of the UK Trades Union Congress (TUC), have characterised the current recession as 'equal opportunities recession'[25] in the sense that job losses in sectors where men predominate, such as manufacturing and construction, are balanced by job losses in retail and hospitality, where more women work. However, the picture is more complex both

17 Angelika Muller, 'Employment protection legislation tested by the economic crisis: A global review of collective dismissals for economic reasons' ILO Dialogue in Brief, No 3, September 2011.

18 ILO, Governing Body 316th Session, Geneva, 1–16 November 2012, 'Global economic prospects and the Decent Work Agenda', para 9.

19 See n 14 above, 111.

20 See statistics on trade union density and collective bargaining coverage in OECD countries and in developing countries in Susan Hayter, Tayo Fashoyin and Thomas A Kochan, 'Review Essay: Collective Bargaining for the 21st Century' (2011) Journal of Industrial Relations, 225–247; David G Blanchflower, 'A Cross-Country Study of Union Membership', IZA Discussion Paper No 2016, March 2006.

21 For further analysis of the efficiency-enhancing effect of labour market institutions see, Diamond Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance* (OUP 2005) 48–51.

22 See n 20 above, 241.

23 Oireachtas (Irish Parliament) Library and Research Service, 'Trade unions, collective bargaining and the economic crisis: where now?' Spotlight No 4, 2011, available at www.oireachtas.ie/parliament last accessed 27 March 2013.

24 ILO Newsroom, Comment and analysis, Weakening collective bargaining hurts recovery, 12 September 2012, available at www.ilo.org/global/about-the-ilo/newsroom/comment-analysis/WCMS_189517/lang–en/index.htm last accessed 27 March 2013.

25 Quoted in T Hogarth, D Owen, L Gambin, C Hasluck, C Lyonette and B Casey, 'The equality impacts of the current recession', Warwick Institute for Employment Research, University of Warwick / Equality and Human Rights Commission Research Report 47, EHRC, 2009, 31.

between the genders (especially in developing economies), and across different equality groups in both industrialised and developing economies.

The GFC is having a major impact, globally, on labour market equality in at least three respects. First, As ILO Director-General Juan Somavia noted, '[e]conomically adverse times are a breeding ground for discrimination at work and in society more broadly.'[26] The common thread can be described as one of retrenchment: a withdrawal into prioritising work for those groups traditionally perceived to form the 'core' of the labour market, as seen, for example, in attitudes that give preference to male employment in order to support the male breadwinner;[27] or the hardening of attitudes towards migrants, leading to reduced employment or migration opportunities, increased xenophobia, deterioration in working conditions and even violence.[28] Studies show a growing perception that employers will no longer be able to afford the 'luxury' of pursuing 'diversity strategies' and that this will limit or diminish the gains made by women and other groups in the labour market in general and the corporate world in particular.[29]

Secondly, there has been a differential impact of recession on different groups. Among settled communities, there is evidence to show that ethnic minority groups enter unemployment earlier during a recession and exit it later than majority groups.[30] Studies of previous crises show a disproportionate impact on the employment of women in developing countries, and this pattern is repeated in the current crisis.[31] In particular in developing countries, women are more likely to be engaged in 'vulnerable' or 'precarious' employment; work that is in the informal economy, not within the embrace of employment protection laws applicable to employment in the formal economy. In industrialised countries, the story is more likely to be one of female work in the public sector being vulnerable to austerity measures. For example, evidence from the US and the UK suggests that, following an initial period at the start of the current recession when the first wave of job losses hit the private sector, women (and, in the UK, ethnic minority groups) who are disproportionately employed in the public sector are experiencing a second wave of job losses as a result of spending cuts in the public sector.[32]

Thirdly, in terms of monitoring and enforcement: in the context of austerity measures, the budgets of labour administration and inspection services and of the specialised bodies that deal with non-discrimination and equality, are at risk. Such cuts may 'compromise the ability of those institutions to address what could be counted among the worst social consequences of the economic crisis'.[33]

To what extent do regulatory and policy options to inequality in the labour market alter in times of economic crisis? What is the response of equality law and policies in times of economic crisis given competing justifications for equality and diversity? To what extent do arguments for equality and diversity need to be differently constructed and understood in conditions of economic crisis?

One response, as witnessed for instance in the EU, begins from the assumption that labour rights and standards, and in particular, equality rights, can be an *input* into economic growth and efficiency rather than a *drag* on growth and prosperity. Viviane Reding, Vice-President of the European Commission and in charge of Justice, Fundamental Rights and Citizenship, states:

> 'The economic case for getting more women into the workforce and more women into top jobs in the EU is overwhelming… We can only reach our economic and employment goals by making full use of all our human resources – both in the labour market as a whole and at the top. This is an essential part of our economic recovery plans.'

This was the perspective adopted within the European Commission's report on progress made during 2011 on equality between women and men, part of the Commission's broader report on the application

26 ILO Press Release accompanying the 2011 ILO report on Equality at work.

27 ILO, 'Equality at work: The continuing challenge', *Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, ILO, 2011, paras 17–18.

28 *Ibid,* paras 13–14.

29 'Recession Turns Heat up for Men', *Financial Times*, 19 April 2009.

30 Equality and Human Rights Commission / Government Equalities Office, Monitoring update on the impact of the recession on various demographic groups, December 2009, 23.

31 See n 27 above, para 18.

32 Eileen Appelbaum, 'Women's Employment in Recession and Recovery' Center for Economic and Policy Research, available at www.cepr.net last accessed 27 March 2013; Hogarth et al, see n 25 above.

33 See n 27 above, para 40.

of the EU Charter of Fundamental Rights.[34] The (economic) reasoning here is that fostering a labour market favourable to social integration, and increasing labour force participation of groups previously excluded because of discrimination will assist in meeting the goals of the EU integration project, such as the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, the achievement of economic and social cohesion and solidarity.[35]

However, this positive attitude to labour rights is greatly at odds with the discourse (and action) elsewhere within the EU institutions – indeed, elsewhere within the European Commission itself – as can be seen in the response of the Troika (which includes the European Commission) to the eurozone crisis.

The positive attitude is also at odds with the approach of governments of EU Member States – even where they are not subject to demands to deregulate labour law as a condition of receiving financial support. Other states do not adopt such a benign perspective towards labour rights, least of all equality rights. In the UK context, the Conservative–Liberal Democrat coalition government (May 2010 to date) has initiated a review of labour and employment law, a key feature of which is a push to reduce 'red tape', namely, regulations perceived to be an exogenous interference with business and labour market flexibility.[36] Equality rights are not immune from this cull of labour rights, in this desire to reduce 'burdens' on business. For example, the Equality Act 2010, drafted and enacted by a previous Labour government, came into force at the same time as the new coalition government came into power. The coalition government declined to bring into force certain sections of this statute, and also abolished, in April 2011, a requirement under the Act that had imposed a duty on public bodies to conduct 'equality impact assessments' in order to analyse the potential or actual effects of proposed policy on disability, ethnic minority, gender, faith, age, transgender and maternity groups.

A contrary approach is to seek to rely on equality laws to challenge the government's economic policies, where it is argued that austerity measures have a particularly adverse impact on women's labour market experience, or those of other disadvantaged (ethnic) minority groups. In the UK, the Race Relations (Amendment) Act 2000 introduced a statutory duty to promote race equality, namely, to take proactive steps to eliminate unlawful racial discrimination, to promote equal opportunities and promote good relations between people from different racial groups. Subsequently, public sector equality duties covering disability and gender were introduced on similar lines. The Equality Act 2010 replaced these specific duties with a new single equality duty covering race, sex, disability, sexual orientation, religion and belief, age, gender reassignment, pregnancy, and maternity. In 2010, the Fawcett Society, an NGO that campaigns and lobbies for equal pay and equality between men and women, applied for judicial review of the newly formed coalition government's austerity measures, challenging the 2010 emergency budget on the ground that it would have a disproportionately negative impact on women.[37] The claim was that the government was in breach of its obligations to undertake a 'gender impact assessment' to assess whether its budget proposals would increase or reduce inequality between women and men, given the contention that 72 per cent of the proposed public sector cuts would be met from women's income, as would £6bn of the £8bn savings generated in one year. More specifically, the reasoning behind this use of equality law to challenge the gender impact of the GFC is as follows:

> 'This budgetary austerity is clearly made possible because of the state's role as employer. In addition to the direct impact of these measures on public sector employees, the majority of whom are women, child welfare benefits were frozen, Sure Start maternity grants limited to one child and child tax credits significantly reduced. The Women's Budget Group issued an analysis of the emergency budget, highlighting: "Low income mothers, who are the managers and shock-absorbers of poverty, will be among the main losers. Women from black and minority ethnic

34 EC, Report on the Application of the EU Charter of Fundamental Rights, Brussels, 16.4.2012 COM(2012) 169 final.

35 See Preamble to the Framework Directive, Directive 2000/78 Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (on religion or belief, disability, age, sexual orientation), Official Journal L 303, 2 December 2000, 16–22.

36 Her Majesty's Treasury and Department for Business Innovation and Skills, The Plan for Growth, March 2011, available at http://cdn.hm-treasury.gov.uk/2011budget_growth.pdf last accessed 27 March 2013.

37 Fawcett Society, 'Fawcett Launches Legal Challenge to Government Budget' Press Release, 1 August 2010, available at www.fawcettsociety.org.uk/index.asp?PageID=1165 last accessed 27 March 2013.

groups will be particularly hard hit, as 40 per cent of them live in poor households.'"[38]
The judicial review action was ultimately unsuccessful owing, it has been claimed, to 'a compelling case for granting judicial review [having been] eclipsed by a desire to maintain political stability in the face of the economic crisis'.[39]

The use of human rights norms in times of economic crisis

In addition to equality discourse, fundamental (human) rights may also serve as a means of challenging reforms that seek to retrench labour and social rights.

A set of observations about the role of human rights in labour markets, made just before the emergence of the current GFC,[40] has gained deeper resonance in the aftermath of the crisis. It is arguable that neoliberal economic policy has undermined the welfare state in those industrialised countries that had developed institutions of social citizenship to 'soften' the impact of the market on workers. Laws that protected and promoted trade unions, for instance, have been undermined as the economy is refashioned. As traditional vehicles for social rights, such as the welfare state and collective bargaining, have declined, one can note that 'legal and constitutional mechanisms are increasingly being used to assert social claims'.[41] This has, in turn, given rise to new discourse of labour rights and of the relationship between social rights and the market.[42]

No two commentators on the subject provide an identical version of the evolving treatment of labour rights as human rights.[43] But a common starting point is the taxonomy developed by Marshall, of a three tier classification of rights of 'citizenship' into three generations: civil – liberty of the person, freedom of speech, thought and faith, the right to own property; political – the right to participate in the exercise of political power; and social or socio-economic; the latter seeming to offer a way to demonstrate the validity of workers' claims.[44] Traditionally, the post-war era in industrialised countries witnessed the implementation of social rights via collective decisions by the political machinery of the state as to allocation of available resources.

More recently, the international community has placed emphasis on an identifiable group of 'core labour standards', which, given the discourse on the 'indivisibility' of human rights, would suggest that socio-economic rights may be justiciable. Such 'core' social rights are most prominently to be found in the ILO's 1998 Declaration of Fundamental Principles and Rights at Work. The EU's 2000 Charter of Fundamental Rights also offers a prominent example of the characterisation of labour rights as fundamental rights at the international and supranational level.[45]

Taking the EU as a case study, it would appear that human rights norms developed outside the EU framework – for instance, the Council of Europe's European Social Charter, and the ILO's international labour standards – may be a more effective bulwark against austerity measures within the EU, than the 'home grown' human rights instrument of the EU Charter of Fundamental Rights. Recent years have witnessed the resort to the European Social Charter as a response to the austerity measures, labour rights conditionality, and stabilisation mechanisms arising from the eurozone crisis.[46]

38 Hazel Conley, 'Using Equality to Challenge Austerity: New Actors, Old Problems' (2012) Work, Employment and Society, 349–359, 354.

39 *Ibid*, 357.

40 See Judy Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights?' (2007), Comparative Labor Law and Policy Journal, 29–66.

41 Simon Deakin, 'Social Rights in a Globalized Economy' in Philip Alston (ed) *Labour Rights as Human Rights* (OUP 2005) 51–52.

42 See n 40 above.

43 Tonia Novitz and Colin Fenwick, 'The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice' in T Novitz and C Fenwick (eds) *Human Rights at Work: Perspectives on Law and Regulation* (Hart 2010).

44 T H Marshall, *Class, Citizenship And Social Development: Essays By T H Marshall* (Doubleday 1964).

45 See n 40 above, 30.

46 For example: Complaint No 66/2011 *General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece;* Complaint No 65/2011 *General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece;* Complaint No 76/2012 *Federation of employed pensioners of Greece v Greece; No 77/2012 Panhellenic Federation of Public Service Pensioners v Greece;* No 78/2012 *Pensioners' Union of the Athens-Piraeus Electric Railways v Greece.* See Claire Kilpatrick, 'Can Fundamental Rights Resocialize Europe?' paper presented to the conference on 'Resocializing Europe and the Mutualization of Risks to Workers' 18–19 May 2012, University College London.

The European Committee of Social Rights (ECSR), the main supervisory body monitoring the implementation of the (revised) European Social Charter of the Council of Europe, has recently examined five complaints against Greece under the ESC's 'collective complaints procedure' concerning significant reductions in pension and employment rights imposed in both the private and public sector. The reforms, which in part allowed for the extension of a 'trial period' during which workers could be dismissed without notice to one year and the reduction of the basic salary for under 25-year-olds to two-thirds of the national minimum wage, were aimed at cutting costs for Greek employers affected by the GFC. The ECSR held, in October 2012, that the reforms contravened the European Social Charter and amounted to a violation of workers' rights, in particular, breaching Article 4 of the European Social Charter, which requires that workers be given 'reasonable' notice before termination of their employment.[47]

Conclusion

The GFC has had a devastating impact on labour markets globally, and on livelihoods and incomes of ordinary working people. According to the ILO, there were an estimated 456 million workers around the world living below the US$1.25 a day poverty line in 2011.[48] While working poverty has been on the decline (a reduction of 233 million since 2000 and of 38 million since 2007), there has been a marked slowdown in progress since 2008, with 50 million more working poor in 2011 than projected, based on pre-crisis trends.[49]

The labour market institutions – employment protection laws and industrial relations systems, established welfare states in industrialised countries, or nascent systems of social assistance in developing countries – which might have served to protect workers from some of the harsher effects of the downturn, have struggled to meet the challenge and, in some instances, have been conspicuously targeted by austerity measures. Nevertheless, there remain significant voices – namely, the ILO, trade unions and workers' organisations, and those parts of the European Commission responsible for labour law and human rights – arguing for labour law and social rights as an essential element of economic and political governance, even more necessary during times of economic crisis.

47 The decision on the merits by the European Committee on Social Rights in the case *GENOP-DEI and ADEDY v Greece,* Complaint No 66/2011 was published on 19 October 2012. In this case registered on 21 February 2011, the complainant trade unions alleged that Greece was in breach of Articles 1 (right to work), 4 (right to a fair remuneration), 7 (the right of children and young persons to protection), 10 (right to vocational training) and 12 (right to social security) of the European Social Charter. In its decision on the merits, the Committee reached the following unanimous conclusions: no violation of Art 1 s1, Art 7 ss 2 and 9 of the 1961 Charter; but there were violations of Art 7 s7, Art 10 s 2, Art 12 s 3, Art 4 s 1 of the 1961 Charter in the light of the non-discrimination clause of the Preamble to the 1961 Charter.

48 ILO, Key Indicators of the Labour Market (KILM) 7th Edition, 14 October 2011: this biennial report covers 18 indicators on employment and decent work with the latest available data for more than 200 countries, areas or economies worldwide.

49 ILO, Global Employment Trends 2012: Preventing a deeper jobs crisis, Geneva 2012, at 42.

Chapter 9

Responding to the Underlying Causes of the Crisis: Why Labour Should Not Pay

Shelley Marshall[1]

Introduction

The International Labour Office (ILO) estimates that after three years of continuous crisis conditions in global labour markets and against the prospect of a further deterioration of economic activity, there is a backlog of global unemployment of 200 million.[2] There are an added 27 million unemployed people in the global economy, thanks to the crisis.[3] The outlook for global job creation has been worsening. ILO's baseline projection shows no change in the global unemployment rate between now and 2016. In light of these employment conditions, it would seem logical that measures would be undertaken at national and international levels to ease the consequences of the crisis for workers. Instead, austerity measures implemented in Europe in particular are increasing the burden of the crisis for labour.

The current GFC can be thought of as a three-stage crisis. The first stage was the initial shock, beginning in the US and spreading quickly thanks to the interconnectedness of financial markets. This was met by coordinated fiscal and monetary stimulus in many countries around the world. In some cases, up to 90 per cent of additional public spending went into bailing out banks.[4] In the second stage, higher public deficits and sovereign debt problems – seen especially in Europe – led to increased austerity measures in an effort to buoy capital markets. Fiscal stimuli began to diminish, and advanced economies concentrated on quantitative easing monetary policies. The combined impact appears to have been a weakening of both GDP growth and employment. The third stage might be thought of as a labour market crisis. Although growth has occurred in many countries, unemployment persists. Labour market imbalances are becoming more structural, and therefore more difficult to eradicate. This is associated with an increased risk of a second dip in growth, intensifying the labour market distress that has deepened since the onset of the crisis. In this third stage of the crisis, policy space has been significantly restricted, making it difficult to halt, or even slow, the further weakening of economic conditions. Weak economic conditions in Europe and the US are putting pressure on economies worldwide, and threatening the gains made in developing countries in recent decades in the reduction of poverty.

This chapter makes three arguments. The first is that labour is incorrectly carrying responsibility for the debt crisis. There are numerous explanations for the US-led financial crisis of 2007 and the sovereign debt crisis of 2009/10 in Europe. None focuses on labour as the cause. Yet labour has been targeted in austerity measures that aim to re-balance national budgets and reduce indebtedness. The second

1 Shelley Marshall, Monash University
2 ILO, 'Global Employment Trends 2012' (Geneva, ILO 2012), 9.
3 *Ibid.*
4 *Ibid*, 12.

argument is that given that inequality is seen by some to be a cause of the crisis, and increased inequality has certainly been an outcome of the crisis, measures should be put in place to increase equality. Labour law is an important tool for reducing inequality, and if designed appropriately, this can occur in a reflexive and responsive manner. Instead of using labour law to this end, conditionalities currently associated with EU bailouts are demanding greater labour market flexibilities using blunt tools, together with harsh austerity measures, which are likely to intensify long-term unemployment and inequality rather than reduce it. The third argument is that the reason that austerity is being chosen over other policy options is due to the dominance of financial markets. So much economic policy today is focused on 'restoring confidence in the markets', yet, as Wolfgang Streeck has recently commented, it is now impossible to restore the confidence of the financial markets and the majority of citizens at the same time.[5] Until financial interests dominate nations less, it seems likely that labour will continue to carry the burden of a crisis it was not responsible for. If commentators who argued that inequality is one of the causes of the crisis were right, current trends would indicate that continued instability in the future is likely.

The argument is made in a number of stages. Part 1 of the chapter examines contrasting views about the causes of the 2007 US financial crisis, and the 2009/10 European sovereign debt crisis. Part 2 presents data on the effects of the crisis on labour. It shows that inequality has increased, although the wealth of the top quintile was reduced by financial market losses. Unemployment and informal work have also increased dramatically. Part 3 briefly assesses what role labour law might play in promoting equality, employment growth and a shift from the informal to the formal labour market. Part 4 concludes by examining why these tools are not being employed by nation states following the crisis, and why other measures have been preferred.

Part 1: Causes of the 2007 and 2009/10 financial crises

The re-globalisation of capital markets since the 1970s has been painful, pockmarked by periodic crises spanning at times a multitude of countries. These include the inflation crisis of the 1970s, the public debt crises of the 1980s, the private debt crises of the 1990s and early 2000s, finally exploding in the US private debt crisis of 2008 and rolling into the European sovereign debt crisis of 2010.[6] Explanations for crises vary, and different understandings of the causes of crises lead to different policy prescriptions regarding how to lift a national economy out of the crisis. This section examines various explanations for the current financial crisis.

Certain new dimensions played important roles in the severity and global scale of the ongoing crisis, compared with previous crises, particularly with respect to its transmission and amplification. Although the crisis is not unusual for having been preceded by financial liberalisation, the extent of financial liberalisation and the failure of financial regulation are particularly stark. The primary trend that preceded the crisis was the expansion of the financial sector, along with widespread use of complex and opaque financial instruments. This factor could be responsible not only for the bust, but also for the extraordinary character of the current recession in both the US and Europe. Over time, financial markets grew ever larger relative to the non-financial economy. Important financial products became more complex, opaque and illiquid, and system-wide leverage exploded.[7] In mid-2008, the Basel-based Bank of International Settlements estimated that the global outstanding derivatives reached US$1.14 quadrillion: US$548tn in listed credit derivatives plus US$596tn in notional/OTC derivatives.[8] By comparison, the GDP of all the countries in the world was only US$60tn.[9] Derivative financial instruments designed to hedge risk, became themselves the source of volatility.

The interconnectedness among financial markets, nationally and internationally, with the US at the core, had increased in a short period before the crisis.[10] Capital account openness and financial market

5 W Streeck, 'Markets and Peoples: Democratic Capitalism and European Integration' (2012) New Left Review, 62.
6 *Ibid*, 64.
7 J Crotty 'Structural causes of the global financial crisis: a critical assessment of the "new financial architecture" (Essay)' (2009) Cambridge Journal of Economics.
8 Derivatives are financial products with value that stems from an underlying asset or set of assets; what some call 'bets on bets'.
9 V Popov, 'Why Transition Economies Did Worse than Others in 2008-09 Recession' 1 March 2011, available at: dx.doi.org/10.2139/ssrn.1893789 accessed 23 October 2012.
10 S Claessens, M A Köse and M E Terrones 'The Global Financial Crisis: How Similar? How Different? How Costly?' (2010) Working Paper 1011, March 2010, Tüsiad-koç University Economic Research Forum working paper series.

reforms led to massive increases in cross-border gross positions, especially among OECD countries. The household sector also played a central role. Most previous episodes of financial distress stemmed at least partially from problems with state borrowing (eg, Latin America's debt crisis of the 1980s) or the corporate sector (eg, the Asian crisis). The 2007 US crisis, however, largely originates from overextended households, in particular with respect to subprime mortgage loans. These new elements combined to create unprecedented sell-offs in the autumn of 2008 and resulted in the GFC.

Evidence shows that past crises often followed credit expansions triggered by financial liberalisation that lacked necessary regulatory and prudential reforms to control the liberalisation. The poor sequencing of regulatory reforms has also been blamed for past crises.[11] What is unusual about the current crisis is the breakdown in the effectiveness of financial regulators because of unhealthy turf competition between various supervisory agencies in some countries. Conflicts of interest by rating agencies, who were relied on by state agencies and private investors also exacerbated problems.[12] In other respects, the crisis was like others. Relative wages in the financial sector (after controlling for education, experience and other usual determinants) in recent years were equally unusually high – as high as they were only in the 1930s.[13] The exuberant pattern of asset prices in the US and other advanced countries prior to the current crisis is reminiscent of those observed in earlier major financial crises episodes in the post-war period. The housing price boom in the United States ahead of the current crisis was, however, unusual both in its strength and duration.[14] The house price boom was partly fuelled by low (short and long-term) interest rates resulting from abundant global liquidity and large demand for safe assets. The pricing of derivative instruments was often based on a continuation of increasing house prices that facilitated the refinancing of underlying mortgages.

Governments around the world responded to the financial crisis with stimulus packages and massive bailouts of banks, costing great amounts of taxpayer funds. The total amount of stimulus in the G20 was estimated to cost around US$692bn for 2009, which was about 1.4 per cent of their combined GDP and a little over 1.1 per cent of global GDP.[15] These bailouts and stimulus packages put many countries into great debt. This debt was often funded through the purchase of bonds. Between 2009 and 2010, international bond markets began to price in the growing risks associated with the debt of Greece, Ireland, Italy, Portugal and Spain (GIIPS). Bond markets required increasingly higher interest rates to buy debt. Eventually, these interest rates reached such high levels that they became no longer sustainable. The governments in question were forced to ask for support from the EU and the IMF. These organisations obliged but made their support conditional on tough austerity programmes that would enable these countries to rebalance their budgets. Under EU agreements, GIIPS countries cannot address these problems by devaluing their currencies (the value of the euro is determined at a eurozone level, not a national level) and have few alternative tools to revamp economic growth. International financial markets are unwilling to lend to them, except at very high interest rates, because they doubt their ability to produce the economic growth necessary to repay the loans. Instead, the GIIPS are left with 'internal devaluation' strategies aimed at reducing prices relative to other countries, in order to make the countries more competitive and boost growth.

Except in the case of Greece, fiscal deficits are not seen to be the consequence of excessive welfare state spending or of over-regulation of the labour market within countries most affected by the crisis. This begs the question, then, why the favoured way out of it is the retrenchment of the welfare state and removal of the floor of social rights.[16] It cannot be justified based on factors that are understood to have caused the crisis. The answer would appear to lie in political economy dynamics rather than sound policy analysis based on explanations for the crisis and subsequent recession.[17]

11 *Ibid.*

12 *Ibid*; see Crotty 2009 (n 7 above), for a detailed description of key structural flaws in the financial institutions and practices of the neoliberal era that helped generate the current crisis.

13 *Ibid* 9, 6

14 See n 10 above.

15 A comparative table of 2009 spending can be found at www.brookings.edu/~/media/Research/Files/Articles/2009/3/g20%20stimulus%20prasad/03_g20_stimulus_prasad_table.PDF, last accessed 27 March 2013.

16 S Deakin, 'The Sovereign Debt Crisis and European Labour Law' (2012b) Industrial Law Journal 41, 251–253.

17 K Armingeon and L Baccaro, 'Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation' (2012) Industrial Law Journal 41, 254.

Explanations for the crisis based on income inequality

A number of commentators blame rising inequality and the decline of labour's share of GDP for various policy decisions that fuelled the crisis. In his 2010 book, *Fault Lines*, Raghuram Rajan, former chief economist at the IMF, argued that rising inequality in the past three decades led to political pressure for redistribution.[18] For reasons of political expedience, this was delivered in the form of subsidised housing finance rather than through increases in real wages or other transfers. Low-income households, which otherwise would not have qualified, received improved access to mortgage finance. The resulting lending boom created a massive run-up in housing prices and enabled consumption to stay above stagnating incomes. The boom reversed in 2007, leading to the banking crisis of 2008. Other commentators have come out in support of this thesis. Nobel Laureate Joseph Stiglitz argues inequality has led to a concentration of power in the hands of the few.[19] This powerful minority use their leverage to make gains at the expense of the majority, through 'rent seeking'. Concentration of power in private hands can be just as damaging to the functioning of markets as excessive regulation and political control. It was this concentration of power that resulted in financial regulations being reformed in such a way that allowed imprudent investment and the creation of asset bubbles.

Another thesis is that rising inequality contributed to the crisis because it led to unsustainable consumption and debt in households whose disposable income was dropping or growing slowly. The OECD observes that growing inequality was a common trend across the advanced economies between the mid-1980s and late 2000s.[20] Labour's share of national income has fallen across most major advanced economies in the last 20 or so years.[21] Although in some countries, for example, China, India and Brazil, consumption increased thanks to the sustained growth in household income and savings, in the US and elsewhere, it increased thanks to the growth in household debt.[22]

This increased inequality was accompanied by a decoupling of profits and investments, as shares of GDP. In the US since the 1980s, for example, non-residential private investment has been decreasing while profits have been increasing (with an opposite trend in 2003). Business has not been reinvesting profit at the same rate as occurred in the post-war period. In 2006, the year before the crash, the share of recorded profits as percentage of GDP was more than four times non-residential investment.[23] Instead of being invested, it is speculated that the profits were paid to top income earners in the form of capital income such as shares. This contributed to inequality, with top quintile wealth increasing at a far higher rate than other quintiles.

Against this thesis, some argue that the rise in inequality and pro-business policies that resulted in the deregulation of the financial industry may have been a reaction to the slowdown of economic activity, rather than its cause.[24] Empirical studies also throw doubt on the theses that inequality caused the crisis. Michael Bordo and Christopher Meissner[25] used data from 14 advanced countries between 1920 and 2000 to test the hypothesis that inequality causes crises. They find very little evidence linking credit booms and financial crises to rising inequality. Bordo and Meissner conclude that while inequality often ticks upwards in the expansionary phase of the business cycle, this factor does not appear to be a significant determinant of credit growth once they condition on other macroeconomic aggregates.

This part of the paper has found that there is broad consensus that the crisis was in large part caused by financial liberalisation, the spread of financial markets into previously unmarketised areas, the use of increasingly complex and risky instruments and a failure of financial regulation. The evidence on whether inequality is a cause of the crisis is mixed. Regardless of the causes of the crisis, it is clear that the crisis and the subsequent recession have had dire consequences for labour. The evidence concerning the effect of the crisis and the recession on labour is presented in the next section.

18 R Rajan, *Fault Lines* (Princeton University Press 2010).
19 J Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (WW Norton, 2012).
20 OECD, 'Growing Income Inequality in OECD Countries: What Drives and How Can Policy Tackle It?' Forum 2011.
21 M Florio, 'The Real Roots of the Great Recession' (2011) International Journal of Political Economy 40, 5–30.
22 *Ibid.*
23 *Ibid.*
24 D Ben-Ami, 'Inequality a symptom not a cause' (2012) Fund Strategy 24.
25 M Bordo and C Meissner, 'Does Inequality Lead to a Financial Crisis?' (forthcoming) Journal of International Money and Finance.

Part 2: The effect of the crisis on labour

This part of the paper shows that the crisis has had harsh consequences for workers around the world. Unemployment has grown dramatically, particularly among younger people and low-skilled workers. Precarious and informal work has increased, leaving workers more vulnerable to economic shocks. Globally, the convergence between poor countries and rich countries has slowed down. Although growth and poverty reduction have continued at a fast rate in Asia, other parts of the world have not fared as well. There are signs that Asia's economies may now be slowing down, as the effects of stimulus wear off and the slow global economy impacts negatively on growth.

Unemployment increases and labour force participation decreases

The ILO has voiced alarm over the extent of unemployment following three years of crisis conditions: it estimates that there 200 million unemployed people globally, an increase of 27 million since the start of the crisis. The number of unemployed around the world increased by 5.8 million in 2008 and then surged by more than 21 million in 2009, an increase from a rate of 5.5 per cent to 6.2 per cent.[26]

The outlook for global job creation is worsening, rather than improving. According to the ILO's baseline projections, no change in the global unemployment rate is likely between now and 2016, suggesting that it will remain at six per cent of the global labour force. This would lead to an additional three million unemployed around the world in 2012, or a total of 200 million, rising to 206 million by 2016. If downside risks materialise and global growth falls to below two per cent in 2012, global unemployment would rise more rapidly to more than 204 million in 2012, at least four million more than under the baseline scenario, with a further increase to 209 million in 2013, six million more than under the baseline scenario.[27]

One reason the global unemployment rate continues to increase is because unemployment is a 'lagging indicator'. When there is an economic downturn, it usually takes several months before the unemployment rate begins to rise. Once the economy starts to pick up again, employers usually remain cautious about hiring new staff and it may take several months before unemployment rates start to fall.

The unemployment rate differs considerably from country to country, and between regions. In the current European debt crisis, the countries that have preserved employment include Austria, Germany and the Netherlands. In contrast, Estonia, Ireland, Latvia and Spain have experienced extreme employment loss. The Spanish market has been one of the hardest hit in the European crisis: in December 2009, unemployment rose to almost 20 per cent.[28] In March 2012, Eurostats showed the lowest unemployment rates were recorded in Austria (four per cent), the Netherlands (five per cent), Luxembourg (5.2 per cent) and Germany (5.6 per cent), and the highest rates in Spain (24.1 per cent) and Greece (21.7 per cent in January).[29] Currently, some 35 per cent of all jobseekers in the developed economies and EU region have been unemployed for 12 months or longer.[30] The longer people are unemployed, the more their job chances are eroded. Qualifications and skills erode over time, making it harder for firms to find the right people. This presents considerable policy challenges for reducing unemployment. Reactivating long-term unemployed and inactive workers entails considerable fiscal costs, and is hard to achieve.

When people have been unemployed for a long time, they often stop seeking work and stop participating in the workforce, creating a gap between unemployment figures and workforce participation figures. In many countries there is evidence of an accelerated decline in labour force participation. The ILO estimates that in the five years from 2002 to 2007, the global labour force participation rate declined from 65.1 per cent to 64.8 per cent, a drop of 0.3 percentage points. In the four years from 2007 to 2011, the rate dropped to 64.1 per cent, a decline of 0.7 percentage points. The pace of decline in labour force participation at the global level since 2007 has been two and-a-half times greater than in the five years leading up to the crisis.[31] In the world as a whole, there were nearly

26 See n 2 above, 31.
27 *Ibid.*
28 W Vaughan, Work Inequalities in the Crisis: Evidence from Europe (Geneva, ILO 2011), 5.
29 http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Unemployment_statistics, last accessed 27 March 2013.
30 See n 2 above, 47.
31 *Ibid*, 33.

29 million fewer people in the labour force in 2011 than would have been expected based on pre-crisis trends.[32]

Age dimensions of unemployment

Unemployment is not experienced equally across populations. In general, during crises, unemployment affects youth and low skilled workers to the greatest extent. Globally, young people are nearly three times as likely as adults to be unemployed. There are various reasons for high youth unemployment. This may in part reflect the principle of last in, first out – the 'seniority principle' – that has generally been applied by employers in their efforts to shed part of their labour force during recessions. In some countries, such as Sweden, it is even stipulated in the Labour Code. It also reflects the propensity of youth to be employed on temporary contracts, and the fact that employers have found it easier not to renew such contracts or to shed temporary workers.

In 2011, the ILO estimates that 74.8 million youth aged 15–24 were unemployed, an increase of more than four million since 2007.[33] The global youth unemployment rate, at 12.7 per cent, remains a full percentage point higher than the pre-crisis level. In addition, an estimated 6.4 million young people have given up hope of finding a job and have dropped out of the labour market altogether. Even those young people who are employed are increasingly likely to find themselves in part-time employment and often on temporary contracts. In developing countries, youth are disproportionately among the working poor.[34]

Interestingly, while older workers – between 50 and 60 years of age – are traditionally a vulnerable group in the labour market, they have been less affected by employment adjustments in a number of countries. This may reflect the lower reliance on early retirement schemes, due to changes in legal retirement ages in a number of countries.

Gendered dimensions of unemployment

Women are normally worst hit by unemployment during financial crises, but the figures are mixed for the current crisis in Europe. The annual average unemployment rates for 2009 and 2010 were slightly higher for men (9.1 per cent and 9.7 per cent respectively) than for women (nine per cent and 9.6 per cent); in 2011 however, unemployment for males slightly declined in the EU-27, while that of women continued to increase such that the rate for males was again lower at 9.6 per cent than that for females (9.8 per cent).[35]

An explanation for these mixed results is that the initial impact of the crisis was felt on male-dominated sectors such as construction and manufacturing. On the other hand, women employed in male-dominated sectors have often been the first to be dismissed. The reduction in employment for women later in the crisis can be explained by the fact that the second wave of job losses has been in female-dominated sectors such as the public sector.[36]

Inequality increases

Today in advanced economies, the average income of the richest ten per cent of the population is about nine times that of the poorest ten per cent.[37] A sustained period of strong economic growth has allowed emerging economies to lift millions of people out of absolute poverty. But the benefits of strong economic growth have not been evenly distributed and high levels of income inequality have risen further. Among the BRICs, only Brazil managed to strongly reduce inequality, but the gap between rich and poor is still at 50 to one, five times that in the OECD countries.[38] Although the largest part of this increase in inequality was due to top earners 'flying away' from the majority, another part was due to the so-called 'collapsing bottom', where the distance between median workers and

32 *Ibid*, 34.
33 *Ibid*, 9.
34 *Ibid*, 9.
35 http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Unemployment_statistics, last accessed 27 March 2013.
36 See n 28 above, 7.
37 OECD, Divided We Stand: Why Inequality Keeps Rising (Paris, OECD 2011).
38 *Ibid.*

low-paid workers has increased.[39] Various studies have found that financial crises are followed by rising inequality, compared with crisis related to collapse in consumption or GDP.[40] The author was unable to find reliable data to show the effect of the current crisis on inequality. One reason for this is that different stages of the crisis have had different effects. Initial financial shocks resulted in losses for the top quintile, promoting equality. Employment losses and wage losses in the later stage of the crisis and recession have once again resulted in increases in inequality, with considerable differences between countries.

Informal and temporary work increases

The crisis has led to an increase in the number of workers in informal work. The share of informal employment remains high, standing at more than 40 per cent in two-thirds of emerging and developing countries for which data are available.[41] The ILO estimates that the number of 'own-account workers' and unpaid family workers increased by 136 million since 2000, with 1.52 billion vulnerable workers of this type in 2011.[42] The increase in informal work has been worst in Sub-Saharan Africa, accounting for nearly 70 per cent of all employment growth in the region since 2007.[43] Informal work is also high in parts of Central and Eastern Europe. According to World Bank estimates based on the latest available labour force survey in Kazakhstan, informal employment represented 33.2 per cent of total employment in 2009.[44]

Evidence from previous crises suggests that once individuals move to the informal sector it is difficult for them to return to regular employment.[45] In some countries, informality returns to pre-crisis levels after two to three years, while others experience increased informality levels persisting even after five years.[46]

Incomes are generally much lower in the informal economy than the formal economy, and informal economy workers generally receive no health benefits, work-related childcare, sick leave or pensions. If treated unfairly by employers, they have no recourse to the courts, because the employment relationship is rarely documented.[47] The most undesirable of work practices are disproportionately found in informal economies.[48]

The crisis in Europe has further polarised the workforce. Workers at the periphery of the workforce have been the first to be affected by employment cuts, with the core labour force remaining protected, at least in the short term. For instance, nearly 50 per cent of employment losses in France concerned temporary workers, and about 90 per cent of them in Spain.[49] At the same time, part-time contracts have increased for both men and women, as a number of countries and enterprises have encouraged reductions in working hours, leading to a shift of workers from full-time to part-time work to adjust to the economic slowdown.[50]

Slow in convergence in living standards across the world

A further impact of the GFC is that the catch-up in terms of living standards and productivity between the developing and developed world is slowing. As global economic growth is slackening, so too is

39 See n 2 above.
40 A B Atkinson, and S Morelli, 'Economic Crisis and Inequality' (2011) Human Development Research Paper, 2011/06, UNDP.
41 ILO and International Institute for Labour Studies, 'World of Work Report 2012' (Geneva, ILO 2012).
42 See n 2 above, 42.
43 *Ibid.*
44 J Rutkowski, 'Promoting Formal Employment in Kazakhstan' The World Bank, 2011.
45 C Williams and J Windebank, *Informal Employment in the Advanced Economies: Implications for Work and Welfare* (Routledge, 1998).
46 R Torres, 'World of Work Report 2009: The Global Jobs Crisis and Beyond' (Geneva, ILO and International Institute for Labour Studies 2009).
47 K Sankaran, 'Labour Standards and the Informal Economy in South Asia: Need for a Rights Centred Approach' (2003) Delhi Law Review 24, 10; and K Sankaran, 'Legislating for the Informal Economy: The Challenges for Labour Law' (2008) Africa IIRA Congress 2008, Cape Town.
48 Cid, J D T S A M D, 'Decent Work and the Informal Economy in Central America' (2003) In, Department ILOPI (ed); S Freije, 'Informal Employment in Latin America and the Caribbean: Causes, Consequences and Policy Recommendations' In: Inter-American Development Bank S D D, Social Development Division (ed) Labor Markets Policy Briefs Series, 2001; ILO, 'ILO: Women and Men in the Informal Economy: A Statistical Picture' (Geneva, ILO 2002).
49 See n 28 above, 5.
50 *Ibid.*

the convergence of living standards across countries. One significant reason for this is productivity differences between the developing and developed world. Outside Asia, developing regions have lagged behind developed economies in labour productivity growth, raising the risk of a further divergence in living standards and limiting prospects for poverty reduction. Adjusted for differences in prices across countries, the average worker in a developing country produces less than one-fifth of the output of the average worker in a developed country.[51] Asia accounted for all of the catch-up in levels of labour productivity between the developing and developed world between 1991 and 2011, with other developing regions lagging behind.[52]

While working poverty has been on the decline, there has been a marked slowdown in progress since 2008. The ILO's projection based on pre-crisis (2002 to 2007) trends in the incidence of working poverty shows that the reduction of poverty has slowed, with a difference of 1.6 percentage points. This amounts to 50 million more working poor in 2011 than projected based on pre-crisis trends. Similarly, there are an estimated 55 million more workers in 2011 living with their families below the US$2-a-day poverty line than expected on the basis of pre-crisis trends.[53] Global aggregate is heavily influenced by the dramatic decline in extreme working poverty in the East Asia region, where, owing to rapid economic growth and poverty reduction in China, the number of poor workers has declined by 158 million since 2000 and by 24 million since 2007. Nearly 30 per cent of all workers in the world – more than 910 million – are living with their families below the US$2-a-day poverty line.[54] These workers and their dependants remain highly vulnerable to further economic shocks.

Part 3: Policy measures to address these problems

What can be done to address the effects of the crisis on workers and promote job growth? This part of the paper will focus on labour market regulation measures, and comment briefly on two other policy areas that require attention. Rather than focus on specific policies, this part of the paper discusses the role of institutions at the level of principle, or 'function'. It does not engage in debates about specific policy measures.

Labour market regulation and policy responses

Labour market regulation and policy responses to financial crises ought to counteract the broad negative trends within the labour market outlined in Part 2 of this chapter. Labour market policy tools should be harnessed to produce job growth, to ease the effects of job shedding on the new and long-term unemployed, and to assist with job seeking.

Labour market regulation is often viewed only in terms of its 'protective' functions, for instance, limits on firing people. As a consequence, labour laws are often blamed for creating labour market rigidity. However, 'regulation' is not just about setting rules – although this remains essential – it is more broadly about how best to bring about changes in behaviour: to shape market behaviour. Institutions are bundles of norms and conventions of varying degrees of formality and rigidity, which function to guide the behaviour of agents.[55] Because labour regulations can be seen as 'devices for regulating the expectations of actors under conditions of uncertainty',[56] they are particularly important for smoothing the effects of economic shocks. The impacts of regulations are heavily dependent on the labour market model. Societies can suffer from regulations that are either too high or too low, but it is difficult to predict which will be the case on the basis of modelling, since labour laws are both endogenous and implementation-dependent.[57]

51 See n 2 above, 11.
52 *Ibid.*
53 *Ibid*, 42.
54 *Ibid.*
55 S Deakin, and F Wilkinson, *The Law of The Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press 2005).
56 See n 16 above.
57 S Lee and D McCann, 'New Directions in Labour Regulation Research' In: S Lee and D McCann (eds), *Regulating for Decent Work: New Directions in Labour Market Regulation* (Geneva, ILO 2011).

An important function of labour market regulation is risk distribution.[58] This occurs through social insurance as well as rules regarding hiring and firing that distribute risk by stipulating who bears the cost of financial downturns for an organisation. Where the ease of firing is high, workers may bear the risk of a financial downturn as labour can be shed quickly rather than drawing upon other resources such as financial reserves or withholding dividends to owners. Where the ease of firing is low, the risk of financial downturns is distributed to other stakeholders. In practice, societies balance this risk in a variety of ways, and buffer the risk of job loss as a consequence of hiring and firing rules with a range of social security schemes. There are a range of mechanisms that can be used to distribute risk that are particularly important during recessions and in the aftermaths of financial shocks.[59]

Measures for employment and social protection

Stimulate employment generation by:

1. investing public resources for infrastructure of all types;
2. providing additional support through credit facilities, tax reductions and technical guidance to small enterprises in particular;
3. granting subsidies and reductions in social security contributions to enterprises to lower the cost of retaining workers in jobs and facilitating new hires; and
4. retaining workers in jobs through working time reductions, partial unemployment benefits, labour cost reductions and training schemes.

Provide income support to workers and families through:

1. extension of unemployment benefits;
2. extension of and adjustments in health benefits and old-age retirement benefits; and
3. expansion of cash transfer programmes and social assistance programmes.

Support unemployed and jobseekers through:

1. strengthening of public employment services; and
2. expansion of training programmes and facilities.

Stimulate social dialogue and consultations with business and labour on measures to counter the crisis through:

1. national and sectoral consultations between business and labour and with governments;
2. national and sectoral agreements between business, labour and with governments; and
3. enterprise consultations and agreements.

Targeting spending measures on the labour market can be highly effective. Estimates for advanced economies regarding different labour market instruments following the crisis show that both active and passive labour market policies have proven very effective in stimulating job creation and supporting incomes, in contrast with blunter stimulus measures.[60] Spending should therefore be on employment-rich instruments, which return revenue to governments in the mid-term.

Bargaining over wages and conditions is also a flexible way of distributing risk. Rather than using blunt tools to reduce wages, bargaining could occur at an enterprise and industry level to reduce either wages or hours of work to reflect the market conditions of the firm, conditional upon wage increases when economic conditions improve. Not all industries or enterprises are suffering from economic downturn at the same rate. Therefore blanket wages increases are not called for. Bargaining allows wage increases to be linked to productivity increases, ensuring that the gap between productivity increases and wages does not become larger.

The crisis presents an opportunity for developing countries to introduce or improve their weak

58 S Deakin, 'The Contribution of Labour Law to Economic and Human Development' In: S Marshall (ed) Labour Law and Development (Oxford, Hart/ILO forthcoming).

59 ILO, 'Protecting People, Promoting Jobs' (Geneva, ILO 2009).

60 *Ibid.*

or non-existent social security and expand on their limited capacity for information-gathering and programme evaluation. Crises also allow countries to reduce or remove ineffective policies in favour of equitable ones that promote long-term growth and better risk management. In the past, many countries have capitalised on this opportunity and successfully exited from their crises while also improving their policy frameworks in the long term. During the current crisis, in Singapore, Malaysia, the Philippines and Indonesia the governments have relied on the traditional adjustment strategies of their welfare regimes. This has resulted in a shift of the social burden to the family. In contrast, after the crisis, South Korea, Taiwan and Thailand began to expand their state social security systems.[61]

The *maintenance of demand for goods and services* is another function of labour market regulation. Low wages, for example, generate low aggregate demand, stifling local demand for new industrial products. This is one of the reasons that blanket wages decreases can be harmful for growth. It further undermines the extent to which the local economy is integrated or internally interlinked.[62] When an economy is not integrated, and imports outstrip exports, it can suffer from current account imbalances and precarious access for existing manufacturers to the goods and services required to produce, due to currency fluctuations and trade access issues. There are other means of stimulating demand. Fiscal policy is currently favoured. However, fiscal policies such as lowering interest rates have very little impact upon the poor in developing countries. Increasing income has a far greater impact upon the poor's ability to purchase goods and services.

Over the last 20 years there has been a decline in the real wages of the middle and bottom quintiles of income earners in many countries around the world. The share of wages in GDP has fallen further since 2010–2011 in all the large developed countries along with a further shift of income towards those in the managerial professions. For instance, in the eight decades before the recent recession, there was never a quarter when wage and salary income amounted to less than 45 per cent of the economy. Now the figure is below 44 per cent.[63] This produces low demand, contributing to a deepening of the recession.

The promotion of *empowerment* and *social cohesion* associated with rules that aim to promote economic opportunity and higher levels of equality is a further important function of labour market regulation.[64] Labour market regulation's contribution to redistribution of wealth also reflects this function. There are a number of other institutions that can also play a role in redistributing power and income and contributing to egalitarianism within societies. However, labour market institutions have generally taken forms that make them particularly well placed to perform this function. One reason that labour market institutions have been particularly good at playing a redistributive function is because they can operate independently of predatory or corrupt states. Labour market institutions, such as collective bargaining and wage-setting institutions often involve only labour and capital, or labour and capital alongside government. Where they are constituted democratically, they are a long-standing example of the deliberative and participatory decision-making forms, which have been trumpeted in the development literature as mechanisms for overcoming capture by elite groups and predatory states.[65] Labour market institutions need to be constituted so as to increase the bargaining power of workers in order to play a power and income redistributive role.[66]

The role of income redistribution to produce greater social cohesion is particularly pressing currently. A recent study conducted by the ILO found that in 57 out of 106 countries, the Social Unrest Index increased in 2011 compared to 2010. Europe, the Middle East, North Africa and Sub-Saharan Africa show the most heightened risk of social unrest. On average, Latin America – where there has been a degree of employment recovery and, in a few cases, improvements in job quality – has experienced a decline in the risk of social unrest.[67] This index suggests that there are considerable dangers in continuing with austerity measures at the cost of social cohesion and the promotion of equality.

61 K Busch, 'World Economic Crisis and the Welfare State' (2010) International Policy Analysis, Friedrich Ebert Stiftung.
62 B Sutcliffe, '100 Ways of Seeing an Unequal World' (Zed Books, 2001).
63 F Norris, 'For Business, Golden Days; For Workers, the Dross' *The New York Times* 25 November 2011.
64 See n 58 above.
65 J Elster, (ed) *Deliberative Democracy* (Cambridge University Press 1998), M A Melo and G Baiocchi, 'Deliberative Democracy and Local Governance: Towards a New Agenda' (2006) International Journal of Urban and Regional Research 30, 587–600.
66 A Santos, 'What Kind of "Flexiblity" in Labor and Employment Regulation for Economic Development?' 2007.
67 See n 41 above.

Financial regulation reform

National level financial regulation

Prospects for employment creation could improve substantially if current problems in the financial sector were properly addressed. The ILO recommends, in particular, a quick implementation of financial sector reforms and the setting up of an operational framework that encompasses both domestic and international financial market reforms to substantially help in reducing financial market volatility and stimulating employment growth.[68]

International financial regulation

The policy space available for responding to the third stage of the crisis is now limited. Deficit-financed public spending and monetary easing simultaneously implemented by many advanced and emerging economies at the beginning of the crisis is no longer a feasible option for all of them.[69] The large increase in public debt and ensuing concerns about the sustainability of public finances in some countries have forced those most exposed to rising sovereign debt risk premiums to implement strict belt-tightening.[70] Borrowing further in order to fund further stimulus that might spur jobs is therefore not an option for most countries.

Instead, further action needs to be taken to improve international financial regulation. The Basel guidelines were changed in response to deficiencies revealed by the crisis; however, more needs to occur. Under the third of the Basel Accords banks must triple the size of the capital reserves that they hold against losses. Yet as Martin Wolf says, 'This sounds tough, but only if one fails to realise that tripling almost nothing does not give one very much'.[71] Others have criticised requirements for bank equity holdings not only for being low but also for being imprecise, creating the risk of avoidance.[72] And banks continue to exert countervailing political pressure, arguing that any big changes would impede economic growth. Many also said that the Basel club's timetable, which was to have the proposals implemented by late 2012, was unrealistic. Clearly, such political dynamics still have a long way to travel.

One of the more significant developments in the financial arena is the increasing political support for the 'Robin Hood' or Tobin tax idea. This is a tax on financial transactions, which would serve the purpose of dampening financial speculation and reducing the size of the financial sector, while helping to finance important development objectives and/or insuring against future crises. For example, a tax at a rate of 0.1 per cent would be insignificant in relation to the transactions costs associated with international trade or long-term investments. On the other hand, daily transactions of US$3tn would yield revenue of US$30bn per day, or nearly US$1tn per year. The idea is that since this amount exceeds the total profits of the financial sector, an effective Tobin tax would imply a drastic reduction in the volume of short-term financial flows. On the other hand, revenue from a Tobin tax, while significant, would not be sufficient to replace the main existing sources of taxation such as income tax or company tax.

For many years, discussions of the Tobin tax have largely been the preserve of academics, or activist organisations such as the Paris-based Association for the Taxation of Financial Transactions and Aid to Citizens. Following the crisis, however, then French President Nicolas Sarkozy and several other government leaders endorsed the idea. In October 2012, the EC agreed to a eurozone 'coalition of the willing' to go ahead with a financial transaction tax, likely to be levied at 0.1 per cent on shares and bonds, and at 0.01 per cent on derivatives. This will provide a useful experiment, but for the tax to operate effectively it requires the participation of a far larger number of countries. Ideally, it would include all nations in the world, so as to avoid the creation of perverse incentives to set up Tobin tax

68 See n 2 above, 28–29.
69 *Ibid*, 13.
70 *Ibid*.
71 M Wolf, 'Basel III – too soft, not enough' Business Spectator, 15 September 2010.
72 A Admati, P Demarzo, M Hellwig and P Pfleiderer, 'Fallacies, Irrelevant Facts, and Myths in the Discussion of Capital Regulation: Why Bank Equity is Not 'Expensive' (2010) Rock Center for Corporate Governance at Stanford University Working Paper No 86, Stanford Graduate 'School of Business Research Paper No 2,065'.

havens. Nevertheless, the tax may provide funding for much-needed pro-employment policies. And if it is seen to be a success, more countries will likely join the scheme.

Part 4: Conclusion

Before boarding a plane on Saturday 18 October 2008 to meet President George W Bush, French President Nicolas Sarkozy proclaimed, 'Europe wants it. Europe demands it. Europe will get it.' The 'it' here is global financial regulation reform, which was seen to be necessary to stave off the spread of the US financial crisis. Almost four years later, we have no new global financial order, the crisis is still raging in Europe and it threatens the global economy once again.

Instead of tighter financial regulation, austerity policies and across-the-board cuts in public spending programmes are observed in Europe. These are likely to compound the problems in the labour market outlined in this paper. Past experience suggests that, in particular, labour market policies with income-support schemes have the potential for large and positive job creation effects. In contrast, cutting down on such programmes will further entrench problems in labour markets, making it more costly to reduce unemployment rates and creating a substantial drag on the recovery. Recent cuts in schemes that support jobseekers and the unemployed are likely to come with substantial long-term adverse consequences for labour market prospects.

Why hasn't reform, beyond small reforms to the Basel Accords and the introduction of a European Tobin tax experiment, been forthcoming? Perhaps the most significant reason that reform of the type needed to stem the boom and bust cycle has not occurred is simply because of the power of banks and financial institutions. This power is direct, in the form of lobbying and through representation where it matters. It is also indirect, and is related to fear. At a national level, the power of financial institutions has been well documented. In 2009 and early 2010, for instance, financial firms in the US spent US$1.3bn to lobby Congress during the passage of the Dodd-Frank Act.[73] This lobbying is seen to be responsible for the weakening of legislation in the areas of derivatives trading and shareholder rights. It is more difficult to trace the lobbying activities of banks and financial institutions at an international level, where there is no transparency required on expenditures of this type. However, we can assume that vast sums have been spent.

The fear of further instability may be more significant than the influence gained through lobbying activities. In some ways, indeed, it is the perception of instability that gives financial markets negotiating leverage. Nations must carry out austerity measures so as to pay debts or international deposit-protection agreements must be put in place 'or else' the markets will crash, devastating local economies. Governments are fearful of regulating finance or 'punishing' the banks in case it jeopardises fragile economic growth. As one former Fannie Mae official was quoted as saying in *The New York Times*, 'I am afraid that we risk pushing these guys off a cliff and we're going to have to bail out the banks again'.[74]

Streeck, for example, has argued that 'democratic capitalism' involves a fundamental contradiction between the interests of capital markets and those of voters or citizens. In the past, this tension has been put to one side by borrowing from the future, either in the form of public debt or private debt. The problem, according to Streeck, is that states have two sovereigns; their people *and* global markets. Politicians are increasingly being selected for their capacity to appease financial markets, rather than for their democratic credentials. According to Streeck:[75]

> '"People whisperers" are succeeded by "capital whisperers" who, it is hoped, know the secret tricks needed to ensure that investors receive their money back with compound interest. Since investor confidence is more important now than voter confidence, the ongoing takeover of power by the confidents of capital is seen by centre left and right alike as not a problem, but as the solution.'

This view may sound radical, but financial analysts share it. The highly influential Cheuvreux Crédit Agricole Group's political analysis section dismissed as unlikely François Hollande's claim that he

73 D Igan and P Mishra, 'Making Friends' 2011 Finance and Development 48.
74 N Schwartz, 'US Is Set to Sue a Dozen Big Banks Over Mortgages' The New York Times, 1 September 2011.
75 See n 5 above, 64–65:

would stand up to 'faceless' financial markets[76] and would put in place pro-growth policies instead of austerity measures:

> 'While shrewd from an electoral point of view, Hollande's strategy is sure to backfire once elected… François Hollande will have to displease either financial markets or voters right after the end of the 2012 electoral cycle, as he is sure to be unable to reconcile both'.[77]

Rather than expect individual countries to make stands of this nature, in the knowledge that they risk demoted Standard and Poor ratings, capital flight and sustained litigation, it would be simpler to put in place international and global policies and institutions that promote global economic stability. Otherwise, we risk further financial shocks and a deepening of the labour market crisis that the world is currently experiencing.

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76 F Hollande 'Hollande Campaign Speech' Le Bourget, 22 January 2012.
77 Doisy, 2012.

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Chapter 10

Global Financial Crisis, Corporate Responsibility and Poverty: GFC Taskforce Phase II

Dr Birgit Spiesshofer MCJ[1]

Introduction

The GFC, triggered by the collapse of the investment bank Lehman Brothers in 2008, was not only the result of individual irresponsible behaviour of some bankers, but also disclosed systemic failures of the financial system. The GFC had, and continues to have, severe negative social, economic and ecological impacts, in particular on the poorest in the world.[2] Funds are invested in the rescue of banks instead of feeding the poor.[3] The financial market moved from derivatives in real estate to the speculation in foodstuffs, leading to an increase in prices that some of the poorest can no longer afford to cover their basic needs. Credit shortages hit small enterprises, profit margins of suppliers in less-developed countries are tightened, unemployment is high and land grabbing becomes a rising claim[4] as agricultural land is discovered as an attractive and solid investment in uncertain times.[5]

Despite all these (and more) negative impacts, the GFC also had a cathartic effect insofar as it made the systemic failures, the misguided incentive schemes, the conflicts of interest and the disastrous consequences of the lack of efficient regulation and control transparent, and triggered a broad international discussion on corporate (social) responsibility (CSR), not confined to the financial sector and the First World, but encompassing business operations worldwide, in particular the supply chains in less-developed countries. If the CSR concept is developed in a realistic and efficient way it can improve working and living conditions in the long run everywhere, including the poorer countries, and alleviate poverty.

The GFC disclosed the destructive side of capitalism, suggesting that there need to be limitations and controls upon the financial systems that support it. The upside of market economies and competition is, however, the immense creative potential that should be challenged in an intelligent way to enhance the social, economic and ecological conditions at a global level.

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2 See Joachim von Braun, 'Food and Financial Crises: Implications for agriculture and the poor', December 2008, see www.ifpri.org/book-776/ourwork/researcharea/food-prices last accessed 12 October 2012; Katerina Kyrili and Matthew Martin, 'The Impact of the Global Economic Crisis on the Budgets of Low-Income Countries', research report for Oxfam, 29 July 2010, see www.oxfam.org last accessed 12 October 2012.

3 Jean Ziegler, 'Nahrungsmittelspekulation ist ein Verbrechen gegen die Menschlichkeit' (Food Speculation is a Crime against Humanity) Sueddeutsche Zeitung 20 September 2012, pointed out that in 2008 the World Food Program had a budget of US$6bn, which was reduced to US$2.8bn in 2012 due to the GFC.

4 See www.oxfam.org last accessed 12 October 2012.

5 See n 3 above.

Ethics and economics

The GFC revealed the limited effectiveness and inherent weakness of corporate policies demanding ethical business conduct, when economic incentives and constraints work against them. The flood of publications post-Lehman, branding the bankers' greed and claiming higher ethical standards for top management and employees,[6] disregard the systemic side,[7] that is the fact that in a competitive market economy moral behaviour is not only a matter to be left to individual character, virtue and strength, but also requires an institutional and regulatory framework that warrants that moral behaviour does not entail a severe (competitive) disadvantage, either for the individual employee or for the enterprise as such, but rather an advantage in the intra-company and marketplace competition. A business ethics approach requesting high moral standards for individuals without acknowledging the systemic aspects may create some heroes, but it will not unfold a decisive and sweeping influence, nor will it lead to a fundamental change of the rules of business conduct.[8] Its efficacy has been compared to that of a bicycle brake on an intercontinental jet.[9]

The decisive question is therefore how to translate ethics into economics; in particular, what are the economic and legal mechanisms and instruments, taking into consideration the means of competition and the rules of modern market economies, which compel or at least promote ethical behaviour in an efficient and sustainable way.

Karl Homann[10] correctly pointed out that competition is the imperative and central mechanism of modern market economies, and that there is an inherent tension between competition and moral requirements. Even business leaders with high moral standards cannot avoid striving for sustainable profit maximisation as in the competitive race they will be eliminated otherwise. Although there are business leaders and companies striving for fair (instead of maximum) profit margins, voluntarily taking into consideration societal needs besides economic goals, driven by the endeavour to be regarded as 'honourable merchants', the basic elements of market competition nonetheless cannot be disregarded. Therefore, moral intentions cannot be realised *against* the modern market economy, but only *in* it and *through* it; they have to become part of the regulatory frame and of the societal order in which businesses operate, and they have to apply to all competitors and have to be enforced equally in order to be effective and to avoid a distortion of competition.

Moral standards will be effective only if they are connected – by operation of law, technology or, in the internet age, by reputational impacts – with economically measureable negative or positive consequences, and with losses, costs or liability on one hand, or competitive advantages, ultimately translateable into profits, risk or cost avoidance, on the other. Moral appeals and condemnation of greed will be ineffective as long as the system allows, incentivises or even requires enterprises and their employees to cut corners. The conscience of an individual cannot compensate for the failure of the institution.

Homann[11] points out that the GFC was not, as is often described, the result of an irrational herd instinct of some irresponsible and insane bankers. The GFC was caused by – from a (short-term and isolated) personal and business economic point of view – completely rational behaviour, given the circumstances of an insufficiently regulated, ill-incentivised and opaque financial sector. Therefore any search for realistic and efficient solutions has to start with the acknowledgment of these facts. The call for a new framework for the financial sector and for business in general to enhance responsible and ethical behaviour and business conduct is valid, but has to be specified: the quantity of regulation is

6 See, eg, Julian Nida-Ruemelin, 'Die Optimierungsfalle' (The Optimization Trap) 2011 119ff, 295; Hans Küng, 'Projekt Weltethos' (Project World Ethos), 9th ed 2004, 51ff.

7 Karl Homann, 'Ethik, Vertrauen und die Ordnung der Wirtschaft' (Ethics, Confidence and the Economic Order), in Hans-Jürgen Papier and Karl Homann, *Freiheit und Moral* (Freedom and Morals) 2009, 22.

8 *Ibid*, 21ff; Karl Homann, 'Grundlagen einer Ethik der Globalisierung' (Foundations for an Ethics of Globalisation), in Heinrich v Pierer, Karl Homann and Gertrude Lübbe-Wolff, 'Zwischen Profit und Moral' (Between Profit and Morals) 2003, 35ff; Gertrude Lübbe-Wolff, 'Die Durchsetzung moralischer Standards in einer globalisierten Welt' (The Enforcement of Moral Standards in a Globalised World), *ibid*, 73ff; Niklas Luhmann, 'Wirtschaftsethik als Ethik?' (Economic Ethics as Ethics?) in Josef Wieland, 'Wirtschaftsethik und Theorie der Gesellschaft' (Economic Ethics and Theory of Society) 1993, 134, 145.

9 Ulrich Beck, 'Gegengifte. Die organisierte Unverantwortlichkeit' (Antidotes. The Organised Irresponsibility) 1988, 194.

10 See n 8 above.

11 See n 7 above, 24 et seq.

not decisive; the goal cannot be to suffocate or abolish competition, but rather to create smart rules, coherent with and embedded in the market economy, which curb, control and reduce the mechanisms with negative impacts on one hand, and support and utilise the positive potentials of competitive behaviour on the other, ensuring at the same time that compliance with these rules cannot be reduced to lip service or green, white or blue washing, but is integrated into the core strategies and internal rules and cultures of the various industry sectors and the individual companies. Otherwise, as Thomas Hobbes put it, life will be 'solitary, poor, nasty, brutish and short'.[12]

Besides numerous regulatory initiatives at the international and national level, designed to address the shortcomings and flaws that became apparent in the GFC, the financial sector seems to have got the message that it has to revise its business model in light of the public's fundamental loss of trust and credibility. It seems that the pressure of suffering is sufficiently high that the economic actors accept the necessity to submit to, or, at least to consider new rules.[13]

McKinsey & Company in October 2012 published a review on the banking industry, called 'The triple transformation: Achieving a sustainable business model'.[14] Besides analysing the economic challenges the banking sector faces, McKinsey recommends that banks should aim high, fundamentally transforming their economics, business models, and culture – they call it a 'triple transformation'. The report finds that a fundamental cultural change has begun, for example, through the redefinition of customer value and adjustment of compensation models. Undifferentiated business models will be reconfiguered based on three core capabilities: risk driven, customer-centric and infrastructure-driven. Regulation will lead to a reassessment of the benefits and challenges of size. As a critical component of the triple transformation, banks should examine their cultures carefully across four dimensions to ensure they are fostering value creation: balancing the interests of shareholders and society as a whole; creating value for customers; ensuring the soundness of internal processes; and influencing the mindset of employees. Directors and senior managers should view cultural transformation as a strategic business issue, not a public relations problem.

The following recommendations of the McKinsey report sound like CSR guidelines for the banking sector:

> '- Banks must not lose sight of the need to balance their duty to maximise profits against the potential cost to society of losses caused by excessive risk-taking. Any risks that could require taxpayers to provide funds to the bank, whether due to internal or external events, must be avoided.
>
> - Banks need to redouble their commitment to creating value for their customers, ensuring transparency and meeting best-practice standards for products and services. This includes treating all customers and counterparties fairly with regard to pricing, execution, and middle- and back-office services.
>
> - Internal processes in areas such as risk management and compliance must support the core values of safeguarding customer interests and meeting the bank's legitimate responsibilities to society as a whole. Risk policies and procedures and controls must be rigorous and consistently enforced across the organisation.
>
> - Executives should be rewarded not only on the basis of producing strong financial results, but also based on high ethical and business standards. Customer focus should be a key component of performance evaluation. Bank executives should also be aware of their role in the broader economy and make the case for the industry by proactively promoting the benefits of a healthy banking system.
>
> - Bank directors and executives must address the concerns of a variety of stakeholders: regulators, investors, customers, politicians, and the general public. If they fail to take the initiative on cultural transformation, change is likely to be imposed by outside forces – potentially endangering business models.'

Rainer Neske, member of the board of Deutsche Bank, played the same tune, stating that the

12 See n 7 above, 24.

13 *Ibid*, 25: actors will submit to new rules only under two conditions: (1) when the pressure of suffering is sufficiently high; and, (2) they have a rough idea about the possible solutions for the crisis.

14 Second McKinsey Annual Review on the banking industry October 2012, www.mckinsey.de/html/presse/2012/20121009_pm_global_banking_report.asp last accessed 27 March 2013.

shareholder value does not suffice as (sole) legitimation any more, but that measurable customer value has to become a fixed component of an integrated business strategy to legitimise the business model and to regain the trust of society.[15] Purely profitability-orientated incentive models shall be deserted in favour of a 'fair share' approach; customer benefits and shareholder value shall be equivalent parameters in the new business strategy and in the performance matrix. The new credo is: only a bank that generates sustainable customer value will generate sustainable shareholder value.

Brave new world? Fair share, stakeholder value equivalent to shareholder value – all problems solved? Shareholders of banks, including Deutsche Bank,[16] claim that the past, according to Neske, obviously purely or mainly profitability-orientated approach did not increase the shareholder value; to the contrary, the share price sank substantially and the dividends paid to the shareholders were poor. Against this background the question is: who benefited then if it were not the shareholders, and, is the antagonism shareholder value versus customer value really the decisive question, or, does it disguise deeper concerns that would require other instruments and remedies, such as a strengthening of the position of shareholders vis-à-vis the management to make sure that a strategy is implemented that generates sustainable profits for the shareholders, and, that the profits end up in the pockets of those who bear the entrepreneurial risks (the shareholders), rather than in the pockets of those of highly paid employees? Is the shareholder value really the antagonist to the customer or stakeholder value, or, could it be, that they are pointing, at least in certain respects, in the same direction?

A thorough analysis of the sources and roots of the GFC is required in order to evaluate whether the proclaimed new rules and their implementation have the potential to become efficient game changers, or whether they can come under attack as just another set of window dressing. Issues that need to be addressed in that context are, in particular, the transparency of products and services regarding cost and risks; conflicts of interest between customer value and profitability interests of banks and rating agencies; adequate and efficient due diligence and risk assessment methods both for internal and external evaluations; incentive schemes for bank employees that effectively change their position from seller of products (with the highest yield for the bank and for themselves) to customer adviser. An effective and credible turnaround would require that these and other key issues are addressed through a substantial alteration of the schemes, and, that the top management sends a clear message to the staff that the new rules will be enforced without exception. This message will be credible and successful only when there are no substantial economic incentives or constraints maintained or created that work against the new rules. It will be a challenge to reconcile profit maximisation interest of the bank on one hand and the customer value on the other within the organisation. The staff usually has a very fine sensibility for ambiguous messages. It is to be expected that outside stakeholders, in particular governmental agencies, consumer organisations or eventually new rating agencies (financed by customers) will challenge the implementation of the new rules and monitor their enforcement and efficiency.

In any event, the goal of any business is to generate profit; however, the critical question is how it is generated. Business does not operate in a vacuum but is dependent on the resources and the concurrence of society; in the GFC, banks were even existentially dependent on the willingness of society to rescue them. Society has to define the standards and conditions, connected with the operational and social licence to operate,[17] and it has to develop efficient means to enforce this framework, both to protect the interests of other stakeholders and society at large, and also in favour of a functioning market economy and undistorted competition. In addition, it will seek to protect and promote the survival of those enterprises that adhere to solid business and ethical standards. Even Milton Friedman, who is considered a 'hardcore' neoclassical liberal, acknowledged: 'We cannot avoid to draw a line between those who act responsibly and those who don't'. This means, however, that our ultimate goal, that is freedom, is essentially ambiguous. Paternalism is unavoidable with regard to those

15 Rainer Neske, 'Die neue Legitimation der Banken (The new Legitimation of the Banks), Die Bank 05/2010, at www.die-bank.de/banking/die-neue-legitimation-der-banken last accessed 12 October 2012.

16 See Georg Meck, 'Anshu Jain, Der Banker, der "The Deutsche" umbaut' (Anshu Jain, the Banker who Converts 'The Deutsche') Frankfurter Allgemeine Sonntagszeitung 7 October 2012.

17 See Jan Eijsbouts, 'Corporate responsibility, beyond voluntarism. Regulatory options to reinforce the licence to operate' Inaugural Lecture, Maastricht, 20 October 2011.

whom we do not consider to act responsibly.[18]

What, then, is the relationship between ethics and economics? The cynical standpoint is that ethics is about words; economics is about results. CSR, well understood, means that ethics is about results. Ethical claims will become effective (only) when they are translated and integrated into the framework within which businesses operate.

CSR – convenient escape or effective remedy?

The discussion on CSR is focused mainly on two issues: (a) the extension of corporate duties beyond profit maximisation to integrate social, ecological and wider community concerns into the DNA and strategy of an enterprise; and (b) the closing of the governance gaps created by globalisation, in particular, the creation of consistent standards applicable to the operations of corporations worldwide, including their supply chain.

Corporate responsibility – beyond profit maximisation?

'The business of business is business' – the famous statement by Milton Friedman, is often quoted to justify that a corporation may not legitimately pursue any other purposes besides profit maximisation. This quote, isolated from its context, overlooks, however, that Milton Friedman did not only acknowledge but request, as a precondition of a functioning market economy, an institutional framework. According to Friedman, government is necessary to stipulate the rules of the game, to supervise their compliance, take care of their enforcement and provide for conflict resolution between private parties. He realises that there are aspects, such as 'neighbourhood effects', in modern terms ecological issues, which the market cannot adequately address, or only at such tremendous cost that political instruments are preferable to market solutions.[19] Besides the general responsibility of market players to obey the laws, Friedman discusses, a specific 'social responsibility' of the owner of a monopoly.[20] His view on discrimination is logical and modern: a businessman who discriminates because of race, religion or the like does not only impose disadvantages on the discriminated person, but also upon himself. An entrepreneur who applies such preferences that are not economically motivated imposes on himself more disadvantages than an entrepreneur who does not discriminate. In a free market there will be a tendency to eliminate him.[21]

It is thus interesting to note that even a hardcore neoclassical liberal like Milton Friedman underlines the need for a framework within which business can and must operate. Josef Ackermann, the former CEO of Deutsche Bank, seconded Friedman by stating on several occasions that for a global capital market, globally applicable and consistent rules are needed.

The question is therefore, who and what constitutes the framework. The traditional approach, in particular, before the globalisation wave, is the one Milton Friedman pointed out: government and (in a democracy, the democratically legitimised bodies) are in charge of designing and enforcing the framework. This is well-known, solid ground, usually referred to as compliance with applicable laws and regulations that encompass, in particular in highly regulated areas like the EU or the US, a wide range of human rights, employment, environmental and business conduct issues such as corruption and money laundering, data protection and antitrust rules.

The EC stated in its Communication of 25 October 2011, called 'A renewed EU strategy 2011 – 14 for Corporate Social Responsibility',[22] that respect for applicable legislation, and for collective agreements between social partners, is a 'prerequisite' for meeting a corporation's social responsibility; it is, however, not the end. Whereas the EC had previously defined CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a *voluntary* basis',[23] the EC now promulgates a new definition of CSR as

18 Milton Friedman, *Kapitalismus und Freiheit (Capitalism and Freedom)* (7th edn, 1971, Piper, 2010).
19 *Ibid*, 46 et seq.
20 *Ibid*, 149 et seq.
21 *Ibid*, 135 et seq.
22 COM(2011) 681 final.
23 COM(2001) 366, emphasis added.

'the responsibility of enterprises for their impacts on society'.[24]

What is the difference between the two definfitions? Why did the EC see a necessity to claim corporate responsibility beyond the requirements and limitations spelled out in applicable laws? And, does this claim conflict with shareholder-centred national company laws?

The original CSR approach, developed in the EC's 2001 Green Paper,[25] promoting 'voluntary' social and environmental initiatives (beyond legal requirements), proved to be of limited effectiveness. Certain companies embraced CSR as a tool to differentiate themselves in a positive way in the market competition, others experimented with internal codes of conduct, with or without implementation, enforcement, auditing and certification schemes. An increasing number of companies signed up to the ten CSR principles of the UN Global Compact, the Business Social Compliance Intitiative or published sustainability reports according to the guidelines of the Global Reporting Initiative. In spite of this progress, CSR remained an issue for a small, select group of forerunners, mainly larger companies, and niche players.[26]

This is not surprising given the fact that CSR was considered mostly to be an extra burden, more bureaucracy; 'codemania' generated 'code fatigue' and the anxiety to incur liability if the company did not live up to the self-imposed and proclaimed standards.[27] As developed above, in a competitive market economy an enterprise will 'voluntarily' take on additional responsibilities, which are not part of the business framework (yet), only when it can assume that, at least in the long run, it will have a competitive advantage, for example, a higher attractiveness for consumers and business partners, better risk management, cost reductions, reputational upgrades or a technological advantage. Whether such advantages are detected and considered important enough to embark on a CSR exercise depends largely on subjective assessments and attitudes including cost–benefit considerations. Taking into consideration these mechanisms, it is not surprising that the EC's 'voluntary'-based strategy encountered only limited resonance and did and could not become a sweeping success.

In addition, the line between voluntary and mandatory commitments was never a sharp one, taking into consideration the multitude of hybrid instruments, such as emission trading schemes, corporate governance codes, legislation stipulating objectives without prescribing the instruments, and other guidelines and interpreting communications. The cacophony of guidance standards, codes and sustainability reportings did not help either as it could not provide certainty that a company was doing the right or even the best thing when it embraced one of the various concepts. Finally, the old approach focused only on the negative aspects of entrepreneurial activities and requested additional commitments and limitations, it disregarded the positive side of the competitive market economy, which is that enterprises can also contribute to society in a creative and positive way, for example, by developing new, environmentally friendly technologies, creative employment schemes and sustainable business strategies.

Based on these findings, the EC's new approach to define CSR as the responsibility of enterprises for their (positive and negative) impacts on society is more coherent with a competitive market economy, in particular, as it also addresses the positive and creative potential of business and calls on it as part of business's responsibility to the benefit of society. The EC, much to the dismay of European business organisations, but consistent with regard to the above findings that ethical claims have to be integrated into the (more or less binding) business framework in order to be effective, complements the new definition with an agenda for actions that will be rolled out until 2014. The action package contains a mix of instruments, in part the following: a) CSR aspects will be integrated into binding public procurement and other directives; b) states shall be required to develop simultaneously CSR-strategies and instruments and report on their progress; c) large businesses will be required to adopt international standards like the UN Global Compact, the ISO 26000 Guidance Standard on Social Responsibility, or the OECD Guidelines for Multinational Enterprises; and d) all businesses be required to respect human rights as spelled out in the UN Guiding Principles for business and human rights.

24 Emphasis added.

25 See n 20 above.

26 Sybren C de Hoo, 'In Pursuit of Corporate Sustainability and Responsibility: Past Cracking Perceptions and Creating Codes', Inaugural Lecture, Maastricht University, 20 October 2011.

27 See *Kasky v Nike Inc*, www.businesshumanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/NikelawsuitKaskyvNikeredenialoflabourabuses, last accessed 27 March 2013.

These are steps to integrate CSR concerns into the framework for business conduct. European business organisations protested against this 'hardening' of soft law and voluntary schemes. On the basis of the above findings, a consequent move to achieve a more widespread implementation has been undertaken. The EC plans to require intensive and detailed discussions in order to develop realistic and manageable guidance and to avoid the suffocation of business by bureaucracy, and that already existing legal standards are paraphrased as CSR or human rights requirements. Careful analysis will be required to identify how much of a gap exists between the already applicable social and environmental laws and society's expectations regarding corporations' responsibility; and, it is fair and necessary to discuss who, in a democracy shall have the authority to define 'society's expectations'. The role of stakeholders and the so-called 'courts of public opinion' deserve an intensive discussion.

Why is CSR deemed necessary at all?

The CSR discussion is closely connected with the globalisation of the economy in the past two decades. Whereas in the highly regulated areas such as the EU and the US most human rights, employment, environmental and business conduct expectations are spelled out in detail in laws and regulations, and robust enforcement and adjudication schemes exist, their reach is usually confined to business activities within the borders of the respective national states or EU territory. Globalisation entailed outsourcing and specification; substantial parts of the production of Western companies were outsourced to subsidiaries or suppliers operating in less-developed countries where the production costs were low due to low employment, safety and environmental standards. Apple computers, for example, outsourced its production partly to Foxconn, which hit the headlines because of disastrous working conditions. Mining companies have a substantial part of their operations in Third World countries, often facing environmental issues and human rights challenges, in particular, with regard to indigenous peoples' rights. Newer technologies like the internet, and also the international banking system, require worldwide applicable rules for their operations.

As the existing international law regarding social and environmental standards and business conduct is fragmentary, and new agreements, such as those on climate change, are hard to achieve, new instruments are required to answer the challenges of globalisation and to reduce the divide between developed countries with high social, safety and environmental standards on one hand and poor countries with low or non-existent standards, or the lack of efficient enforcement due to the lack of robust institutions or corruption on the other. 'Soft law' like the OECD Guidelines on Multinational Enterprises, which apply to the worldwide operations of companies situated in OECD countries, became imperative to bridge the governance gaps.

Another reason for the call for enhanced and extended corporate responsibility was the increasing economic and political power of large multinational companies. More than half of the largest economies in the world are multinational corporations.[28] Power and responsibility were considered as two sides of the same coin. In addition, phenomena like climate change or the GFC increased the awareness that uniform and coherent international action is required because of the global impact of corporate (mis)behaviour. The discussion on corporate responsibility was considered necessary in order to ensure that societal expectations are respected and taken into consideration (even) where the arm of efficient and binding regulation was too short.

Does CSR create a conflict with the shareholder value?

Milton Friedman[29] advocated that an entrepreneur has only one (social) responsibility: to maximise the profitability of the enterprise in favour of the shareholders, as long as the stipulated rules of the game are observed. Trade unions have the 'social responsibility' to represent the interests of their members. We all have, according to Friedman, the responsibility to design a legal structure that requires that a person pursuing her own interest, as if guided by Adam Smith's invisible hand,[30] achieves a goal

28 See 'Die 100 Größten' (The 100 Largest) Frankfurter Allgemeine Zeitung 4 July 2012; Paul Kirchhof, 'Das Gesetz der Hydra' (The Law of the Hydra) 2008, 264 et seq.

29 See n 19 above, 164 et seq.

30 *The Wealth of Nations* (1776), IV, 2, 421.

beneficial to society that was not necessarily part of her intention.

To the extent the expectations of society with regard to social and environmental concerns and business conduct are spelled out in binding legal instruments they are part of the framework within which the pursuit of the shareholder value may take place. Besides specified employment and environmental regulations, company law can also provide that directors have to take into consideration, as part of their duty of care, wider community concerns.

Sec 172 UK Companies Act 2006 stipulates that UK directors must promote the success of the company for the benefit of its members as a whole, and in doing so have regard to:

- the likely consequences of any decision in the long term;
- the interests of the company's employees;
- the need to foster the company's relationships with suppliers, customers and others;
- the impact of the company's operations on the community and the environment; and
- the desirability of the company maintaining a reputation for high standards of business conduct.

The Commentary to section 172 explains that this duty enshrines what is commonly referred to as the principle of 'enlightened shareholder value'. Having regard to the factors listed, the duty to exercise reasonable care, skill and diligence will apply (Section 174). It will not be sufficient to pay lip service to the factors, and, in many cases the directors will need to take action to comply with this aspect of the duty.[31]

The US Sarbanes Oxley Act 2001, the response to the corporate scandals at Enron, Tyco and WorldCom, mandated the Securities and Exchange Commission (SEC) to adopt stronger corporate governance requirements for listed companies. Following this mandate, the SEC instructed the US Stock Exchanges to require listed companies to adopt, monitor and enforce a code of conduct, typically encompassing the usual CSR topics.[32] The motivation was the protection of the company's reputation, thereby securing the shareholder value. The sanction was drastic: delisting.

In a similar way the Dutch Corporate Governance Code 2009 adopted CSR in Principle II.1 and integrated it into its Best Practice Provisions, which are subject to the 'comply or explain' requirement.[33] The Principle states that the management board is also responsible for CSR issues that are relevant to the enterprise. In discharging its role, the management board shall be guided by the interests of the company and its affiliated enterprises, taking into consideration the interests of the company's stakeholders. As part of best practice, the management board shall submit to the supervisory board for approval among others CSR issues that are relevant to the enterprise; the main elements shall be mentioned in the annual report. The company shall have an internal risk management and control system, whose instruments are among others a code of conduct, to be published on the website, and a system of monitoring and reporting; a whistleblowing arrangement shall be established.

In those countries where the company codes do not contain such explicit statements, the OECD Corporate Governance Principles 2004 may provide guidance. In the introductory remarks the remit of corporate governance is characterised as:

> 'Maximising value subject to meeting the corporation's financial, legal and other obligations. This inclusive definition stresses the need for board of directors to balance the interests of shareholders with those of other stakeholders – employees, customers, suppliers, investors, communities – in order to achieve long term sustained value.'

The EC states in its recent CSR Strategy that enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of:

- maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large; and
- identifying, preventing and mitigating their possible adverse impacts.[34]

In general it can be said that even when it is not explicitly spelled out, it is part of a director's duty to protect the shareholder value against reputational and financial risks, cost and liabilities, and also in

31 Commentaries no 325, 328.
32 See the corporate governance requirements of NYSE and Nasdaq; see also n 17 above, 42.
33 See n 17 above, 41 et seq.
34 COM(2011) 681 final, 6.

the long run, to take into consideration the interests of other stakeholders because recklessness in that regard may result in financial downsides, or, in the loss of opportunity and competitive advantages.

Another aspect of CSR, which shall only be mentioned here, is to what extent charitable contributions in the form of donations, or as community engagement (such as the construction of schools and hospitals) are considered. Milton Friedman dismissed such engagement as an abuse of the capital.[35] On the other hand, companies benefit in a multitude of ways by well-functioning communities, for example, through the availability for hire of persons who are well-educated by state institutions. As corporate citizens they usually spend limited amounts on cultural and social activities.

In summary, it can be concluded that corporate responsibility reaches way beyond profit maximisation and encompasses social, environmental and ethical concerns; partly explicitly spelled out by laws, partly implicitly contained as integral elements of the framework in which companies operate. Corporate responsibility encompasses both the request to do no harm and the expectation that entrepreneurial creativity will be used to improve social, environmental and community conditions.

CSR – harmonisation of business standards worldwide?

As indicated above, one of the main drivers of the CSR discussion is the divide between high social and environmental standards in the so-called First World and significantly lower protection in less-developed countries, with multinational enterprises cutting cost and avoiding the high requirements in their home states by outsourcing production and services to poor countries. A central claim of the CSR discussion is that multinationals should not abuse the weak governance structures in poor regions but adhere basically to the same standards in their conduct worldwide, thereby raising the standard of living for the poor and avoiding environmental damages in the less-developed countries. Although the GFC rather exacerbated the problems in the poor countries, it has one positive aspect: the spotlight is on corporate responsibility, not limited to the financial sector.

A number of multinationals have responded to this claim for worldwide coherent standards and signed on to international guidelines like the UN Global Compact, the OECD Guidelines for Multinational Enterprises, or industry specific codes like the Business Social Compliance Initiative (BSCI) for the textile industry or the Extractive Industries Transparency Initiative (EITI) for the mining industry, or their own self-imposed codes of conduct. All these approaches contain voluntary standards, partly including supervision by independent auditing and certification organisations.

At the IBA's Annual Conference in Dublin in October 2012, representatives of some African countries claimed that CSR is a convenient escape for multinationals from facing their real responsibilities as they only voluntarily adhere to certain standards (or not) and assume that they fulfil their social responsibility by building schools and hospitals for the communities in which they operate without addressing the core requests for better working conditions, higher wages and environmental and community protection. It was also pointed out that in a lot of countries subsidiaries of multinationals are public–private partnerships, such as Shell in Nigeria. It was stated that in these situations, where the state is at the same time entrepreneur and regulator, the state faces an inherent conflict of interest, which is often solved at the expense of regulatory enforcement.

Others reject CSR as a paternalistic approach of Western companies and would prefer to see an empowerment of local trade unions and civil society groups to claim and fight effectively for their own rights and environmental protection as they define it. The criticism coming from Islamic countries points in the same direction; some reject the human rights concept as an emanation of Western culture and as part of an imperialistic strategy, in particular, of the US. They claim that they would like to spell out their expectations regarding corporate responsibility in line with their own cultural values and rules. For a multinational enterprise adhering to Western values this claim can create a conflict.

One of the most pressing issues is how social and environmental standards can become more stringent to protect employees, communities and the environment in poor countries.

Financing institutions like the World Bank and the International Finance Corporation are important trendsetters as their financing is usually contingent on the adherence to and implementation of a whole body of social, safety, environmental and corporate governance rules which form part of the

35 See n 19 above, 166 et seq.

financing agreements and become thereby 'hard', contractually enforceable law.

Supply chain management can also be an efficient translator of CSR standards in poor countries as the CSR requirements are usually spelled out in the procurement procedure and become thereafter part of the supply contracts, often combined with due diligence, auditing and certification requirements.

Another aspect, also binding multinationals with regard to their activities in less developed countries is the extraterritorial application of (Western) national laws, well known in the field of corruption, but also discussed with regard to environmental standards so that Western companies must adhere to the national laws of their home state abroad and may be sanctioned for violations committed outside of their home state according to their domestic laws by their home governments.

A relatively new development is that citizens of African countries file lawsuits in US and European courts against Western parent companies based on the allegation that their subsidiaries violated human rights in the claimants' home countries. In *Kiobel v Royal Dutch Petroleum Co*, the US Supreme Court had to decide whether Nigerian plaintiffs can seek legal protection against Royal Dutch Shell in US courts for human rights violations allegedly committed by a Shell subsidiary in Nigeria, based on the US Alien Tort Statute. The list of *amicus curiae* briefs, also on behalf of European business organisations, shows the eminent economic importance of this question; in particular non-US-based business is afraid to become subject to the enormous damages awards of US courts.[36] Shell faces additional damages claims filed by Nigerian farmers in Dutch and UK courts for environmental oil contamination in the Niger Delta. The Hague Court admitted the claim of four Nigerian farmers who are supported by the Dutch environmental organisation Milieudefensie. The case in The Hague is a precedent, which can have a massive impact as thousands of farmers are suffering from the oil contamination in the Niger Delta, and many multinational companies have their headquarters in the Netherlands.[37]

Summary and outlook

Besides all the negative impacts, the GFC also generated a positive result: the spotlight is on corporate responsibility. In a competitive market economy, ethical, social and environmental requirements have to be translated into the framework within which businesses (may) operate. In highly regulated areas like North America or the EU, society's expectations are mostly spelled out in laws, supported by robust enforcement and adjudication schemes. The GFC revealed, however, that with regard to the banking sector, the framework was insufficient and flawed. New legal and business rules will bring about an effective change of the game only if they address the basics, in particular, economic mechanisms and incentive schemes. Corporate responsibility requirements beyond profit maximisation and shareholder value are legitimate, even when they are not explicitly spelled out in social and environmental laws; they can improve the working and living conditions in the poor countries and reduce the negative environmental footprint of multinationals in less-developed regions; they can incentivise the creative potential of companies and use the mechanisms of competition to develop more sustainable solutions and technologies.

We will see an increasing integration of ethical, social and environmental concerns into the framework allowing and steering business conduct, and we will also hear more discussion about extraterritorial application or effect of national laws and about the standing of Third World citizens who aspire to hold parent companies liable in First World courts for alleged environmental or human rights violations of their subsidiaries in Third World countries.

36 See 'Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Volker Beck ua' (Response of the Federal Government to a Request of the Member of Parliament Volker Beck) BT DS 17/9867 v 5.6.2012; Brief of the Federal Republic of Germany as Amicus Curiae in Support of Respondents of February 2, 2012 and Supplemental Brief of Volker Beck and Christoph Strässer, Members of Parliament of the Federal Republic of Germany, Amici Curiae in Support of Petitioners; see also *Chandler v Cape plc*, (2012) EWCA Civ 525, www.business-humanrights.org; the parent company was directly liable towards the employees of its subsidiary on the basis of a 'duty of care'.

37 See Frankfurter Allgemeine Zeitung 12 October 2012; www.tagesschau.de/shell114.html, last accessed 27 March 2013.

Chapter 11

The Roles of Lawyers in Steering Corporate Governance and Responsibility Towards Addressing Social Injustice and Inequality

Professor Bryan Horrigan[1]

Introduction

The fundamental question for the global legal profession

Is the global legal profession ready to embrace action on poverty abroad and at home as an integral aspect of the profession's own socio-ethical, professional and even legal responsibilities?[2] Put another way, can lawyers fully embrace service to the poor, the homeless and the otherwise needy on all of the levels that matter in a fully functional legal system? This means embracing the members of such communities as clients (even on pro bono terms) owed professional obligations, as disadvantaged members of local communities within the ambit of the legal profession's own corporate social responsibilities, as stakeholders whose lives are affected for better or for worse by the actions of businesses advised by lawyers, and as citizens whose denial of access to justice and basic human rights enjoyed by the middle class and the rich puts the administration of justice and the rule of law seriously to the test.

Few contemporary questions for the legal profession are as fundamental and – for some lawyers – confronting as these questions. The global legal fraternity and those who regulate them and use their services must embrace fully the multi-dimensional roles and responsibilities of lawyers in this grand global project of fighting poverty.

Framing the fundamental questions in this way is significant on five distinct but related levels. First, put in these terms, the questions suggest a connecting thread between what lawyers and business enterprises do (or do not do) and the endgame of alleviating and even eliminating poverty. In other words, the action or inaction of the global legal profession makes a difference to what happens to people afflicted by poverty and its ravages – hunger, malnutrition, disease and denial of basic human rights.

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2 This paper draws and builds upon some of the author's previous work on transnational CSR and corporate governance, focused more particularly on the law and poverty. The paper does so through the prism of connections between CSR and corporate governance, business enterprises (including legal organisations) and human rights, and the roles and responsibilities of legal and business professionals, all in the fight against poverty in a just society governed by the rule of law.

Secondly, such questions raise the prospect that the universalisation of human rights in law cannot really succeed without realisation of the human rights denied to mass populations worldwide by conditions of poverty. The multiple human rights integrally connected to poverty eradication include socio-economic rights (eg, rights to everyday subsistence, meaningful work, minimum wages, basic education, secure housing, etc) and related political and civil rights (eg, freedom of speech, advocacy, association and movement).

Thirdly, the questions posed at the outset focus attention on the thinking, regulation and behaviour of corporations, financial institutions and other market participants in meeting socio-economic needs (including poverty eradication) under post-GFC conditions. This focus is justified by the combined role of finance, investment and law in alleviating or alternatively exacerbating conditions of poverty.

Fourthly, the questions require an approach to contemporary corporate governance, responsibility and sustainability that cuts across the distinct ideas and practices that are conventionally associated with notions such as corporate governance, corporate social responsibility (CSR), 'the triple bottom line',[3] socially responsible investing (SRI) and reference to environmental, social and governance (ESG) considerations in corporate, financial and investment affairs. Finally, such questions not only point towards key roles and responsibilities in this grand project for lawyers across all arms of the global legal profession – in government, the courts, the legal academy, the Bar and law firms, and in business and NGOs – but also intimate that successful completion of this project is not possible without such a collective effort across the profession and with others in key governmental, business and societal roles.

The human face of these dimensions and concepts must be confronted. When we say in the abstract that lawyers have regulatory, advisory, litigious and other roles involving business enterprises (including law as a business enterprise in its own right) that can improve or worsen the conditions of poverty-stricken communities and hence promote or detract from the full universalisation of human rights, such abstractions sometimes cloud the harsh reality of poverty at its global, local and personal levels. Once we make the connections between the legal profession's social responsibility, business enterprises, human rights and poverty, this new lens allows lawyers and others to see some conventional aspects of their work in an unconventional perspective.

For example, a multinational corporation whose actions along its global supply and distribution chain exploit local environments, communities and employees in developing economies rightly faces not only a reputational risk but also possible community castigation as an abuser of human rights and a contributor to poverty. Public policies and business actions in one corner of the globe that contribute to investment speculation in global financial markets in basic foods, agricultural produce and other resources also contribute to poverty, starvation and illness.[4] Lawyers who take CSR and human rights seriously must also take poverty as a central aspect of human rights and social responsibility seriously too.

The need to reframe lawyerly roles and responsibilities in fighting poverty

Landmark shifts in perspective are needed to develop mainstream acceptance of the connection between poverty, law and the correlative responsibilities of lawyers. Similar landmark shifts in reframing individual and collective responsibilities have occurred in related contexts. For example, consider first the relationship between nuclear weapons and socio-ethical responsibilities. Whatever its pragmatic value, the nuclear deterrence policy of the East and West during the Cold War and its aftermath cannot withstand serious socio-ethical scrutiny after its exposure as a serious offence to principles of common morality that transcend national boundaries and historical eras.[5] Once the inherent immorality of the policy of mutually assured destruction (MAD, the deterrence policy) lies exposed, because of its inherent threat to many innocent civilian lives, commanders of nuclear submarines and political leaders of countries with nuclear weapons each hold flow-on socio-ethical responsibilities not to use or even threaten the use of such weapons.[6]

3 John Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (Capstone Publishing 1999).
4 See, eg, 'The Economics of Curbing Speculation in Food, Water and Vital Resources', CSRWire Daily News Alert, 30 November 2012.
5 John Finnis, Joseph Boyle and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (Clarendon Press 1987).
6 *Ibid*, 347–354.

Next, reconceive this connection between nuclear weapons and socio-ethical responsibilities through the prism of human rights. The universalisation of human rights assumes significance beyond the 20th-century's Second World War that is unimaginable but for the human rights atrocities and other international war crimes of that conflict. In his latest book, Jeffery Robertson QC unifies all of these dimensions in his claim that we must abandon any post-Cold War complacency about nuclear weapons, take seriously the risk of rogue states holding nuclear weapons, and reframe our response to this risk as a fundamental threat to universal human rights, and not simply a matter of disarmament and international humanitarian law.[7]

This is far from being an esoteric academic argument, because 'nuclear weapons in themselves breach the most fundamental of human rights, the right not to be arbitrarily deprived of life, and soon will be in the grasp of men whose abuses of their own people are barbaric'.[8] Robertson's evocative imagery and conclusion explicitly reveal the landmark shift in perspective that is needed for remedial action to take root, given the imperatives that 21st-century society assigns to universal human rights: 'Unless nuclear weapons are viewed through the prism of human rights, and the capacity to make them is denied to human rights abusers and then to all other states, sooner or later a nuclear winter will change the climate before climate change changes it'.[9]

Could we be on the verge of a similar realisation of the true links between another geopolitical challenge (ie, global poverty), human rights and law, with correlative collective and individual responsibilities for the legal and business professions? On many fronts, the shared responsibility and response of organisations across the public, private and community sectors is being increasingly recognised as the only viable solution to a range of global 'wicked' problems, not least of which is the alleviation and eventual eradication of poverty in all of the communities (including communities that are part of a business supply and distribution chain) in which any business (including law firms) does business. Businesses of all kinds have corporate social responsibilities.[10] Those responsibilities embrace the recognition and practice of supporting human rights. Poverty is intertwined with concerns about human rights. Inevitably, we are drawn towards the conclusion that the universalisation of human rights can only succeed if the legal and business professions play their part, and cannot be realised fully while poverty remains at its present levels worldwide.

The impact of the GFC and the 21st-century business environment

The onset and continuing aftermath of the 2008–2009 GFC offers a timely reminder of the need for vigilance in ensuring that systems and practices of corporate governance and responsibility serve the right balance of societal interests in the right ways. The GFC also raises multi-dimensional issues about the balance between free markets and regulatory intervention, the relationship between democracy and capitalism, the interdependence of developed and developing economies and the interaction between business and society.

The GFC and its ongoing fall-out therefore place the spotlight once again on conceptions and practices of governance at all levels of society. 'Governance in the broad sense is open for debate – the role of the state, international cooperation, the scope of prudential regulation, the role of boards of directors and in particular risk management procedures and capital adequacy requirements are all being questioned', in the pithy assessment of one leading Anglo-Australian corporate law and governance scholar.[11]

All of these issues have connections to the governance, regulation and behaviour of business organisations of all kinds, from multinational corporations (MNCs) and their global supply and distribution networks and customers, to small to medium-sized enterprises (SMEs), new social enterprises and partnerships across the public, private and community (including NGO) sectors. In

7 Geoffrey Robertson, *Mullahs without Mercy: Human Rights and Nuclear Weapons* (Vintage Books 2012) 6, 11, 341; Karren Kissane, 'Crusading Lawyer Drops a Bomb or Two' The Saturday Age (Melbourne) 8 December 2012, 16.

8 *Ibid*, 6.

9 *Ibid*, 11.

10 For further argument and illustration, see, eg, Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar 2012).

11 John Farrar, 'The Global Financial Crisis and the Governance of Financial Institutions' (2010) 24(3) Australian Journal of Corporate Law 227.

turn, those connections raise their own issues about the variety of roles for lawyers in this grand global enterprise. So, in the wake of the GFC, and its exposure of market exploitation, irresponsible financing and securitisation, and resultant socio-economic harm, legitimate questions can be asked about the multiple roles that all arms of the legal profession can play in fostering a new approach to corporate governance, responsibility and sustainability worldwide in alleviating social injustice and inequality in general and poverty and all of its deprivations in particular.

Three basic ideas for lawyers to embrace

Moving this agenda forward is not possible unless we frame and act upon three fundamental ideas. The first idea is that the global challenge of successful action on poverty is now a fundamental benchmark for the success or failure of the universalisation of human rights, whatever dimensions or characterisations each of poverty and human rights might possess. The second idea is that confronting the underlying causes and effects of poverty in local communities across the globe as an aspect of fundamental human rights is now an issue of societal responsibility for business enterprises of all kinds, from MNCs, SMEs and other business enterprises (including professional services, firms, barristers' chambers and legal professional associations) to state-owned enterprises, transnational institutions and community bodies, and hence part of a new, essential and truly transnational approach to corporate governance, responsibility and sustainability in the 21st century. The third and final idea is that all arms of the legal profession have significant, coexistent and interactive roles in confronting global poverty as part of the broader social responsibility and accountability of the global legal profession as a whole, especially (but not exclusively) in the interactions between lawyers, business and human rights. If lawyers accept these ideas, they must also accept a responsibility to act on them.

Accepting this responsibility requires lawyers to work through important issues of ethical, professional and legal duties. For example, can lawyers completely avoid responsibility for the law's harmful impact upon human rights and related poverty conditions by seeking refuge in professional obligations to clients as currently conceived? The opportunities and dilemmas on this level can be illustrated as follows:

> 'Increasingly, law firms are being 'named and shamed' for whom they represent and advise. A recent example is the controversy around distressed sovereign debt or 'vulture funds', which target poor countries who are receiving international debt relief, buy their debt, often just before those debts are to be written off, and then sue the country for the full amount.
>
> 'The UN Independent Expert on Foreign Debt has said that these suits can have major adverse impacts on human rights in poor countries, because they divert funds that could otherwise be spent on health, water and sanitation, food, housing and education. Several major London law firms received negative publicity for pursuing such collection claims in court and some have since publicly stated that they will not act for these entities when they are engaging in these criticised transactions. In response to the controversy, the UK has recently enacted legislation that restricts the availability of its courts for vulture fund collection suits.
>
> 'Yet it is a core principle of the legal profession that all clients are entitled to legal advice and representation, whether nor not the lawyer personally agrees with their objectives. This is central to most notions of access to justice and the rule of law, which is a foundation for the corporate responsibility to respect human rights. Moreover, the obligations of a law firm to serve the interests of its clients faithfully, and to maintain the confidentiality of lawyer–client communications, are embedded in the professional legal standards that lawyers are sworn to observe.'[12]

These are serious issues and points of tension for well-intentioned lawyers, and they deserve to be worked through in their full ethical, professional and legal dimensions. However, notwithstanding such concerns, the bottom line is that lawyers need to avoid complicity in human rights harm.[13] Lawyers

12 Discussion Paper, 'Law Firms' Implementation of the Guiding Principles on Business and Human Rights', A4ID (Lawyers eradicating Poverty), November 2011, 17.

13 On this and following points in this paragraph, see the discussion and suggested actions in: Discussion Paper, 'Law Firms' Implementation of the Guiding Principles on Business and Human Rights', Advocates for International Development (Lawyers eradicating Poverty), November 2011, 17–23.

face choices about screening and representing particular kinds of clients and the circumstances under which they will and will not do so. Increasingly, law firms confront reviews of their own track record as virtuous organisations, as part of public and NGO scrutiny of organisational irresponsibility in the digital age, or under client audits of law firms as their business services providers.

Neither the content of lawyers' ethical codes and professional obligations, nor the overriding imperative to provide legal rather than commercial or ethical advice to clients, can preclude meaningful consideration of possible human rights consequences and other harm to local communities affected by clients' actions, especially under 21st-century business conditions in which political, regulatory, financial, social and other risks can legitimately figure in professional advice. Finally, whatever the outcome of such reflections about their own socio-ethical stances and their obligations to clients, lawyers also have obligations to their profession and the broader administration of justice that generate other roles and responsibilities for lawyers concerning human rights and poverty, including legal and policy advocacy and reform that makes it harder rather than easier for any business to exploit the poor and gain 'neutral' legal help in doing so.

Framing the roles of the legal profession in fighting poverty

Categorising lawyerly roles

Law wears many guises — an academic discipline (ie, law), a profession (ie, the legal profession), a business (eg, a profitable law firm), a system (ie, the legal system), a part of government (eg, law-making courts and legislatures), a public good (eg, social justice) and a core feature of democratic governance (ie, the rule of law). In the present context, all arms of the legal profession owe fidelity to law's higher-order ideals. For all arms of the broader legal profession, this means taking seriously their implicit commitment to the public goods of law-making, law reform and social justice under the rule of law, in ways that keep pace with 21st-century democratic governance and regulation, and might even extend beyond existing worthy initiatives by the legal profession as a whole.

The various possible roles for the legal profession in this grand global justice enterprise can be summarised for the purposes of this discussion as follows. Each arm of the global legal profession has a part to play in each role, to one degree or another. In that sense, the roles are function-based, rather than lawyer-based. Importantly, none of these roles are at large. While there are many ways in which lawyers worldwide might contribute collectively or individually to solving global poverty, the main emphasis here is upon the connecting thread between lawyers' societal responsibility concerning the contribution of business enterprises (including law firms and other legal organisations as business enterprises) to eradicating global poverty as an aspect of universal human rights.

Viewed in that light, the various roles of the different arms of the global legal profession in this context might be characterised as follows:

- theory-building, research and scholarship;
- legal and regulatory literacy;
- law-making and other standard-setting;
- public policy and advocacy;
- legal education and training;
- internal and external legal advice;
- adjudication, enforcement and monitoring; and
- individual social justice commitments.

Jeffrey Sachs, the Special Adviser to the UN Secretary-General on the Millennium Development Goals, which directly focus upon addressing poverty worldwide, offers a suitable starting point from which to begin examining the roles and responsibilities of lawyers across the public, private and community sectors in addressing poverty under post-GFC conditions:

> 'The marketplace does have some elements of basic fairness: hard work can produce a higher income; laziness is punished (b)ut the fairness of the marketplace should not be exaggerated… Whole regions of America and other countries have faced deep economic crisis because of shifts in global market conditions that are far beyond anyone's control. In all of these cases, the

> marketplace can be brutally unsentimental, leaving the poor to starve or die from illnesses and neglect, unless society steps forward through government or charitable relief.
>
> 'Just as there are many people who don't deserve their poverty, there are many others who don't deserve their wealth… Wall Street bankers took home tens of billions of dollars in Christmas bonuses each year in the lead-up to the 2008 financial meltdown, just as they were driving their firms toward bankruptcy. Several of America's best-paid CEOs in the past decade led their companies into illegality, bankruptcy, or both.
>
> 'Amazingly, even when Wall Street required government transfers to stay alive in 2009, the megabonuses persisted (and the White House looked the other way because Wall Street had financed Obama's 2008 campaign)…
>
> 'Despite the claims of free-market advocates, virtually all societies throughout history have organised governmental means to ensure support for the poorest among them. Most have also placed a special responsibility on the rich to pay their share. Until the last two centuries, however, the extent of poverty was so pervasive that there was often not much that society could really do for the poor beyond emergency relief (in the case of a famine, for example). Now, with our great affluence, we can do much more. Indeed, I argued in *The End of Poverty* that we can actually end extreme poverty once and for all in our generation if the rich will accept their share of the effort to help raise the education, health, and productivity of the poor.'[14]

Whatever anyone's views of Sachs' conclusion, there are connections made and issues raised even in these short paragraphs that are hard for lawyers to ignore in terms of their own societal, organisational and individual responsibilities concerning poverty. Lawyers have roles in public, private and community organisations that can make a difference to poverty. Lawyers also have roles as internal and external advisers to corporations and other business enterprises that go to basic questions of corporate liability, accountability and responsibility for the effects of poverty in communities affected by those businesses. Lawyers operate within regulatory institutions whose actions directly or indirectly impact upon poor communities, and whose shortcomings are revealed in collective regulatory failures across the globe, which contribute to phenomena such as the GFC. Lawyers facilitate business transactions, engage in public advocacy for clients and conduct other activities that produce or curb laws and other forms of regulation that directly or indirectly affect poverty for someone, somewhere in the world. Lawyers who take seriously an organisational commitment to CSR or an individual commitment to social justice can do various things that might improve conditions of poverty, hunger, disease and so on.

One important step that cuts across many of the foregoing lawyerly activities is for lawyers in all arms of the legal profession to participate in standard-setting initiatives that address the problem of poverty. These standard-setting initiatives must be developed under contemporary conditions of governance and regulation, where governmental and non-governmental actors contribute to a variety of 'hard' and 'soft' laws. In democracy's 21st-century form, this includes lawyerly involvement in aspects of the democratic process crystallised by the US Supreme Court's Justice Stephen Breyer for the American Society of International Law in 2003. On Justice Breyer's view, there is an active alliance of academics, professionals and other non-governmental groups engaged with governmental actors in standard-setting that ultimately results in new and reformed laws.

A similar coalition of interests at national and international levels are involved in a variety of multi-stakeholder standard-setting initiatives that produce 'soft' law that later garners enough support to become transformed into 'hard' law. This organic 'bottom up' (as distinct from 'top down') view of law-shaping is another prong of democracy's contemporary evolution from simple majoritarian rule to a more citizen-engaged form, which Justice Breyer describes from an American standpoint as follows:

> 'Finally, the transnational law that is being created is not simply a product of treaty-writers, legislatures or courts. We in America know full well that in a democracy, law, perhaps most law, is not decreed from on high but bubbles up from the interested publics, affected groups, specialists, legislatures, and others, all interacting through meetings, journal articles, the

14 Jeffrey Sachs, *The Price of Civilisation: Reawakening Virtue and Prosperity after the Economic Fall* (Vintage 2012) 39–40.

> popular press, legislative hearings, and in many other ways. That is the democratic process in action. Legislation typically comes long after this process has been under way. Judicial decisions, particularly from our [US Supreme] Court, work best when they come last, after experience has made the consequences of legislation apparent.'[15]

Another necessary step is for lawyers in all arms of the legal profession to support or undertake the research that is necessary to investigate and address the links between law, human rights and poverty. This research includes cross-disciplinary and cross-jurisdictional theory-building for reform of international and national law and policy, evidence-based assessment of existing regulation and its gaps, and case studies on the legal, financial and investment architecture's impact upon human rights and poverty.

Despite all of the attention now given to, for example, CSR, ESG and human rights concerns and correlative tools for investment decision-making and business reporting, large areas of the relationship between finance, investment and law surrounding these concerns lie relatively untouched by investigation, standard-setting and remedial action.[16] Existing CSR-related decision-making and reporting measures do not address much of the socio-economic harm (including poverty) caused by irresponsible lending, sub-prime mortgages, securitisation of debt and other finance and security arrangements that the GFC has called into question.

Lawyers therefore have many different roles in a variety of public, organisational and personal capacities, all of which relate to the interaction between business and society in ways that address social inequality and injustice. In particular, these roles and capacities bear upon discrete facets of a holistic and embedded approach to corporate governance, responsibility and sustainability. Such an approach has much to offer in connecting the role of law and regulation, the work of lawyers and ongoing global challenges in achieving socio-economic prosperity and a civil society.

For that reason, the remainder of this chapter concentrates mainly upon two key lawyerly roles and responsibilities affecting poverty. They concern lawyers as professional advisers to organisational clients whose activities improve or exacerbate the conditions surrounding poverty, and lawyers as members of legal organisations, which, as business enterprises in their own right, must respect human rights whose fulfilment or abuse also affects poverty. In both cases, a legal and regulatory lens on corporate governance and CSR through the prism of business responsibility for human rights offers important insights on some of the most dramatic ways in which lawyers can do something about poverty.

Roles of the legal academy

The academic arm of the legal profession worldwide has a variety of roles in teaching, research and public policy development that align good corporate governance and responsibility with societal goals of eradicating social inequality and injustice. This includes the inculcation of ethics of social, business and professional responsibility in law and business school courses, public advocacy and thought leadership in developing appropriate models and regulation for responsible lending and business, and contributions to discipline-based and cross-disciplinary research that facilitates business contributions to socio-economic prosperity as well as the curbing of corporate irresponsibility and harm.

Despite the considerable post-GFC attention in business schools and business literature worldwide to the heightened need for business ethics in business education, training and practice, relatively less prominence has been given to the question of legal ethics and the professional responsibility of lawyers in facilitating corporate responsibility and preventing corporate irresponsibility. Here, contemporary calls for 'shared value', 'enlightened shareholder value' and compassionate, responsible and sustainable capitalism all reflect the struggle to find new ways of understanding the relationship between business, markets and society in the 21st century.

For example, the conversion to 'shared value', long-term business success, sustainable business practices and meaningful stakeholder engagement closes the gap between shareholder-centred concerns, societal concerns and the drivers of true business success in society. In this way, true business

15 Stephen Breyer, 'The Supreme Court and the New International Law' (Speech delivered at the Omni Shoreham Hotel, Washington, DC, 4 April 2003).

16 Mary Dowell-Jones and David Kinley, 'Minding the Gap: Global Finance and Human Rights' (2011) 25(2) Ethics & International Affairs 183.

value to society is viewed in terms of sustainable business success and its interdependence with broader societal systems. This has correlative implications for the operation of business and its multi-dimensional relationship to poverty, especially in the form of poor consumers, poor employees and poor communities along a business enterprise's value chain.

Roles of legal practitioners

The practising arm of the broader legal profession at large across the public, private and community sectors also has a variety of roles available to them in connecting the public, professional and personal aspects of legal work to broader concerns of social (in)equality and (in)justice. Lawyers within government have important roles to play in policy-making, law-making and regulatory investigation and enforcement surrounding both responsible and irresponsible business behaviour at home and abroad. Courts, tribunals and official regulators have roles in interpreting, applying and enforcing business, consumer and other laws with sensitivity to their societal effects.

Similarly, legal and multi-disciplinary professional services firms have important 'gatekeeper' roles in facilitating responsible corporate client behaviour, together with thought leadership roles in public policy advocacy and regulatory innovation in this area. For example, many law firms now have practice areas in corporate governance, responsibility and liability that relate to wider issues about business effects upon society. As business enterprises in their own right, many legal and professional services firms, barristers' chambers, and other legal organisations are accountable to their clients and other constituencies for their organisational approaches to matters of social responsibility and environmental sustainability.

In particular, lawyers and their organisations have important roles in helping their clients and own organisations implement the landmark UN Framework and Guiding Principles on Business and Human Rights, especially given the connection between human rights and socio-economic justice for communities affected by business for better or worse. In their various individual and institutional capacities, lawyers with relevant expertise across the various sectors can also join other participants in multiple 21st-century standard-setting initiatives focused upon responsible business in society. Accordingly, the post-GFC roles of a corporation's internal legal advisers (eg, corporate counsel) and external legal advisers (eg, law firms) in this grand enterprise of poverty eradication can be seen as links in a circular chain between law, corporate governance, CSR, human rights and poverty.

Like any business, lawyers in commercial practice must engage progressively with different orders of CSR. They must also relate their engagement with CSR to their range of professional obligations. These obligations are owed to clients, courts, the profession as a whole, the administration of justice and the broader public interest. If poverty matters to law and justice – and it does – as a fundamental concern of socio-economic justice, access to civil and criminal justice and the rule of law, then poverty must also figure somewhere in the professional obligations of lawyers.

The roles of lawyers engaged in corporate governance regulation, advice and adjudication

Corporate governance standard-setting draws upon good practice in corporate governance thinking and behaviour across jurisdictions. Hence, this area of concern is a matter for corporate law-makers, policy-makers and regulators, including courts and the lawyers who appear before them. Lawyers and judges engaged in the art of making and assessing arguments about matters of corporate law can gain insight from what has been argued and decided elsewhere, especially when there are new laws, unresolved issues or novel applications. In some developing economies, reference to the corporate legislation and case law of other countries is officially authorised for instructive purposes in interpreting and developing that country's own corporate law.[17]

Even in mature corporate regulatory systems that share a common transnational heritage and adjudicative methodology as common law systems, commonalities and contrasts in corporate legal

17 For example, section 5(2) of the current South African Companies Act says that '(t)o the extent appropriate, a court interpreting or applying this Act may consider foreign company law'. In addition, constitutional protection of human rights is also a relevant matter for South African corporate law, given that section 5(1) states that the Companies Act must be interpreted according to its designated purposes which, under section 7, include a purpose to 'promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law'.

problems, courtroom arguments and judicial outcomes across jurisdictions can be instructive in testing and developing the boundaries of corporate law. This is a matter for judges, legal practitioners and corporate counsel seeking to explore the boundaries of corporate law's development and application. Here, the extent to which stakeholder interests are required or permitted to be taken into account under corporate law and governance is important in working through the business responsibility towards human rights, including the impact upon the poor in all of the communities affected by any business.

Moreover, the progressive globalisation of law through appropriate judicial reference at the national and sub-national level to international and foreign law means that courts across jurisdictions are also part of a broader transnational enterprise in cross-fertilisation and modelling of approaches to corporate law and its outcomes and reform. For countries with a common law heritage, this broader enterprise extends beyond the commonplace reference to one another's judgments by UK, Canadian, Australian and other courts, and even beyond the shared heritage of corporate law doctrines and practices in the broader Commonwealth of Nations.[18]

At the very least, it also includes an emerging body of comparative CSR-sensitive law both inside and outside corporate law, and a transnational set of policy and regulatory drivers (eg, the facilitation of ESG considerations in investment decision-making) that are penetrating business conduct and corporate law alike. Such developments raise questions under corporate law about the scope for directors' duties to permit or even require reference to human rights and other stakeholder interests, especially under human rights due diligence (HRDD) and other business reforms signalled by the UN Human Rights Council mandate of Harvard's Professor John Ruggie, as detailed later in this chapter.

Categorising poverty's legal dimensions

The UN and national agencies now squarely identify poverty as a fundamental 'access to justice' issue.[19] All lawyers therefore must confront and take seriously in their responsibilities and actions the uncomfortable reality that law and poverty are inextricably linked, for better or worse. This connection can be stated simply and starkly, as follows: 'The law causes, and extends, poverty – and poverty causes, and extends, legal problems'.[20]

The pioneer of microcredit and social businesses in the developing world, Nobel Prize winner Muhammad Yunus, puts the connection between poverty and human rights just as starkly and simply: 'Poverty is the absence of all human rights'.[21] He similarly draws attention to the inequitable ways in which legal and financial systems harm the poor and keep them disempowered from accessing opportunities that are the basic human rights of all, as follows:

'If the poor are to get the chance to lift themselves out of poverty, it's up to us to remove the institutional barriers we've created around them. We must remove the absurd rules and laws we have made that treat the poor as nonentities … The problem I discovered in Bangladesh – the exclusion of the poor from the benefits of the financial system – is not restricted only to the poorest countries of the world. It exists worldwide. Even in the richest country in the world, many people are not considered credit-worthy and are therefore ineligible to participate fully in the economic system.'[22]

The bottom line is that lawyers must accept the sobering truth about the non-neutral position that lawyers occupy as participants in any legal system and the value-laden role of law in the fight against poverty. Once we identify the various ways in which law's institutions, structures and content 'disproportionately and deleteriously impact on the poor, the marginalised, and the disadvantaged',[23] we can move towards resolving the various ways in which criminal and civil justice exacerbates or helps the conditions of the poor:

'(P)eople living in poverty encountering the criminal justice system are deprived of the means

18 See, eg, Angelo Capuano, 'The Realist's Guide to Piercing the Corporate Veil: Lessons from Hong Kong and Singapore' (2009) 23(1) Australian Journal of Corporate Law 56.

19 See, eg, Magdalena Sepulveda, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights', UN Doc A/67/278 (9 August 2012).

20 Editorial, 'Justice and Poverty' (2012) 37(4) Alternative Law Journal, 220.

21 Muhammad Yunus, *Creating a World Without Poverty: Social Business and the Future of Capitalism* (PublicAffairs 2007) 239.

22 *Ibid*, 49.

23 See n 20 above.

> to challenge the conditions of their arrest, remand, trial, conviction, detention and release. In civil and administrative matters, where legal aid is not available, people living in poverty are often denied access to justice in matters involving property, welfare payments, social housing and evictions, and family matters such as child custody.'[24]

The connections between law, poverty and human rights are increasingly being drawn in major standard-setting documents too. The indivisible link between poverty, human rights and access to justice is crystallised in the 2012 UN report by the Special Rapporteur on extreme poverty and human rights, as follows:

> '(T)he interdependence of all human rights is unequivocal when considering the situation of persons living in poverty, which is both a cause and a consequence of a range of mutually reinforcing human rights violations. Eradicating extreme poverty not only requires improving access to housing, food, education, health services, water and sanitation, but also requires ensuring that persons living in poverty have the resources, capabilities, choices, security and power necessary to enjoy the whole spectrum of human rights.
>
> 'Access to justice is crucial for tackling the root causes of poverty, exclusion and vulnerability, for several reasons.'[25]

The link between law and poverty as seen through the prism of human rights has implications for what law firms and other legal organisations do as business enterprises in their own right. This is an aspect of how business addresses human rights concerns. On this level, the responsibilities and performance of lawyers do not always meet established benchmarks for other businesses, as evident from recent international analysis of the role of law firms in this space:

> '[Law f]irms are just beginning to grapple with the fact that, as business, they have their own responsibilities not to infringe on human rights through their own operations and through their business relationships. This requires a close look at law firms' practices with respect to employees, supply chains and clients.
>
> …
>
> 'Regarding law firms and human rights, a review of the largest 100 law firms in the world indicates the following:
>
> - None appear to have published a high-level policy statement committing them to respect human rights in the management of their business.
> - A tiny handful of these firms have signed up to the UN Global Compact, whose first two principles relates specifically to human rights.
> - Only two of these firms have published corporate responsibility reports in accordance with the Global Reporting Initiative Guidelines, which contains key performance indicators relating to human rights.
> - Only one law firm appears to have published its policy with respect to client selection and supply chains.'[26]

In short, the conditions of poverty both affect and are affected by access to justice, human rights and other aspects of the rule of law nationally and internationally. Correlative roles and responsibilities arise for the legal and business professions as a result. The approach of all businesses towards human rights embraces responses to poverty throughout the business value-chain and in all of the communities where a business operates or otherwise derives value. At the very least, this applies to lawyers within their own legal organisations as part of their own organisational social responsibility (or CSR) in general and approach towards business respect for human rights in particular. These points assume even more significance in light of the UN-inspired 21st-century agenda on business and human rights, the contemporary overlap of corporate governance and CSR, and hence the emergence of human rights (and therefore poverty as it relates to human rights) as major concerns for aspects of corporate governance and CSR too.

Considered from that standpoint, what roles must all arms of the legal profession play in the wake of the GFC to promote the kind of corporate and financial responsibility that makes a difference to poverty

24 *Ibid.*
25 See n 19, 3 [4] above.
26 See n 12, 2, 7 above.

alleviation as a basic dimension of universalising human rights? The answer to that question depends upon changes to the 21st-century business regulatory environment and correlative reorientations of corporate governance and responsibility, as distilled immediately below.

21st-century governance and regulatory environment for action on poverty

Changes in the orientation of governance and regulation

Part of changing how we think about the responsibilities of lawyers, businesses or anyone else involves changing how we think about societal and global governance and regulation. The new paradigm for this can be described in many ways. In other work, the author describes it in terms of governance that transcends government, regulation that transcends law and responsibility that transcends enforceability.[27] The governance, regulation and responsibility of organisations across all sectors and borders now sits within such a framework, as do the correlative roles and responsibilities of business and lawyers towards CSR, human rights and poverty.

The effects of the GFC exacerbate conditions of poverty, social injustice and economic welfare that compound the geopolitical and related challenges of climate change, sustainable development, free trade and investment, socio-economic prosperity and even CSR, as identified in recent G8 and G20 summits. At the same time, there are more frameworks, standards and models for socially and environmentally responsible business than ever before in human history. These tools have been developed in an era of governance and regulatory transition on multiple fronts, involving a range of state and non-state institutions and actors, and resulting in a variety of laws and other norms affecting the interaction between business and society.

Another challenge lies in working through how changes to 21st-century society's governance and regulation, as a result of a multiplicity of governmental and other societal actors, affect and even reset the terms of engagement for societal and individual responsibilities. This is the era of what has been called 'intersystemic' and 'network' governance and regulation by multi-stakeholder coalitions across the public, private and community sectors nationally and globally, notwithstanding the role that government still plays in such matters.[28]

Nation states and governments remain central to all systems of governance, regulation and responsibility,[29] but there are ongoing fundamental changes in how governments engage with the people and how the people hold all institutional power-wielders accountable for their use and abuse of power and its effect upon their lives. While governments and multi-lateral institutions (eg, the UN, OECD and WTO) remain firmly at the helm of much national and global public policy development, non-state institutions and actors are increasingly coming to the fore, especially through multi-stakeholder, standard-setting initiatives and extra-governmental mechanisms of societal scrutiny.[30]

Changes in the orientation of democracy

Democracy itself is being recast so that its formal institutions are more amenable to the mechanisms of what is variously described as 'deliberative', 'participatory' and 'monitory' democracy.[31] This involves accountability to the people by the government of the day and all of its branches for their adherence to society's democratic preconditions, in terms that are not limited to periodic visits to the electoral booth.[32] Here, we are in transition from an almost exclusive focus upon majoritarian democracy and

27 Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar 2012).

28 See, eg, Robert Ahdieh, 'From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction' (2007) 57(1) Emory Law Journal 1, 2, 5, 7.

29 See the 'state-centric relational approach' outlined in Stephen Bell and Andrew Hindmoor, *Rethinking Governance: The Centrality of the State in Modern Society* (Cambridge University Press 2009).

30 See, eg, John Keane, *The Life and Death of Democracy* (WW Norton 2009) 688–689.

31 On 'deliberative democracy', see Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press 2004); On 'monitory democracy', see Keane, n 30 above.

32 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996).

'government by representatives'[33] to embracing 'government by discussion',[34] a 'partnership conception of democracy'[35] and governance through multi-order monitoring of all institutional exercises of power over the people in the new era of 'monitory democracy'.[36]

Its rise reflects what Professor John Keane describes as 'the conviction of millions of people that periodic elections, competitive parties and parliamentary assemblies, though an important inheritance, were simply not enough to deal with the devils of unaccountable power'.[37] So too are the organs and actors of government exposed to enhanced standards of public contestability, deliberation and justification in their official decisions and actions.[38] Indeed, at least some of the values and mechanisms of deliberative democracy arguably apply beyond the public domain to the corporate and civic domains too, not least in furthering 'the aims of deliberative democracy for society as a whole'.[39] In these ways and others, the formal institutions of democracy are accommodating multiple accountabilities across multiple sectors to multiple constituencies, through a wide range of multi-stakeholder standard-setting and monitoring initiatives.

Recent examples of major global standard-setting of relevance to the triangular relationship between socio-economic inequality and injustice, corporate governance and responsibility, and lawyers' roles in civil society include key UN initiatives (eg, UN Global Compact, UN Millennium Goals, UN Principles for Social Investment, UN Principles for Responsible Investment, and UN Framework and Guiding Principles for Business and Human Rights (Ruggie Mandate)), OECD standards (eg, OECD Guidelines for Multinational Enterprises, incorporating the business and human rights standards resulting from the Ruggie Mandate), the latest EU strategy 2011–2014 for CSR, and international standards such as ISO26000 (Social Responsibility). National business regulatory regimes still lag behind such initiatives, with few notable exceptions.

However, in the 21st-century global business environment after the GFC, there is a closer alignment between the public policy needs of interdependent economies, the range of legal and other regulatory levers available to governments and others with a stake in business impacts upon society, and emerging regulatory and business models that integrate organisational, market and societal concerns. This alignment is a crucial systemic feature underpinning efficient and effective legal and regulatory responses to the related challenges of poverty, unsustainable development, socio-economic inequality and injustice and non-fulfilment of human rights.

Changes in the orientation of corporate governance and responsibility

Such 21st-century developments are also part of an ongoing transition from an old ethic of corporate governance and responsibility (at least in some major developed economies) centred upon the triangular relationship between companies, boards and investors, to a new ethic of multiple drivers of sustainable business success involving multiple constituencies across multiple organisational, sectoral and jurisdictional lines. As new economic, social and environmental interdependencies are being realised, they produce responses in community expectations and behaviour, public policy and regulation and business models and drivers.

Across the public, private and community sectors, this is resulting in a convergence of traditional notions and practices of corporate governance with evolving forms of CSR and related standards, such as the use of ESG considerations in corporate and investment decision-making. In this way, the concerns of CSR, ESG, SRI and related issues become mainstream concerns for organisational governance, business modelling and competitive market opportunities and risk assessments, with flow-on implications for the societal roles of businesses and those who advise and regulate them.

Corporate governance regulation and practice is responsive to the growing interactions between

33 See n 30, xviii above.
34 Amartya Sen, *The Idea of Justice* (Harvard University Press 2009), 324.
35 Ronald Dworkin, *Justice For Hedgehogs* (Harvard University Press 2011), 384.
36 See n 30, xxxiii above.
37 *Ibid*, 868–869.
38 See n 31 above.
39 Suzanne Corcoran, 'The Corporation as Citizen and as Government: Social Responsibility and Corporate Morality' (1997) 2(1) Flinders Law Journal 53, 33–34.

national, transnational and global norms affecting business on multiple levels.[40] Cross-jurisdictional thinking and practice of good corporate governance informs the design and implementation of corporate governance law and regulation. In Anglo-American corporate regulatory systems that broadly subscribe to market capitalism, shareholder value and board oversight of management, the law of directors' duties and defences is increasingly becoming a domain in which some of these external pressures are brought to bear. Witness, for example, the transnational public policy debate about the different possible justifications for requiring corporate directors to take account of stakeholder interests and wider social responsibilities. These justifications focus upon grounding this decision-making by corporate directors alternatively in contexts such as a traditional social compact between all societal actors, a notional licence from society about the conditions under which a business can operate, an aspect of CSR and business ethics, an action that is permitted but not required by law, or a new notion of sustainable business success in society.

At the same time, national corporate regulation increasingly has potential points of interaction with international economic law, transnational norms of finance and investment and global frameworks affecting multinational business activity, including international standard-setting for business and human rights (as detailed below). It is also responsive to ongoing changes in the tension between the oversight and management responsibilities of boards as an essential component of corporate governance.

All of this puts pressure upon our conventional frames of reference. Economically, the traditional Anglo-American view of corporations is that they exist to serve the interests of the shareholders who invest financial resources in them. At the time when many of our ideas and laws about companies were formed, it was easy to see how the owner–manager who invested all of the financial capital in a factory owned by their company might expect to reap the financial rewards alone, while having mainly a local impact for better or worse. However, to what extent can the ideas and laws about companies that have been developed primarily for industrial expansion serve today's world of transnational corporate groups, overseas supply and distribution chains, multi-stakeholder networks, institutional and individual investor profiles and multiple forms of human, intellectual and social capital?[41]

The first decades of the 21st century have witnessed new theoretical challenges to the prevailing notion of shareholder primacy, value and wealth-maximisation that arguably underlies much Anglo-American corporate governance regulation and practice.[42] Considered from the academy's perspective, these challenges stem from sources as variable as cross-disciplinary opposition to shareholder-based normative theories of corporate governance, debates about the sustainability and limits of market capitalism, and new calls for 'shared value'[43] and other models of corporate engagement with society to replace business as usual.

What still remains in doubt is the extent to which notions of 'shared value' and socially sustainable capitalism represent threats to shareholder-based norms of corporate governance and business success, or simply different ways of meeting or even reconceiving them. After all, even one of the most widely quoted opponents of CSR, Milton Friedman, once argued that his own famous statement that 'the social responsibility of business is to increase its profits' was equivalent to the argument of a CSR advocate that 'the enlightened corporation should try to create value for *all* of its constituencies'.[44]

However, at the very least, there is ongoing scholarly and regulatory renegotiation of the terms of engagement between corporate governance and CSR. In turn, this development is matched by new

40 On the general phenomenon of interaction between local, municipal and international norms in the globalisation of legal orders, see, eg, Paul Schiff Berman, 'From International Law to Law and Globalization' (2005) 43 Columbia Journal of Transnational Law 485.

41 On the limits of the industrial factory-based model of corporations as a guide for 21st-century corporate governance thinking, regulation and practice, see Jay A Conger, Edward E Lawler III and David Finegold, *Corporate Boards: New Strategies for Adding Value at the Top* (Jossey-Bass 2001) 147–148; Margaret M Blair, 'Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century' in Thomas Clarke (ed), *Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance* (Routledge 2004) 184.

42 For a landmark defence of the shareholder-based norm in mature corporate regulatory systems worldwide that has generated much scholarly debate, see Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law', in Jeffrey Gordon and Mark Roe (eds), *Convergence and Persistence in Corporate Governance* (Cambridge University Press 2004).

43 See, eg, Michael Porter and Mark Kramer, 'Creating Shared Value: How to Reinvent Capitalism – and Unleash a Wave of Innovation and Growth' Harvard Business Review January–February 2011, HBR Reprint R1101C.

44 See the sources and analysis in Horrigan, n 27, 92–93 above.

standard-setting for business and human rights. As we make and work through these connections, the implications for poverty and lawyerly actions become clearer.

Changes in the orientation of CSR

Recent developments in Europe, Anglo-American jurisdictions and other countries signify a growing transnational regulatory trend towards a closer alignment between CSR and corporate governance. These trends are tracked and illustrated from legal and other disciplinary perspectives by new scholarship that highlights the commonalities and contrasts of principles and other standard-setting across jurisdictions.[45]

CSR-sensitive considerations are permeating at least some aspects of corporate law across jurisdictions, as well as other aspects of corporate regulation. Even conventional regulation and practice of corporate governance and responsibility can confront CSR-related concerns in areas such as directors' duties and defences, annual corporate reporting, legal compliance and due diligence, shareholder proposals, stakeholder engagement mechanisms, investment decision-making and corporate governance standards. This is in addition to the integration of human rights within corporate compliance, due diligence and organisational risk management and reporting systems under the various UN and other global standards discussed below.

The old paradigm kept CSR separate and marginalised from the core concerns of corporate law and its relationship to business success, legal standards and market efficiency as means to the end of social equity, efficiency and effectiveness. In other words, CSR in limited forms was perceived and acted upon largely as a voluntary add-on extra, considered largely from a corporation's standpoint alone, disengaged from any real interdependence in wider aspects of societal governance and regulation, and the first thing to be cut back or thrown overboard in tough financial times. The new paradigm witnesses the integration of CSR within standard business practice, organisational governance and corporate law and regulation.

Recent regulatory developments across Anglo-American countries and on the world stage reflect the emerging global significance of the CSR agenda in corporate law and regulation in each country. CSR is now a global force, despite strong residual resistance. Recently, *The Wall Street Journal* published 'The Case Against Corporate Social Responsibility'.[46] CSR is a 'potentially dangerous … illusion' that is either 'irrelevant' or 'ineffective'. While corporations might 'do well by doing good' on occasions, 'the idea that companies have a responsibility to act in the public interest and will profit from doing so is fundamentally flawed'. Striking a balance between corporate profit-making and the common good depends ultimately upon 'government regulation' and monitorial 'watchdog' and 'advocacy' pressure from civil society, with corporate self-regulation playing a subsidiary role. So claims Associate Professor Aneel Karnani from the University of Michigan in his much-publicised recent polemic against CSR in *The Wall Street Journal*.[47]

This is the latest in a decades-long series of landmark writings in the global financial press that attacks CSR. Milton Freedman crystallised the orthodox politico-economic opposition to CSR in his much-cited 1970 article in *The New York Times Magazine*, 'The Social Responsibility of Business is to Increase its Profits'. Most recently, Professor Robert Reich's *Supercapitalism* sounded a similar warning bell against CSR, foreshadowing Karnani's concern that CSR deflects the public and governmental focus on necessary business regulation to improve social welfare and invests misplaced hope in business contributing to that public policy need of its own free will. Even *The Economist*'s landmark concession last decade that CSR has won the battle for our hearts as well as our minds was framed as a grudging concession to the inevitability to CSR's pervasiveness in 21st-century business regulation and practice. Is CSR really as bad or flimsy as the latest reaction against it suggests?

The fact that a company behaves as we would expect a company to behave in relation to all matters that affect its business operations, including its approach to CSR, does not mean that a company

45 See, eg, Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar 2012); Michael Kerr, Richard Janda and Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (LexisNexis 2009).

46 Aneel Karnani, 'The Case Against Corporate Social Responsibility' The Wall Street Journal (New York), 23 August 2010.

47 *Ibid.*

has suddenly begun to behave like a government on one hand, or a community charity on the other. A parallel can be drawn with courts, which do not suddenly become legislatures or trespass beyond the judicial role simply because they take account of social or policy considerations in appropriate ways within the institutional roles and reasoning processes associated with courts and the body of existing law.

If CSR is undergoing a rapprochement with orthodox corporate governance and responsibility, that alone does not deprive CSR of its essential character. Nor should a company's integration of CSR within its strategising, decision-making and other standard business operations necessarily result in either a hollowing-out of CSR's contribution or its subsumption by the essential business imperatives of corporate profit-maximisation and shareholder wealth-generation. If the features of the surrounding business environment, multi-dimensional drivers of business success and notions of corporate governance, responsibility and sustainability can all evolve, so too can the relationship between business and society, beyond what might have been appropriate when the modern corporation first came into being or even under more recent manifestations of shareholder capitalism.

Despite its undoubted benefits, shareholder capitalism's exposed weaknesses generate calls for more sustainable forms of capitalism. The 21st-century global business and regulatory environment is driving corporate profit-making and wealth-generation to become more economically, socially and environmentally sustainable. The G8 and G20 list CSR-related concerns about responsible lending, sustainable development and climate change as geopolitical priorities. Banks and investment funds are mass signatories worldwide to the UN Principles for Responsible Investment. Consequently, they too are paying closer attention to ESG factors in their investment decisions.

Mass business adoption of the Global Compact, Global Reporting Initiative and similar standards swings the pendulum further towards CSR. Good CSR track records give business a seat at the table with government on sustainability issues. Successful businesses are aligning their business models and corporate governance accordingly. Yet, despite pockets of CSR innovation within business, many corporate regulatory systems worldwide are still playing catch-up with all of these developments.

The successful political and business resistance to reform of directors' duties and defences along CSR lines, and the correlative deflection of CSR concerns into other areas and means of regulation (eg, stakeholder engagement in corporate governance, ESG factors in investment decision-making and corporate responsibility and sustainability reporting) together suggest that further corporate law reform in these directions is neither likely nor easy, at least in the short to medium-term. However, in what regulatory scholars call a 'meta-regulatory' business environment, in which a number of different orders of governmental and non-governmental regulation are increasingly important (including business self-regulation according to accepted and monitored standards), there remains some hope that other policy and regulatory guidance might yet be forthcoming.

Those in favour of no change to corporate regulation on CSR's account habitually warn against adding to the overall regulatory burden for business or doing anything that is counterproductive to overall social welfare through effective and efficient corporate production of goods and services. However, judgments about the efficiency and effectiveness are predicated upon what is counted, what is left out of the equation and how this changes as society changes in its expectations of corporate governance, responsibility and sustainability.

Nobody on either side of this debate seriously pretends that the law of limited liability established in the late 19th century adequately accommodates all social costs of multinational corporate activity in multiple sites of business operations (eg, mass consumer or human rights abuses, long-tail liability for future tort victims, catastrophic environmental damage etc), at least when viewed through 21st-century eyes. All sides of the debate simply disagree on the appropriate corrective mechanism and whether it sits inside or outside the core concerns of corporate law. Yet, such evaluations are contingent ones.

At the very least, the global business and regulatory environment is shifting to a significant degree away from wholesale marginalisation of CSR and towards mainstreaming the regulation and practice of CSR. The rush to embrace CSR therefore cannot be marginalised as either a threat to shareholder value or else just good business sense. CSR has evolved beyond public relations, philanthropy and a voluntary business add-on to be offloaded in lean economic times (eg, the GFC). It has become part of a new order of interdependent governance and regulation involving state and non-state actors,

who tackle major social problems together. Businesses, law firms and universities, for example, are joining governments and civil society in the move towards ecological and other forms of organisational sustainability.

Once we move beyond relying on corporate success being predicated on observing a floor of minimum behaviours necessary to comply with the law, we begin a journey towards the ceiling of aspirational corporate governance, responsibility and sustainability. Similarly, once we accept that corporate directors and other actors who are legitimately pursuing the interest of shareholders as a whole are susceptible in some way not only to minimal legal requirements but also to prevailing standards of business ethics, market norms and even societal trends of a kind that relate to a company and its business, we are immediately in the domain of having to account for the range of considerations that affect corporate and boardroom decisions and how they affect them. In other words, if companies and boards must take account of a range of social, economic, environmental and other business drivers and risks beyond the minimum that they are required to do under the law, we are in a realm of debate about exactly what kinds of considerations properly bear upon enduring business success, and how.

In these ways and others, CSR's own progress in the 21st century from the periphery towards the mainstream of business regulation and practice is matched by the twin developments of at least some convergence between CSR and corporate governance, together with the emergence of a body of comparative and transnational law and regulation in which CSR concerns can arise, directly or indirectly. The groundswell of global support for standards such as those produced by the UN, OECD and others in the domain of multinational corporation activity and human rights, social and responsible investment and finance and trade, swings the pendulum further towards CSR, as does the European Commission's renewed CSR focus through its Social Business Initiative and new Strategy for CSR announced in late 2011.

The European Commission's October 2011 package of measures on responsible business includes an 'updated definition' of CSR as 'the responsibility of enterprises for their impacts on society'. Together with its 'new agenda for action' on CSR, this suggests an approach to CSR in the 21st century that entails responsibility and accountability for corporate action beyond the baseline of legal compliance.[48]

Changes in the orientation of lawyers and legal organisations towards CSR

The legal profession is slowly coming to terms with the inevitability of CSR as applied to legal organisations as business enterprises. Law firms face pressure from clients, employees and governments to demonstrate their own CSR credentials. Enlightened corporate clients now audit their professional services providers and other business chain members on their CSR track records. A law firm's CSR performance affects its reputation and its capacity to attract good employees from generations X and Y. Similarly, access to governmental work for lawyers can be linked to CSR factors, such as a firm's employment diversity, pro bono efforts and other societal contributions.

More broadly, integrating CSR within law firms means aligning it fully with their business strategy, performance indicators and other organisational systems. Advising business clients on CSR is also a mushrooming field of work for law firms and other business services providers. In terms of broader public policy and regulatory reform, lawyers for business and those affected by business in markets and communities also have special expertise and responsibility for contributions to corporate law reform initiatives that enhance the place of business in society.

What does this mean for business and those who provide professional services and advice to business? At the very least, it means rethinking corporate and professional approaches to CSR, so that organisations are better situated to deal with the 21st-century conditions of the surrounding business environment.[49] Organisational success, business modelling, competitive differentiation and market opportunities are increasingly being reconceived in terms that connect what is good for an organisation to what is good for a sustainable industry, economy and society – hence the renewed

48 A Renewed EU Strategy 2011–2014 for Corporate Social Responsibility, European Commission, COM (2011) 681 final, 25 October 2011.

49 On these and other discussions of CSR generally, see Horrigan, n 2 above.

call to see business engagement with society in terms of 'shared value'.[50] In the words of leading UK corporate governance expert and boardroom director, Sir Adrian Cadbury: 'Every company, like it or not, has a CSR policy [and] the first issue is whether they recognise the fact, and the second is how far they are alert to changes in what society expects of them in this field'.[51]

In short, four important connections can now be safely made about the response of law and lawyers in their everyday work to poverty as a factor impeding the full universalisation of human rights. First, the concerns of corporate governance and CSR are at most converging and at least overlapping and intermingling, to one degree or another, across a range of corporate regulatory and legal standard-setting initiatives. Secondly, under the impetus of a range of recent UN and other global standard-setting initiatives affecting social and financial investment, business and human rights and sustainable development, the concerns of CSR and responsible investment give prominence to human rights matters *and* relate them to broader issues of corporate governance, responsibility and sustainability.

Thirdly, this chain of relevant connections between law, human rights and poverty is completed by addressing the impact upon poor communities as a core human rights concern, and hence a concern for contemporary CSR and corporate governance too. Finally, whether as advisers to organisational clients on corporate governance and these broader connections, or as members of legal organisations with their own commitments to CSR and human rights as legal business enterprises of their own, legal practitioners cannot avoid the lawyerly roles and responsibilities towards the poor that flow at the very least from these broader connections.

Human rights standards, the Ruggie Mandate and legal roles and responsibilities

New Global Human Rights Framework, Guiding Principles and Corporate Law Tools

How do recent shifts in the orientation of governance, regulation and responsibility on the global stage translate into meaningful tools and actions in the fight against poverty as a dimension of universal human rights? A good example arises from the recent acceptance by the UN Human Rights Council (UNHRC) of both a framework and guiding principles for the global advancement of human rights by business. The three-pronged framework developed for the UNHRC by Harvard's Professor Ruggie as the UN Secretary-General's Special Representative on Business and Human Rights (UNSGSR) is entitled a 'Protect, Respect and Remedy' Framework, comprising 'three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies'.[52] Significantly, this framework is not limited to what governments might mandate by law.

Under its accompanying global Corporate Law Tools project, the UNSGSR's mandate also produced a comprehensive review of the extent to which corporate, securities and related laws in many countries promote or impede business respect for human rights. In one of the consultation documents produced under his mandate to set up his final recommendations to the UN Human Rights Council in 2011, Professor Ruggie and his team identify, among the key issues for the business responsibility to respect human rights, the following issues surrounding HRDD by companies:

> '**Assessing** actual or potential adverse human rights impacts on an ongoing basis, drawing on internal or external expert resources; involving meaningful engagement with relevant stakeholders as appropriate to the size of the business enterprise and the nature and context of its activities.
>
> **Integrating** the findings from their assessments across internal functions and processes to enable appropriate action, including by clarifying internal accountabilities and aligning personnel incentive structures.
>
> **Tracking** performance to know whether human rights risks are being effectively addressed, based on appropriate qualitative and quantitative metrics, drawing on feedback from both internal and

50 See, eg, Michael E Porter and Mark R Kramer, 'Creating Shared Value: How to Reinvent Capitalism – And Unleash a Wave of Innovation and Growth' [2011] (January–February) Harvard Business Review 1.

51 Quoted in Horrigan, n 27 above, 269.

52 Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 8th sess, Agenda Item 3, UN Doc A/HRC/8/5 (7 April 2008).

external stakeholders, and supporting continuous improvement processes.

Communicating performance on human rights in response to stakeholder concerns, including reporting formally as appropriate, taking into account any risks posed to stakeholders themselves, company personnel or to the legitimate requirements of commercial confidentiality.'[53]

This shows how HRDD can be integrated within standard corporate governance arrangements. Moreover, each of these steps lends itself to actions that directly or indirectly affect poor communities as corporate stakeholders in all of the local communities along a business value, supply and distribution chain.

In his final report in 2011, Professor Ruggie secured unanimous UN Human Rights Council endorsement for a set of guiding principles to implement the three-pronged 'Protect, Respect and Remedy' Framework for business and human rights. HRDD and human rights impact assessments (HRIAs) figure in numerous principles, as part of an overarching approach to the integration of human rights considerations within standard business systems and operations. The acceptance in mid-2011 by the UN Human Rights Council of this new overarching framework and guiding principles on business and human rights still awaits full buy-in from national implementation and integration in business regulation and practice. At the same time, these standards are progressively being incorporated or otherwise aligned with important global standards such as the UN Global Compact, revised OECD Guidelines for Multinational Enterprises and updated social and environmental standards from the World Bank's International Finance Corporation.

Implications for legal and business organisations

Organisations within the legal and business sectors face the challenge of implementing these new global human rights standards for business enterprises in ways that are properly sensitive to poverty as a human rights issue too. Statements of professional ethics and conduct governing client-related work and service to the profession and justice system must be broad enough to embrace this dimension. Legal organisations such as law firms, barristers' chambers and multi-disciplinary practices need to extend the range of their own CSR policies beyond conventional pro bono work, philanthropy and environmentally sustainable workplaces to cover the full gamut of human rights, including relief against poverty.

In their advice to clients across the public, private and community sectors, lawyers can legitimately frame policy, transactional and compliance advice in terms of financial, reputational and liability risks associated with human rights breaches or other harm to local communities, including effects upon poor communities in business locations or along a business supply and distribution chain. Consistently with the advice about the legal position in other countries, for example, the legal advice from Australia to Professor Ruggie's Corporate Law Tools Project indicated that, while there was no general and express obligation under domestic law for companies and their directors to take account of internationally recognised human rights, consideration of potential human rights implications (and hence HRDD) was a necessary or at least prudent step in numerous business contexts, as follows:[54]

1. corporate compliance with laws with specific human rights elements (eg, anti-discrimination, employment and privacy laws);
2. business impact assessments for project and infrastructure development (eg, socio-economic impact studies, environmental impact statements and HRIAs);
3. rights-related preconditions for granting governmental approvals and licences for business infrastructure and development proposals;
4. compliance with directors' duties and defences (eg, adequate consideration of the relation between rights-related stakeholder interests and long-term corporate success);
5. corporate responses to shareholder action including litigation (eg, shareholder proposals, institutional investor dialogue and climate change litigation);
6. satisfaction of ESG and SRI concerns of institutional investors;
7. conformance with investment decision-making requirements (eg, ethical, labour, environmental

53 UNSRSG, 'Mandate Consultation Outline', October 2010.

54 At the time, the author was a consultant for the international law firm that provided this advice to the UNSGSR, and he was involved in consultations about some of this advice.

and human rights considerations in choosing or realising investments); and
8. corporate governance requirements for corporate responsibility and sustainability reporting (eg, reportable human rights risks and business success drivers as 'material business risks').

The global uptake of these human rights standards puts pressure on legal and business organisations to do likewise. Building upon the large base of cross-sectoral support for the UNSRSG's outcomes that Professor Ruggie developed during his UN mandate, the framework and guiding principles have had what has been described as a game-changing impact upon the global human rights debate, resetting the cross-sectoral terms of engagement on human rights, mainstreaming business respect for human rights as an organisational concern, and paving the way for HRDD and impact assessments as part of whole-of-government and whole-of-organisation approaches to CSR, corporate governance and sustainable business in sustainable communities.[55]

Specific Guiding Principles on Human Rights

The UNSRSG's framework and guiding principles together provide a template within which business enterprises (including law firms) can manage human rights implications for poor communities affected by a business value, supply and distribution chain. A number of steps are involved. The UNSRSG's Guiding Principle 15 sets as a baseline the integration of organisational human rights policies, HRDD processes and human rights monitoring, grievance and reporting measures, as follows:

> '15. In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:
> a) A policy commitment to meet their responsibility to respect human rights [#1 Integrated CSR/HR organisational policy];
> b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights [#2 Integrated HRDD throughout organisation];
> c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute. [#3 Integrated monitoring/engagement/reporting mechanisms]'[56]

Each of those three core elements has its own guiding principle(s). The suggested elements of an organisational policy on human rights appear in Guiding Principle 16, as follows:

> '16. As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:
> a. Is approved at the most senior level of the business enterprise;
> b. Is informed by relevant internal and/or external expertise;
> c. Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
> d. Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
> e. Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.'

The suggested elements of an organisational approach to HRDD, including HRIAs, appear in Guiding Principle 17, as follows:

> '17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out *human rights due diligence***.** The process should include assessing actual and potential *human rights impacts*, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. *Human rights due diligence*:
> a. Should cover adverse *human rights impacts* that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
> b. Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

55 See, eg, Interview with John Morrison, Executive Director, Institute of Human Rights and Business, 'Business and Human Rights: Countries, Companies, and the State of Play' Ethical Corporation, 27 July 2011.

56 The author has added annotating descriptions in square brackets.

c. Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.'[57]

The need for whole-of-organisation integration to embed HRDD within all organisational levels and functions is encapsulated in Guiding Principle 19, as follows:

'19. In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

a. Effective integration requires that:
   i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;
   ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.
b. Appropriate action will vary according to:
   i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
   ii) The extent of its leverage in addressing the adverse impact.'

Finally, as an example of the various oversight, remedial and reporting mechanisms for embedding respect for human rights within organisational strategies, roles and processes, Guiding Principle 20 focuses upon monitoring and verification, which are themselves important accountability mechanisms, as follows:

'20. In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:

a. Be based on appropriate qualitative and quantitative indicators;
b. Draw on feedback from both internal and external sources, including affected stakeholders.'

These Guiding Principles have a cumulative and holistic effect. They operate at progressively detailed levels of analysis and application. They are not mono-dimensional in their potential embrace of poverty as a human rights concern. At the level of organisational strategy and policy, for example, a business enterprise might take poverty seriously in a number of ways. Its charitable efforts might be directed towards the poor locally, nationally or globally, depending upon the size and nature of the enterprise. Its credentials as a virtuous organisation might be demonstrated through commitment to standards that specifically focus upon the poor directly (as in the UN Millennium Development Goals) or indirectly (as in the UNSRSG's Framework and Guiding Principles). It might cultivate partnerships with governments and NGOs in poverty relief efforts that foster trust and relationships and that also serve the business enterprise well in other contexts. It might conscientiously seek to minimise misuses of corporate power and other harm-causing effects upon the human rights of poor communities in areas of its business operations. It might also develop and support its existing and future employees in poor localities through targeted school, university and training initiatives that benefit both the organisation and employees.

Whatever the particular combination of business modelling, competitive differentiation and organisational strategy involved, a business enterprise must operationalise all of these poverty-sensitive human rights concerns through HRDD. A truly holistic approach to organisational due diligence will integrate HRDD processes and measures with other aspects of organisational due diligence. These mechanisms of HRDD must then be duly monitored, measured, verified and reported. In these ways, the avoidance of business harm to the poor and the adoption of positive actions to help the poor become a standard part of how business does business in society. These things also become a standard part of the approach, knowledge and advice of lawyers who advise, monitor or otherwise regulate business organisations of all kinds.

57 Emphasis added.

Consequential legal roles and responsibilities in relieving poverty

In short, how does all of this matter to the law, lawyers and poverty? The following summary suffices for present purposes. Together, the UNSRSG Framework and Guiding Principles on business and human rights offer a template with sufficient detail and acceptance for widespread adoption by business enterprises, including legal organisations. Lawyers' responsibilities towards the poor therefore have at least a threefold focus, upon what lawyers do in their own organisations, what lawyers do for business clients and what lawyers do in the various ways in which they criticise, monitor or otherwise regulate business actions affecting the poor.

In its application to poverty, this human rights template can stand alone or alternatively become integrated with broader organisational approaches to CSR and corporate governance. On either view, the template also provides structures and opportunities for incorporating the human rights of the poor, homeless and needy within relevant target groups and actions under relevant organisational policies and programmes. In an important sense, international law firms with offices and other presences in a number of countries are in the same position as their client MNCs. Their opportunities both to respect human rights and to fight poverty as part of that endeavour extend transnationally throughout their locational supply and distribution chains.

Concluding observations

Lawyers have positive and negative dimensions to their roles and responsibilities in law's impact on poverty, in the kinds of ways canvassed in this chapter. If some of this appears unduly negative, the answer lies in part in breaking through the indifference or unawareness among many in the global legal profession of the connections that must be drawn between law and poverty, and hence of the multiple roles and responsibilities of lawyers in taking action that makes a difference on poverty. As this chapter attempts to show, there are clear connections in the triangular relationship between the following matters: (a) the changing conditions of 21st-century societal governance, regulation and responsibility; (b) the increasing areas of overlap or convergence between corporate law and regulation, corporate and other organisational governance and CSR; and (c) the inherent links between law, human rights and poverty. The UNSGSR's Framework and Guiding Principles match this triangular relationship, and show a clear way forward for the legal profession to take action against poverty in the progress towards fully universal human rights. All of this offers lawyers, through their many arms of operation and influence, the opportunity to play the central role many have claimed for the profession in serving the fundamental interests of a just society under the rule of law.

Chapter 12

Something to be Proud of: The Response of the Legal Profession to the Argentine Social Crisis

Martín Böhmer[1]

The 2008 crisis went almost unnoticed in Argentina. The country had seceded from the international financial markets half a decade earlier after producing the biggest sovereign debt default in recorded history. Coincidentally, the prices of Argentine commodities skyrocketed, thus enabling the country to recover, sailing on the favourable wind of commerce and a highly devalued peso. With the end of public deficit, Argentina paid its debt to the IMF and to most of its creditors after an aggressive negotiation, the government detached itself from external control and public expenditure was financed mostly with internal and export taxes. This situation, among others, let President Néstor Kirchner and his wife, Cristina Fernández, enjoy three four-year terms in power.

Thus, this chapter will tell part of the story of the reaction of the legal community to the 2001–2002 Argentine crisis and its effects on access to justice. I will also argue that the event in question was a continuation of a longer trend that had started two decades before, with the way Argentina's society dealt with radical evil, that is, the 1976–1983 military dictatorship and its systematic, massive human rights violations.

On 9 September 2001, I was in my office in Palermo University, where I was Dean of its law school. With me there were several colleagues and US visitors, prominently Joan Vermeulen (who had been with Lawyers for the Public Interest and the expert on pro bono clearinghouses and was helping me put together the first conference on pro bono and public interest ever in Latin America). Joan had been in Buenos Aires the year before to test the waters for the willingness of the Argentine legal professions, both the private and the public Bar, to start a pro bono programme. We had found enough support and on 9/11 we were in my office surrounded by the civil society representatives from the US and waiting for the private lawyers to come. In fact, having heard some weird news, we were on the phone with Evan Davis, at the time the President of the Association of the Bar of the City of New York, who was watching the Twin Towers being hit by something from the window of his office at Cleary Gottlieb.

The NYC lawyers could not come, so we had to split the conference in two. In September, overwhelmed by sorrow and worried about the people in New York and about what the future would bring to all of us, we had the conference for the NGO lawyers, both American and Argentine, on how to work with the private Bar, how to harness its energy to help in the civil society fight for democracy and the Constitution. We thought that, of the many ways we could honour the dead, this was a quiet, appropriate one. The members of the private Bar came on 29 November. They met with Argentine law firms and there were roundtables on the many issues lawyers have to deal with in general with PIL cases, and especially when these cases are taken on a pro bono basis and within an ongoing relation with civil society organisations.

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On 30 November, while we were working on panels, the Argentine lawyers' mobile phones started to ring all at once. These were not the eventual calls from clients; something ominous was in the air. Some of the lawyers, especially those who had banks in their list of clients, were frantically making calls and hastily leaving the room. The government had started to set limits to the amount of money people could dispose of from their bank accounts. The worst economic crisis in Argentina's history had just started.

In the months that would follow, the Bar of the City of Buenos Aires, a private, traditional institution that gathers the main corporate law firms of the country, started a Pro Bono and Public Interest Law Commission that functions as a clearinghouse for collective, impact litigation cases coordinating the needs of the civil society with the resources of the private Bar. The practice grew enormously and many of those law firms now count among their firms full-time pro bono coordinators who are developing programmes and focusing each firm's pro bono work in those areas where they have the most expertise. The range of cases in this long decade varied from helping NGOs to become legal entities, to fighting for the right of the people to access public officials' information, and to planning to make every school in Buenos Aires accessible to children with disabilities.

At the same time as this was happening in Argentina, Chile created the Pro Bono Foundation and had a similar impact on the profession. Then Brazil followed suit, and also Colombia, Peru and Mexico. Lawyers, law firms, law schools and bar associations all over the continent have signed the Pro Bono Declaration of the Americas, pledging a certain amount of hours to serve the public interest.

In this chapter I will offer an explanation for this development, in the hope that it will illuminate some aspects of the relationship between the legal profession and the society in which it works, the ethical duties that justify the latter's monopoly of access to and provision of justice as a public service and the opportunities that social crises offer for lawyers to step up and create, restore or enhance their legitimacy; a key for the development of the rule of law.

For just over a century, Argentine law (though in its inception a hybrid of the North American and the European systems) was characterised above all by its inclination towards the continental legal tradition. This conception of law and of the roles of legal actors was configured in line with the overall hyper-presidential political project that was aimed at centralising power. The idea was simply to homogenise law throughout the nation and to subject the other constitutional powers to a centralised discipline with the conviction that a well-grounded national authority would put an end to anarchy and would lay the foundations of a modern state, albeit an authoritarian and exclusive one.

The conception of law that existed until the mid-19th century was modified in accordance with this political conception. Indeed, this new conception of law and its correlative vision about the role of the judges affirmed, on the one hand, that legal systems can bring univocal solutions to every problem submitted to them (a conviction that is known by the name of 'formalism'), given that the denial of the existence of legal loopholes and of contradictions between rules in regulatory systems is part of this ideology. On the other hand, formalism is the condition of the possibility of upholding a deferential attitude towards positive law, regardless of its content or its source of legitimacy.

Thus, in this new conception, judges received and accepted as obligatory the normative contents of the diktats of whoever it was that wielded power, regardless of whether power was wielded through fraudulent elections, or elections in which a party that represented much of the population was proscribed, or directly through coups d'état. This deference towards political actors was justified because the role of judges was to be formalist and impartial. In fact, the conception of the task of adjudicators consisted of conceiving them as neutral enforcers of the legislator's will. In this sense, codification, and in particular the way in which the Civil Code was received by legal scholars and law schools, provided the tools to successfully carry out the formalist project and maintain the separation between politics and law. So on these shores an originally democratic idea was transformed into pantomime when judicial deference towards legislative supremacy was due to whoever obtained power, however they did. Thus, the formalist project began to disengage law from politics, leaving public policy in the hands of whoever was wielding power, and the judiciary in charge of the solution of controversies on a case-by-case basis, rested its decisions solely on the text of the law.

Judicial review (part of the American heritage of this mixed South American system) was a marginal activity and was reduced to exceptional circumstances. Accordingly, constitutional rights were divided between what legal doctrine deemed as 'operative' (enforceable) and merely 'programmatic' (rights

that required legal regulations in order to be enforced by the judiciary), a distinction that greatly reduced the powers of the judiciary to intervene in unconstitutional actions or omissions. The situation of the lack of enforceability of fundamental rights was even worse when the federal Supreme Court added the political question and the de facto doctrines, thus making judicial deference towards any political power explicit.

The notion of a legal 'case or controversy' was another aspect of this conception of law. It reduced the mission of the Court to the case in question, thus rejecting the doctrine of *stare decisis*. Similarly, a theory of administrative law deferential to the executive and contemptuous of citizens' rights afforded legal standing only to those who represented individual interests and high-entry barriers to the possibility of settling collective rights violations, and kept the judicial branch out of the deliberation over the constitutionality of public policies and in general out of the discussion about how to honour the promises of the Constitution. The main characteristic of this project consisted of a discretionary exercise of public power, and the virtual lack of a system of checks and balances. In these circumstances, international law, in particular international treaties, did not offer any solution. A long and unsatisfactory discussion over their applicability prevented their effective enforcement before the courts. In fact, the controversy about their status in the hierarchy of the legal system vis-à-vis the Constitution and, once again, the pretended programmatic and unenforceable character of their provisions kept the international community and its values at a safe distance from our courts. Therefore, the idea of rights as limits to the political will was situated at the margins of Argentine legal culture. Politics, on the other hand, stumbled from military interventions to scarcely legitimate civilian governments, until the radicalisation of the 1960s led to widespread political violence in the 1970s.

But unexpectedly, what happened in the beginning of the next decade was a complete cultural reconfiguration. In fact, through the action of certain groups of people, what was in the margins of our legal culture (and I would add our political culture as well), became central: the idea of rights. In particular, a certain way of understanding human rights reconfigured the conception of law and the role of social actors and the processes through which those actors are called upon to articulate the new paradigm, for the decades to come. As of 10 December 1983, the beginning of its democratic era, Argentina took a series of decisions that have drastically modified its legal culture; they were a response to the events that had scarred the country in the previous decade.

Argentina's experience of radical evil occurred in the mid-1970s, only 30 years after the Holocaust and fewer than that after Nuremberg. In 1976, (once again, the sixth time since 1930), a military coup d'état had taken over the democratic institutions amidst a generalised situation of political violence. The response, once the armed forces were in power, was to orchestrate a clandestine system of massive kidnappings, torture and killings under the cynical name of 'disappearances'. The State itself became terrorist and criminal even under the legal definitions valid at the time. The diagnosis of why it happened was contested but eventually one reason won the day: the problem was the breach of due process and the complete disregard of the rule of law. Through a crucial actor, the mothers of Plaza de Mayo, the families of their victims, asked for the truth of their whereabouts, for due process if they were indicted for a crime and for punishment if those who took their children away were acting unlawfully. There were many social trends that were blamed for this event: the traditional disregard for rules; corporatism; a system of concentration of powers; and the lack of a culture of liberal values. In any case, when the dictatorship collapsed under the pressure of an economic crisis, the defeat in the Malvinas/Falklands War against Britain, and crucially under the weight of the mounting internal and, very importantly, external pressure of human rights groups, a process of transition to democracy started.

The winning party campaigned using the Constitution as a rallying cry and promised to prosecute the perpetrators. It was not clear whether they would be able keep their word. After all, the military personnel responsible for the atrocities were still in office and had the firepower over the civilians. The international situation was not favourable. Most of Latin America was under dictatorships; the brief spring for human rights in the region that the Carter administration had brought from the US was gone and the Cold War was in full bloom under Reagan. The Berlin Wall was still standing, and Nelson Mandela was still in prison. In that context and only with Nuremberg as precedent, a civil government put together a truth commission to gather evidence, and with that information printed in the famous

'Never Again Report', prosecuted the members of the juntas (military-led government) that until recently were the proprietors of life, death and liberty in Argentina. In a few months, five civil judges sentenced them to prison. It was in that trial that the closing remarks of the prosecution ended with the same words of the Report: 'Your Honours: never again!'

After this trial (which was not the only one, as hundreds of military personnel were being tried at the time), the story has its highs and lows. There are violent eruptions of military pressure to limit the prosecutions that forced the hand of the government amid difficult economic circumstances; a hazardous change of government that brought a general amnesty; the permanent pressure of human rights organisations that would eventually open up trials based on the right to truth; the search for the children of the disappeared; and then the decision to prosecute again under the justification that amnesty in these cases was unconstitutional and illegal under international law.

But I believe that the success of the struggle for the right to due process and the application of the rule of law should not be evaluated against the story of the criminal prosecutions. If the diagnosis had been the lack of rule of law, evaluation of the strategy to address this issue has to focus on whether it changed the configuration of Argentine politics in order for it to never again produce dictatorships and violations of human rights. The strategy was the following: out of the demands of the families of the victims assumed by a political party, the democratic government decides to prosecute the worst perpetrators of State-sponsored massive human rights violations. It gathers a Truth Commission peopled by a group of notables, which compiles evidence to be used by the prosecutors and published in a Report. The perpetrators are prosecuted and sentenced to several years of imprisonment. In hindsight, the strategy is translated into the reconfigured Argentine politics as follows: a mobilised civil society becomes organised collectively and collectively identifies a public policy as a violation of human rights. The organisations demand the authorities to end the violation and when they do not respond, they look for alternatives. Eventually, the definition of the situation, the violation of a right, is translated into legal jargon and taken to the courts, which produce a decision that must be enforced by the authorities, and the enforcement is controlled by the civil society in an endless process we call constitutional democracy.

In effect, the courage of the Mothers and the human rights organisations is translated in Argentine democracy in the hundreds of new NGOs that collectively defend plural definitions of human rights. Now we have rights, where in the past there was only the common good defined by the State, even a non-democratic one. The shame produced by the Report (which became a bestseller) explains why social protests are not criminally prosecuted in Argentina, even when there are more than 3,000 street and highway blockades a year. No democratic government wishes to be equated to a dictatorship. The intervention of the courts, the use of constitutional rights and of the international human rights treaties opened up many spaces for deliberation about the adequacy of public policies. Some truth, some punishment, some reparations and even some amnesty in different proportions changed Argentine politics. Almost 30 years have gone by and we still find the possibility of a coup unimaginable and the ethics of human rights pervade every interstice of our political language.

There were many areas in which this reconfiguration resulted in staggering modifications for those who had been working in the previous paradigm. The conception of criminal law and criminal procedure to the interpretation of constitutional rights, or what due process entailed, were some of the political decisions that were strained by the demands for 'trial and punishment' of those who had massively and systematically violated human rights. But no less spectacular was the change with respect to the relationship with rules emanating from non-national actors, whose legitimacy has reached unheard records compared to our previous culture and practices; or the transformation of the relation between civil society (a new concept in Argentine politics as well) and the State through the emergence of new social actors; or the way these social actors now engage in procedures that allow them to claim their rights in public policy spaces previously forbidden to them.

In the context of this work it is particularly pertinent to enquire to what extent this process of reconfiguration is linked to changes in the legal profession as well to the phenomenon of globalisation. However, to the extent that traditional barriers between national and international and between private and public are exactly part of that which is at issue, what follows is a brief attempt to articulate this monumental cultural reconfiguration, whose final countenance is far from clear.

Foreign territories were a natural venue for Argentine political activity; they were the alternative to confronting political violence and risking death. Many of our founding texts were written in political exile. This fact highlights another: the lives of those who shaped our history were marked by the imprint of the diaspora, by the pain of not belonging to the community in which one lives, and the need to speak of and hear about stories of one's homeland. The success of immigration policies created at the turn of the 19th century produced a wave of people that, although eager to build their lives anew kept a longing for their countries of origin, a nostalgia that produced a permanent curiosity of what is said abroad about us. It is a known strategy among our politicians to take tours abroad in order for the press to cover what would otherwise go unnoticed. Argentine policies can be produced in exile.

These skills became useful during the last military government. Many of those who created the conditions that made a democratic system based in the defence of human rights possible were lawyers returned from their exile that helped articulate a new conception of law and politics. International law and the institutions and processes that would later give place to the phenomenon of globalisation had already shown their potential by the end of the 1970s. The power of the international arena to produce political events during the dictatorship linked the democratic transition to the transnationalisation of politics in both formal and informal settings.

This story began in the wake of political violence in the 1960s when lawyers began to work for social movements and violent revolutionary organisations, while at the same time keeping a clear separation between their different activities. As professors in the law schools, they continued the tradition of formalism and legal dogmatism, separating law from other disciplines and in particular from any normative or political discussions. In fact, legal education consisted, as it had been since the creation of the Civil Code in 1870, of the repetition of legal texts and the explanation of those texts by the jurists. In their profession as lawyers they defended their clients through the technical application of the law. And when these clients were fellow activists that had been detained, the technical defence consisted of the utilisation of traditional criminal law. Finally, in their political activism they participated as any other member of the organisation they belonged to.

The panorama changes drastically in the beginning of the 1970s and especially with the appearance of armed clandestine groups (linked to the Armed Forces and the government) that engaged in the repression of violent groups, but also of political and social organisations. Thus, when the institutional mechanisms, that even in military governments established a minimum of due process, disappeared, lawyers found themselves lost with respect to their role. Their old ways drove them to file unsuccessful writs of *habeas corpus* and request individual injunctions against a State that was taken over by clandestine and paramilitary groups in charge of political persecution. It is in this moment when lawyers began working against what they called 'repression and torture'.

The 1976 coup d'état would deepen that tendency and lawyers who were able to survive a relentless persecution would have to turn to exile. From abroad, most of them were instrumental in the strategies of the organisations that began to denounce human rights violations. In fact, by the end of 1975, just three months before the coup, the Permanent Assembly for Human Rights was created. In April 1977 the Mothers of Plaza de Mayo was formed: a group of women started to gather to ask for information about their disappeared children. Then, given the impossibility of being heard in a country taken over by state terrorism, exile once again became the sounding board and the place where news about kidnapping, torture and murders was disseminated. That is how the concept of human rights started to circulate and to become operative in Argentina.

The strategies of civil society organisations not only involved marches and the media, they used the institutional platforms that at that time international law weakly provided: prominently the former UN Under-Secretary-General of Human Rights at Geneva, the Inter-American Commission on Human Rights, and the Senate of the United States, among others. The reports on massive and systematic violations of law redirected the work to what we now call international human rights law: the agenda of constitutional democracy arrived in Latin America through the most unusual channels.

The return from exile coincides, of course, with the return of democracy. The internationalised agenda of human rights is turned into a demand for public policies consistent with the agenda of the human rights organisations: criminal trials and punishment. To a great extent, it is over this agenda that the victory of the Radical Party in 1983 is built. Alfonsín's human rights policy honours this demand

although without the retributivism (everyone involved in the violations deserved punishment) that the organisations pretended. This tension would face the democratic government in symmetrical opposition to the retributivist view (none of those involved deserve punishment) that the Armed Forces demanded.

The two candidates for the democratic presidency disagreed about the legal possibility of the trials: Alfonsín, for the Radical Party, and Luder, for the Peronist Party. The latter had admitted that the so-called self-amnesty law prevented criminal trials for crimes committed during the military government. The former proposed to distinguish between de facto decisions and de jure laws, ending the de facto doctrine begun by the Court in 1930, and allowing democratic authorities to have the power to include or not the rules generated in the legal system of the nation during military governments. The democratic Congress declared the self-amnesty laws void, allowing the prosecutions of those responsible for the atrocities.

Alfonsín's human rights policy assumed much of what was learned in exile. In fact, important laws were modified, and in particular several international human rights treaties were ratified, including the American Convention on Human Rights (which meant accepting the jurisdiction of the Inter-American Court of Human Rights as compulsory), the UN Covenant on Civil and Political Rights and the UN Covenant on Economic, Social and Cultural Rights. Thus, international law multiplied the contents of the list of rights as well as the jurisdictions to demand their enforcement. Since that moment, the rights of Argentines were not limited to the ones that were included in the four corners of the constitutional text but they were extended to those that the international community had agreed upon after the horrors of the Holocaust. But also, those treaties offered spaces for deliberation about the way to honour those rights and processes through which, increasingly, more actors (individuals and civil society organisations) could enforce those mandates even against the majoritarian will of democratic states.

None of this would have been possible without the consent of key institutional actors. It is interesting to point out, to its credit, how appropriate it turned out to be that the same institution that plunged the last nail in the coffin of democracy in Argentina in 1930 accepting the nonsense of the law of force, accompanied the birth of democracy affirming the force of law. In fact, the Supreme Court responded to these modifications, making room for the theory of the distinction between military governments and democracy, thus justifying an institutional break with its non-democratic past and assuming a foundational attitude from its jurisprudence:

> 'The first determinant circumstance, when the matter concerns the consideration of the reach of constitutional rights, is the awareness that our country is going through a particular historic and political conjuncture, in which, from the different instances of normative production and adjudication, it is attempted to rebuild the legal order, with the objective of re-establishing and securing for the future as a whole the Argentine democratic and republican ways of coexistence, so that that objective must orient the constitutional hermeneutic in every field' (in re Bazterrica, opinion of Justice Petracchi).

That attitude of the Court shows its will to become a political and active actor inaugurating a new vision of the role of the judiciary in democracy. The times of uncritical deference to decisions with respect to public policies have been left behind. From now on, the judicial branch would be turned into one more space of public deliberation about the constitutional adequacy of the decisions of the Argentines.

The fall of Alfonsín's government and the advent of Menem's deepened this vision of the Court. The government decided to carry on certain policies that were supposed to be hard to accept by the judges, such as the privatisation of state-owned enterprises and the process of the deregulation of certain markets; it secured the deference of the Supreme Court by increasing the number of its members and incorporating a majority of its own in fast secret sessions in the nation's Senate. The new Court denied the institutional and ideological proposals of the Alfonsín Court and conceived itself as a tribunal deferential towards the decisions of the political powers in particular, that of the President.

The legitimation of presidential decrees is the starting point that the government needed to face an ambitious policy of state reform without effective checks. If the President did not count with enough votes in Congress, he would legislate through decrees that the high court would recognise as if they were acts of Congress. Thus, the politicisation of the judiciary, for better or worse, became a fact of judicial life.

In the process of state reform it adopted the dictates of the Washington Consensus and advanced through executive decrees, some laws and judicial decisions with impressive speed and a general disregard for the rule of law. Thus state public services providers were privatised, many activities were deregulated and an array of regulatory agents was created. These entities were created with the mandate to control the public service in conformity with the new regulations. In order to do so, they had certain autonomy and some public participatory procedures were put in place and provided standing for the consumers, either individually or through organisations created for that purpose. Thus, with the force of international winds blowing in favour of the reign of market control, a new conception of administrative law eroded the centralist and exclusive regulations of the previous tradition. This new administrative law arrived in Argentina and produced a myriad of consumer associations that take hold of new (or forgotten) processes and find lawyers willing to defend their rights and judges willing to listen to them.

Taking the example of human rights organisations and their struggle in the courts to carry on their agenda of demands, NGOs started to multiply. With citizen enthusiasm, internal or external financing, or in the case of consumer associations even the financing of the state as a way to counterweigh the force of private enterprises, civil society organises itself in foundations and associations of the most varied nature. Together with them, the lawyers that had been the protagonists of national and international judicial struggles for human rights provide their recently acquired knowledge and skills to their new clients in the interest of the defence of their rights before tribunals and before the administrative tribunals that now proliferate.

Shortly before the end of his mandate, President Menem agreed with former President Alfonsín to reform the federal Constitution. Menem's need to attain his re-election met the latter's conviction to curtail the system's tendency towards hyper-presidentialism. But a popular demand to fight corruption and to increase the tools to multiply and enforce constitutional rights also defines the new text. Thus, in a bold move, an important number of international human rights treaties are incorporated into the text of the Constitution. Even though some of them were already part of our legislation, as of 1994 it is clear that these treaties are above ordinary legislation and that (as the Court would ratify later) the bodies in charge of their adjudication (like the Inter-American Court of Human Rights with respect to the Pact of San José) produce the final decision. The bill of rights is in this way extended through the incorporation of treaties in the constitutional text. The incorporation of more rights not only affects individual rights, but also collective ones such as the rights of native peoples and consumers, environmental rights, the right to free economic competition and the right not to be discriminated against.

To the complexity of dealing with an extended list of rights of the most varied nature, the new political agreement added the complex institutional issue of the multiplication of the sources of law. In fact, the previous continental law paradigm was sustained in the monotheism of honouring just one authority, the Code, which upheld its legitimacy in the artifice of the general will. That regime now becomes a polytheistic system. The Constitution, the international treaties, the decrees of the executive and the regulations of its decentralised entities that claim authority and demand obedience rest not only on the legitimacy of the votes, but also on the counter-majoritarian force of rights, the need to value economic efficiency and growth, or stability and legal certainty. These other sources of authority are now added to the authority of the Codes and the laws. Polytheism means that legal operators cannot assume just one authority but they have to defer to the claims of these diverse sources and do it in a way that users of the system would understand their decisions and respect them.

At the same time, the Reform of 1994 adds a crucial instrument: rights are recognised and protected by way of making them effective: the individual injunction known as the amparo, that had been created by the Supreme Court almost 40 years before as an immediate redress of evident constitutional violations, and the new collective amparo, which provides legal collective standing to the person(s) affected, to the national ombudsman and to the associations created to defend collective rights. As I mentioned before, since the beginning of democracy, civil society organisations emerged with new demands, inspired by the success of human rights organisations founded in the deterioration of political parties. The Reform of 1994 provided a wider agenda such organisations to constitutionalise their demands and tools to force both the judiciary, recently turned into an open political actor, and

the majoritarian powers to shape their actions in accordance with the promises of the new Constitution.

This is how the practice we call PIL emerges. The practice of PIL consciously uses the forms of law to include those who had been excluded in the democratic deliberation, to maintain the processes that guarantee that deliberation, and to preserve the semantic agreements in which the language of the law is expressed. In that sense, it is much wider than the practice of cases carried out through collective actions, but given its special history in our country, PIL and collective actions have gone hand in hand from a historical and conceptual point of view.

In Latin America, PIL has been linked from its inception to actions that have sought to modify the state of public positions through the intensive use of innovative legal tools. The different shapes that PIL assumes, generally subsumed into the category of impact litigation, have been diverse. Thus, there are many new PIL strategies, eg, judicial review; collective litigation; the coordination of judicial strategies with political agendas of social movements; a certain elitist vision (many times justified by the failures of majoritarian politics) of the legal needs of those excluded from the access to their rights, and even the activity of helping build legal entities for social actors that the cases need; generating associative and functional structures to defend the political agenda that they are trying to advance.

This is how what we can call counter-majoritarian politics was created: with the emergence of the discourse of human rights, the normative validity of constitutional rights and of those rights that arise from international treaties; with the new role that judges assume; with the availability of procedures for civil society organisations to effectively access justice; and with the emergence of private and public actors willing to exercise the sometimes peculiar roles of clients and lawyers in PIL cases.

This practice presupposes the existence, then, of two key actors: the PIL client and the public interest lawyer, and of a particular relation between them, the public interest contract. The PIL client must know (and be warned by their lawyer of the difficulties involved in) the particular role that he or she assumes when he or she decides to file a PIL case. Under such circumstances, the client must accept that, given the case, he or she must postpone his or her private interests in favour of the public interest that he or she claimed to be defending when he or she assumed the case. Given the complexity of the knowledge and skills required to be able to assume such a role, some of the initiatives of civil society organisations interested in this practice generated programmes of legal training and legal literacy in which they delivered the tools needed to assume this new role.

On the other hand, the PIL lawyer must inform the client of the tensions and difficulties to which they are exposed and carry out the case, taking into account that their case must centre on the cause that was agreed with the client when it was accepted. In this way, the ethics of the professional relationship that is created in a PIL case has certain particularities. The agenda of these lawyers (centred in issue-orientated or legal NGOs, or in law schools with PIL clinics) has been changing. In the beginning, the PIL lawyer's agenda consisted of accompanying the claims of the NGOs and offering them one more tool for advocacy. Nevertheless, as new procedural needs, characteristic in these cases, were discovered, the PIL lawyers started to create their own agenda. In fact, on the occasion of the defence of their client's case, the objective generally consisted of creating the procedural tools needed to do this task in the best possible way.

The creation of a pro bono practice recognises this PIL tradition as its own. Lawyers, out of the passivity and even complicity with regimes that disregarded human rights and the rule of law, organised responses to the recurrent crisis Argentina faced in the last decades. To confront radical evil, they sought for truth and punishment; to confront hyperinflation and stagnation, they organised a regulatory state and civil society organisations to control it; to enhance deliberation on public policies they developed procedural mechanisms for individual and collective interests to access the justice system; and to fight against poverty and corruption they organised legal services organisations to advice and advocate in the favour of those least advantaged. A new profession is working in a new political system.

Such tectonic changes require time to settle into practices. They need new ways of legal education, new professional ethics rules, new legal organisations and a new relationship with the judiciary and the political powers. But the Argentine legal profession has come this far – far enough to look back and have many things to be proud of.

Chapter 13

Connections Between the Ethics of Combating Money Laundering and Reduction in Global Poverty

Adrian Evans[1]

Why money laundering and global poverty are connected

Money laundering (ML) inevitably adds to global poverty for several reasons.

First, it assists organised crime. Global and regional criminal organisations, including terrorist groups and illicit arms dealers, depend upon ML to help them escape detection by delaying and confusing police and anti-crime agencies in their efforts to detect what happens to the funds generated by their activities. Organised criminals and rogue governments' raison d'être is the extraction of huge amounts of money from vulnerable and dependent groups (eg, addictive drug users, ethnic and religious minorities, problem gamblers, sex tourists and even paedophiles). These individuals develop sophisticated repressive cultures and networks that in turn entrench large numbers of other people in suffering as well. In some regions, for example, northern Mexico, southern Thailand, Somalia, South Sudan and numerous lesser-known parts of the world, the operations of criminal groups and the poverty of the people they effectively govern, are inseparable. These groups' ability to keep the proceeds of their oppression is secured by effective ML.

Secondly, ML deprives governments of revenue by allowing evasion of taxation systems. Particularly in those regions that are poverty stricken, those governments that wish to reduce poverty are impeded in their efforts to spend on social infrastructure – particularly expenditure on the primary and secondary education programmes that would make a longer-term dent in the personal dependency that helps keep poverty in an endemic state. These problems become even more pronounced when successive global recessions (including those contributed to be some professionals' failure to live up to the implications of professionalism) further depress economies, increase unemployment and reduce tax revenue again.

Thirdly, because ML requires professional help to manage, set up and keep secret the conduits for laundered funds, it undermines the integrity of professional groups such as lawyers, accountants, financiers and bankers. Collectively, these professions could be a key global resource in reducing poverty because they effectively mediate access to the means of production, wealth accumulation and, especially, wealth distribution. ML operates to reduce the collective authority of these professions, downgrading their members to 'technicians', whose opinions are less valued for their moral judgment

1 Adrian Evans, Professor of Law, Monash University. This short note was prepared as a supplement to the Anti-Money Laundering and Ethics session.

and required more for their ability to deliver amoral services without question. To this extent, ML is a player in the maintenance of global poverty because it is contributing to the moral impoverishment of the key groups of citizens in all countries who could really do something to combat it.

What approaches are open to lawyers in deciding to engage with anti-money laundering?

Historically, the legal profession has been at the forefront of every political and social struggle to address injustice and strengthen humanity's commitment to fairness in resource distribution. But some sectors of the profession today appear less aware of these obligations of professionalism and may ask, 'why should lawyers get actively involved in any struggle against poverty?' They may echo a view of some legal academic commentators who consider that the role of lawyers is a narrow one – concerned essentially with interpretation and enforcement of law rather than a moral concern for social equity.[2] But there are other legal scholars and academic practitioners who are equally vociferous and take the opposite view. These writers are confident of the importance of lawyers' active application of a moral position to their everyday work.[3]

IBA commentary on professionalism

If it is correct that lawyers' professionalism requires an active moral agenda (and that remains a big 'if' in some legal circles, whether voiced or not!), then we can draw upon numerous sources in an effort to reinvigorate a wider sense of professional obligation to combat ML; not just because in most jurisdictions ML is illegal, but because it actively entrenches global poverty.

To begin with, the IBA Policy Guidelines for Training and Education for the Legal Profession identify the need for such training and education to include 'ethical-deontological considerations and issues'.[4] The reference to the *deontological* (that is, to notions of fairness in human interaction), makes best sense in terms of the discipline of ethics when it is accompanied by an understanding of the major complementary approaches to ethics (*teleological* – 'the end justifies the means', and *virtue ethics* – the critical nature of human character. The differences between the three approaches have been described as follows:

> '[Consequentialists] are… in general prepared to see individuals suffer when there is a greater good… at stake. They equate ethics with numerical survival of the greatest number [for the greatest good] and their perspective is often described as teleological….; Kant is the best known of the alternative "deontologists", who value rights and fairness over consequences. His "categorical imperative"[5] originally required only benevolence and fidelity but more recently, "Kantianism" has shifted to the "moral rights" of others, so that… [r]ights rather than ends or consequences… [are the priority]; [and] Transcending both these approaches are v*irtue ethics*, an ancient (but increasingly rejuvenated) character-based philosophy derived from Aristotle's

2 There are a number of authors who are sceptical of moral imperatives in the context of legal ethics. See for example, Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton University Press 2008); Stephen L Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities' (1986) American Bar Foundation Research Journal 613; W Bradley Wendel, 'Civil Obedience' (2004) 104 Columbia Law Review 363; and Tim Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Ashgate 2009).

3 See, William Simon, 'Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives', (2010) 23 Geo J Legal Ethics 987 at 992; Christine Parker and Adrian Evans, *Inside lawyers' Ethics* (Cambridge University Press 2007); Stephen Parker and Charles Sampford (ed), *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon Press 1995); Julian Webb and Donald Nicolson, 'Institutionalising Trust: Ethics and the Responsive Regulation of the Legal Profession' (1999) 2 Legal Ethics 148; Mark Potter, 'The Ethical Challenges Facing Lawyers in the Twenty-first Century', (2001) 4 Legal Ethics 23; Duncan Webb, *Ethics, Professional Responsibility and the Lawyer* (Butterworths 2000); Julian Webb, 'Being a Lawyer/Being a Human Being' (2002) 5 Legal Ethics 130; Christine Parker, *Lawyers' Ethics and Access to Justice: Just Lawyers: Regulation and Access to Justice* (Oxford University Press 1999) and Robert W Gordon, 'A New Role for Lawyers? The Corporate Counselor after Enron', in Susan D Carle, *Lawyers' Ethics and the Pursuit of Social Justice: A Critical Reader* (New York University Press 2005).

4 See para 3(c), November 2011. The Guidelines are available at www.ibanet.org.

5 Immanuel Kant, *Foundations of the Metaphysics of Morals* (1785) (Lewis White Beck trans, 1959, Bobbs-Merrill, Indianapolis, 2nd edn 1990) 46.

> *Nicomachean Ethics*.[6] Lawyers accustomed to hard-nosed environments will tend to glaze over at the mention of classical scholarship, but ignoring virtue ethics as worthy of understanding would be a costly decision in itself. The virtue ethicist is a "good" person and therefore supposedly makes "good" decisions regardless of rights or consequences. [Their orientation is capable of incorporating other major ethical approaches because they are in]… 'a state of contentment, a life integrated happily with a sense of purpose, lived out in community.'[7] The qualities that such a person exhibits in order to achieve a proper life are the *virtues*. Together, the virtues: courage; temperance; magnificence; pride; good temper; friendliness; truthfulness; wittiness; shame and justice; to which Aquinas added faith, hope and charity,[8] constitute the ethical life.'[9]

Thus, ethical consciousness needs to go behind rules of conduct and take in ethical principles developed through moral philosophy. The IBA provides international leadership here:

> 'The IBA urges judges, legislators, governments and international organisations to strive, along with lawyers and bars, to uphold the principles set out in the General Principles. However, no statement of principles or code of ethics can provide for every situation or circumstance that may arise. Consequently, *lawyers must act in accordance with the dictates of their conscience*, in keeping with the general sense and ethical culture that inspires these General Principles.' [10] [Emphasis added]

But after awareness of a likely ML situation, what lawyers may need and currently often lack, is the courage to act, which can come from the principles that underlie our national codes.

Apart from anti-money laundering (AML) treaties and increasing examples of national legislation to the same end, legal ethics codes are already trending away from blanket client confidentiality and towards encouraging lawyers to be courageous in disclosing clients' criminal activities. Thus, lawyers cannot claim confidentiality when assisting criminal activity.[11] Further, whistleblowing in relation to *past* crimes is also increasingly important. The Commentary states that 'a lawyer cannot invoke confidentiality/professional secrecy in circumstances where the lawyer acts as an accomplice to a crime',[12] since to the extent that a lawyer becomes aware of a crime and remains silent, s/he risks becoming an accessory after the fact, and inculpated as an accomplice.

Options in approaching fundamental ethics

Leaving to one side *codes* of ethics (which are better defined as statements of professional responsibility, since *principles* of ethics cannot be codified in any regulatory, enforceable manner), there are also a variety of psychological scales or instruments that have been developed to measure levels of awareness of moral complexity – for example:

- moral imperatives derived from religious belief (too numerous to deal with here);
- Kohlberg's[13] six categories of moral development – as follows:
  - **Stage 1 *Punishment and obedience*** – blunt, basic and retributive;

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6 See Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press 2001); Tim Dare, 'Virtue Ethics and Legal Ethics' in Duncan Webb (ed), *Seven Essays on Professional Ethics* (Victoria University of Wellington, Wellington 1998) 141.

7 *Ibid*, 58.

23 Thomas Aquinas (c 1224–1274) *Summa Theologiae*, I-II, 62, a 1.

9 This three paragraph summary is extracted from Adrian Evans, *Assessing Lawyers' Ethics* (Port Melbourne, CUP 2011) 68–69. Dewhurst comments that, 'numerical survival of the greatest number' is too bald a statement for some consequentialists. He observes, 'Mill did not support this position and thought that there were higher goods. For consequentialists like Mill, you only do harm to a few in favour of the many when harm is inevitable and you must choose one or the other to suffer a negative consequence. It is not a matter of imagining a positive benefit to many and then sacrificing a few to achieve it. For Mill, the goal of utilitarian action is to secure the virtues for all of mankind, the whole of sentient creation; and there are times when the individual must sacrifice for the good of all.' (Comment on file with author, 25 October 2011).

10 Extract from IBA, 'Commentary to the General Principles of the Legal Professional' (2010) Introduction, #7.

11 See 'Commentary on IBA General Principles for the Legal Profession' (2010) Explanatory Note 1.2: 'Lawyers cannot claim the protection of confidentiality when assisting and abetting the unlawful conduct of their clients. There is no protection provided by courts or governmental authorities for confidentiality/ professional secrecy among the participants in a crime.' Further, national legal ethics codes typically *allow* a lawyer to disclose information where the purpose is to prevent a serious criminal offence, eg, the proposed *Australian Solicitors Conduct Rules,* r 9.2.4.

12 *Ibid.*

13 See Lawrence Kohlberg, *The Psychology of Moral Development* (Harper and Row 1984).

  - **Stage 2** ***Instrumental relativist*** – pragmatic – 'you scratch my back and I'll scratch yours' – involving mutual self-interest rather than aspiration;
  - **Stage 3** ***Interpersonal concordance*** – good behaviour is that which others approve of – nice, friendly and insipid;
  - **Stage 4** ***Law and order*** is more contemporary – laws govern behaviour and obeying the law is a duty – tending to the religiously extreme and leaning to the unbending – (this is where AML legislation tends to sit);
  - **Stage 5** is more promising – ***Social contract/legalistic*** – individuals are aware of the 'relative' nature of personal values and behave according to social utility;
  - **Stage 6** – ***Universal ethics***, which asserts that the best behaviour is governed by chosen universal ethical principles that transcend laws, and importantly, the rules of professional conduct.
    It is not unreasonable to expect that a lawyer who can identify with either Stage 5 or 6 will also connect AML with the capacity and opportunity for professionals to reduce global poverty.
- several lawyer-specific scales, for example, Atkinson's[14] three lawyer types:
  - **Type 1** is **morally neutral** and will conscientiously do almost anything for their clients (note Type 1 is *outside* Kohlberg's Stages). This lawyer seeks justification by arguing (quite credibly) that society has no security except in a necessary willingness to engage lawyers in proper hair-splitting exercises about the strict letter of the law.
  - In contrast, **Type 2** lawyers **see themselves as 'officers of the court'** and look to public norms of propriety that may be a bit broader than the strict letter of the law (Kohlberg's Stages 5 and 6) – focusing on notions of justice, truth and honour. A Type 2 lawyer is likely to be most receptive to the connections between AML and reducing global poverty.
  - **Type 3** is the lawyer as **change agent**, the provocateur who seeks out loopholes for reform purposes that he or she considers morally right (elements of Kohlberg's Stage 6).
- and **Parker's** four-part categorisation of **zealous advocacy**, **responsible lawyering**, **moral advocacy** and the **ethic of care**.

Parker's typology of lawyers

Parker's[15] typology may be the most accessible for lawyers because it focuses on the concept of *role*. Many of us are already familiar with the first role below, but there are a number of other role categories that can provide more depth when dealing with the need to combat ML.

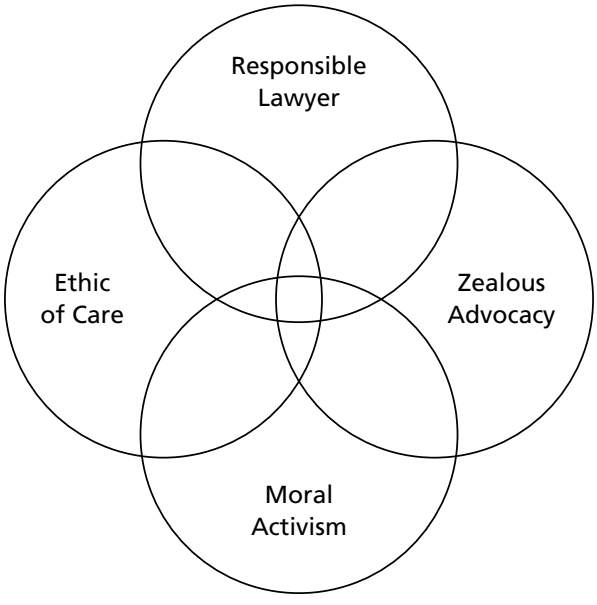
1. ***The adversarial or zealous advocate*** is often dominant and oriented to the 'professional role', agreeing to the client's demands while reluctant to see any role for the lawyer as 'self'. The zealous advocacy is the extreme and clinical consequence of dominant adversarial culture (similar to Atkinson's Type 1; but *outside* Kohlberg's stages).
2. ***The responsible lawyer*** who gives an equally convinced priority to the fairness of the dispute resolution process and lawyers' duties to courts. Responsible lawyering offers the confidence that rules in their essence represent distilled notions of fairness, based on precedent (Atkinson Type 2; Kohlberg Stages 5 and 6).
3. ***The moral activist*** is typically consequentialist and concerned for socially just outcomes, though still without much emotional awareness of others (Atkinson Type 3; elements of Kohlberg's Stage 6).
4. ***The ethicist (or relationship) of care*** walks fairly closely with virtue ethics – this type of lawyer prefers to nurture relationships between all affected by the justice system. This last type of lawyer could well be both virtuous and emotionally intelligent, and while not disregarding holistic solutions to difficult problems, seeks to maintain that relationship as both the method and purpose of all their professional interactions.

Professional conduct rules and popular media conceptions of lawyers' roles help to imprint in new lawyers a view that their clients' demands are their only legitimate priority. But clients' demands are not necessarily the same as their longer-term interests. It may be difficult to see ourselves as anything other than zealous advocates, but the impact of the moral failures in the GFC, the burgeoning pressures

14 See R Atkinson, 'A Dissenter's Commentary on the Professionalism Crusade' (1995) 74 Texas L Rev 259.

15 See, eg, Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics', (2004) 30 Monash Law Review 49.

of contemporaneous population growth, resource diminution and peak oil are compounding both global warming and global poverty. These in turn increase global unrest. ML is a tool of those who would deny and compound these huge challenges. In this context, the social expectations of lawyers are broadening significantly beyond narrow representative roles, especially for transactional lawyers. The modern picture of lawyer types, as the Venn diagram below suggests, offers an overlapping consciousness of opportunity:



While the overall relationship between lawyers' role preferences is complex and uncertain,[16] for present purposes it is reasonable to assert that the lawyer who knows with which of these role types they are *most comfortable*, will be in a better position to anticipate the challenges that will be required of the profession in the context of many global challenges. They may also be better prepared to deal with overtures to engage in ML.

To put the situation *in extremis* and state the obvious, our clients are not always right or good, but we have choices about our own behaviour. And if we also appreciate that getting in touch with our ethical core will help us be on the alert for likely ML scenarios, then we will be rather less likely to meekly accept everything we are told by new clients who may seek to exploit any lack of experience we may have with ML.

16 Adrian Evans and Helen Forgasz, 'Framing Lawyers' Choices: Factor Analysis of a Psychological Scale to Self-Assess Lawyers' Ethical Preferences' (2013) 16(1) *Legal Ethics*, 134.

Chapter 14

The IBA Global Financial Crisis Project Dublin Conference: The Presidential Priority Sessions

John Claydon, Mary Gold and Luz Nagle

The President of the IBA and the Task Force on the GFC, Poverty and Law identified a series of programmes offered at the IBA Annual Conference in Dublin in October 2012 called the 'Presidential Priority Sessions'. These sessions either specifically addressed the effects of the GFC on poor people and poor countries and the role of law in mitigating or exacerbating poverty or explored examples of both hard and soft law regimes that have been created to protect, either directly or indirectly, the interests of the poor. While the latter sessions did not specifically address the effect of the GFC on poverty, they did provide some guidance on how governments, businesses and the law could be more responsive to the legitimate interests and economic concerns of the public in times of economic stress. In addition to the keynote address, the Presidential Priority Sessions included the PPID Showcase on Lawyers Against Poverty and selected other sessions that addressed the human rights and economic protection of the public at large and specifically of the poor, as well as anti-corruption initiatives, AML and CSR regimes. In the following pages we will review these various sessions. This is the work of three rapporteurs: John Claydon, Mary Gold and Luz Nagle.

Keynote address by Joseph Stiglitz

Professor Joseph E Stiglitz, a Nobel Prize Laureate in Economics and University Professor at Columbia University in New York, addressed the negative effect of the GFC on the already growing income inequality between the rich and the poor and outlined the almost insurmountable challenges the poor face in trying to improve their economic condition. Supporting the need for significant government financial stimuli, he advocated the abandonment of the currently popular economic austerity programmes that have been implemented by the US and many European and other governments to reduce debt. An edited version of Professor Stiglitz's address follows.[1]

Conventional approaches to solving the GFC

It has been five years since the beginning of the GFC and the downturn continues with no imminent and sustained recovery in sight. The question that arises is how long can the downturn be expected to last? It must, first, be stressed that economies do not recover without intervention.

The diagnosis relating to the GFC is fairly simple: the financial sector caused the problem, abetted by government supervisory failures – poor banking policies and lax regulations allowed a host of bad practices and their consequences to occur. To treat the problem it was agreed that time was needed

1 Prepared by Mary Gold.

to give the banks an opportunity to heal, something that was initially predicted to take about one-and-a-half to two years. A mild stimulus was introduced to keep the economy going. Then it was posited that with the financial sector healed, the country could resume its pre-crisis position. However, both the diagnosis and the prescription were wrong. In fact, four years have lapsed since the stimulus and the economies in the US and Europe have not recovered. Even if the GFC played a critical role in the recession it was caused by much more than a financial crisis.

In addition, conventional wisdom maintained that the absence of effective banking would impede investment. But once the banks were restored to reasonable viability, it was believed that investments would be restored. And indeed, outside real estate, investment has largely returned to normal in the US. Large firms are sitting on an estimated $2tn of cash. It is, therefore, not the lack of finance that is holding back the US economy; it is the failure to use these funds to stimulate growth. Instead the upshot is that the GFC has made the underlying problems worse in two ways: by leaving excessive household leverage in its wake and an overhang of real estate. This has important implications, especially for countries like Ireland and Spain, which outdid the US in the seriousness of the bursting of their bubble. As a result, it will be hard to restore these economies to full employment because of the gap in aggregate demand and the debt load of individuals.

Growth in income inequality

Prior to the GFC, wealth inequality was growing in most countries. The consequence of the crisis, particularly in Europe and the US, was an exacerbation of this trend. Today, the median US household income has reverted to what it was in 1996. The median real income for full-time male workers is back to what it was in 1968. The median wealth is back to what it was in the early 1990s. In 2010, the year of the recovery, 93 per cent of growth went to the upper one per cent.

Before the crisis, real estate in the US represented 40 per cent of all investment. Today it is less than half of that. Similarly, before the crisis, the savings rate in the US was near zero. In fact, the bottom 80 per cent of the population was consuming 110 per cent of their income. The personal savings rate now has gone up from near zero to a little over four per cent – still far below the traditional average and below what it ought to be. Thus, even after deleveraging, consumption will not be anywhere near what it was before the crisis. In terms of demand, housing construction and consumption, the very activities that give an economy its energy, are going to be markedly weaker than they were in the years before the crisis.

Addressing the structural transformation of work

In the US and Europe, the main economic structural transformation occurring today is the movement away from manufacturing. This shift parallels what happened before the Great Depression. At that time, there was an increase in productivity in the agricultural sector with the result that fewer farmers were needed to grow the necessary food for the population. At the end of the 19th and beginning of the 20th centuries, 70 per cent of the population worked directly or indirectly in agriculture; it is now only three per cent. However, those working in the agricultural sector moved to manufacturing jobs. Today we face an analogous problem. Now because of increased productivity in manufacturing, workers have to move out of manufacturing to other types of employment – mostly in the service sector. In the US and Europe, these problems are compounded by globalisation: a larger share of the shrinking global employment in manufacturing will be centred in emerging markets, and a smaller share in the US and Europe. Even China has had a marked decrease in employment in manufacturing. In the US, manufacturing represented 21 per cent of employment in 1980 and by 2012 it was under nine per cent. We are victims of our own success. When this kind of productivity increases, employment shrinks.

Europe faces similar structural transformation problems. Spain and Greece are in depression – they have 25 per cent unemployment, the same rate as in the Great Depression. In addition, more than 50 per cent of their young people are unemployed. This is the period of their lives in which they should be building their skills; instead their human capital is weakening and they are becoming alienated. The future of these countries is in jeopardy – their stability, democracy, etc, are affected. The diagnosis of

what went wrong in Europe was incorrect and as a result the prescription was miscalculated. We were told that the problem was excessive debt but Europe's debt-to-GDP ratio was better than that in the US. Before the crisis, Ireland and Spain had a surplus, not a deficit. They fulfilled all the conditions of the Maastricht Convergence Criteria. Unlike Greece, they were not profligate. If Greece were the only problem, a small country of 10 million people, it would be easily solved. Because the problem was misdiagnosed as overspending, the prescription has been harmful austerity programmes.

Markets do not often make these structural transformations easily because those who have to move from the old sector to the new have low wages and losses in asset values and thus cannot make the necessary investments. For these reasons, government needs to take a major role. In facilitating the shift from agriculture to manufacturing, governmental Keynesian industrial policies were crucial. The GI Bill and the Second World War were important to the post-depression transformation. Today, an even larger government role is needed. Unfortunately government is not doing what it should and is backing away from this role. A major problem in the US is that the government is pursuing contractionary policies.

The adverse effects of austerity measures

Austerity policies have been tried many times and have almost never worked – they were tried unsuccessfully by Hoover in 1929 and more recently by the IMF in East Asia and Latin America. These austerity policies have converted downturns into recessions and recessions into depressions. The only examples in which austerity has worked are in cases in which exports have replaced government spending – something that is easiest for small counties where there are flexible exchange rates. It is impossible for large economies that have weak trading partners to depend on exports for recovery.

In Europe, austerity measures are being pursued. In the US, they have also been used to fight the GFC. Employment in government today is 600,000 lower than before the crisis and if there had been a normal increase to reflect the increase in the labour force, some 1.2 million employees would have been added to the government sector. Thus the decline in government employment is one of the major factors contributing to the weakness in the economy. At the same time, these cutbacks are hurting the ability of the US to make the structural transformations that are needed.

Europe's flawed banking and currency arrangements

Europe has the additional problem of a flawed currency arrangement: the euro is untenable. The establishment of the eurozone was based on politics and not economics. The economic conditions necessary for a common currency were not present. The EU leaders knew this but hoped that, in the ensuing years, there would be sufficient changes to make the system work and make the eurozone viable. During good times, there was no impetus to address the issue. Nothing was really done until after the crisis in Greece, when a succession of misguided measures was implemented. Having a common currency takes away two critical adjustment mechanisms for dealing with a disturbance: exchange rate and interest rate adjustment mechanisms. It does not appear that internal devaluation, the lowering of wages and prices, can work on their own. What is needed in Europe is a structural change of the euro arrangement.

Emerging markets

Emerging markets have weathered the 2008 storm much better than expected. The reason was the decoupling of the emerging markets' economies from those of the advanced industrialised countries. This was surprising because we believed that the emerging markets were dependent on exports to the industrialised world. China and India did well for a time, but are now experiencing a slowdown from nine per cent to seven per cent growth. China is supportive of slower but higher quality growth and has the knowledge and ability to ensure that growth does not dip too low. The slowdown is affecting Latin America and Africa because, while they benefit from high resource and commodity prices in a challenged economic environment, demand reduces. However, overall, growth in the emerging markets will not be strong enough to pull the US and Europe out of the doldrums.

Recommended fiscal responses to the GFC

- In the US, the foreclosure crisis has to be dealt with first. Today, 20 per cent of homes are underwater; seven million people have lost their homes and several million more will also lose them. There have to be mechanisms introduced for members of the public to restructure their debt, such as, a homeowners' version of the US bankruptcy regulation Chapter 11, which allows businesses to seek protection while they restructure.
- There needs to be a fiscal stimulus. It constitutes the best way to address the looming deficit and debt. The first stimulus worked: unemployment in the US would have peaked at 12.5 per cent without it – it peaked at ten per cent. But the stimulus was too small. A further stimulus could bring down unemployment even more. It must be remembered that the recession caused the deficit, not the other way around. Right now the US can borrow at a negative real interest rate and can invest in the public sector, and in infrastructure, technology and education, all of which have suffered from underinvestment. These investments would allow the US to solve some of the structural transformation problems, address the problem of inequality and promote economic growth.
- If the economic framework were to change in Europe, it too could have access to credit, at the same negative real interest rate as the US could.
- Europe also needs a common banking system with common deposit insurance and common resolution. The mutualisation of debt is also necessary. At present, indebted countries can only borrow at high interest rates; this weakens their economies and is bad for an economic turnaround.
- The choice should be made between more Europe (a mutualisation of debt in a common banking framework) or less Europe (a break-up of the eurozone as it currently exists).

Recommended legal responses to the GFC

- Corporate governance needs to be improved in order to correct an incentive system that distorts behaviour and encourages the financial sector to engage in excessive risk taking. The primary role of this sector, rather than engaging in speculation, should be to provide loans for small and medium businesses that cannot raise money in capital markets. It is also important for stockholders to have a 'say in pay'.
- Banking regulation has to be introduced that prevents banks from doing harm to others by engaging in speculation that can hurt customers, shareholders, employees, etc. Individual members of society possess an important freedom, that is, the freedom not to be harmed by others.
- Lawyers have to be mindful of the fact that because of the GFC, legal aid has been reduced for those who cannot afford legal services. The legal profession has to insist that there is access to justice for all.

The PPID Showcase: Lawyers against poverty

Joint Session of the PPID Division and Pro Bono/Access to Justice Committee[2]

The purposes of this session, moderated by Joss Saunders of Oxfam, were to survey the current extent of poverty globally, discuss its causes and recommend how lawyers can facilitate change

Professor Thomas Pogge of Yale University quoted a wealth of statistics dealing with the current state of poverty. He noted, for example, that nearly a third of all deaths in any year are due to poverty-related causes, and that nearly a billion people are chronically undernourished and lack safe drinking water and adequate shelter. Two billion people lack essential medicines and even more lack adequate sanitation. The income disparity between the world's rich and poor is grossly disproportionate, and increasing. Regulatory systems encourage those with resources to augment them: strong protection of intellectual property rights favours the rich countries at the expense of the poor ones, undermining

2 Moderator: Joss Saunders, Oxfam, Oxford, England. Speakers: Sr Stanislaus Kennedy, The Sanctuary, Dublin, Ireland; Thomas Pogge, Yale University, New Haven, Connecticut, USA; Muhammad Yunus, Yunus Centre, Dhaka, Bangladesh. Prepared by John Claydon.

developing country exports. Pollution affecting areas of basic needs, such as water and land use, harms the poor. As rule-making moves to the global level, where there is little transparency and accountability for implementation, those with resources are well placed to lobby governments to protect their interests.

The prevalence of poverty globally inspired the establishment of the UN Millennium Development Goals, eight international development goals that have been adopted by all UN Member States and a number of international organisations for achievement by 2015. Each goal has specific targets. The first goal is 'eradicating extreme poverty and hunger'. In 2005, the G8 countries agreed to provide funds to cancel US$40–55bn in debt owed by poor countries to enable them to channel the saved resources into programmes for alleviating poverty, and the 2012 UN Millennium Goals Report stated that the target of reducing extreme poverty by half by 2015 has already been met. It also projected, however, that by 2015 nearly one billion people will be living on incomes below the US$1.25 per day poverty line. Of the US$120bn of yearly official development assistance, only US$15bn, amounting to 0.04 per cent of global household income, goes to basic food security, health, education, water and sanitation services. It is clear from this report that progress in achieving these poverty-related goals has been uneven, with much more necessary.

Global norms establishing social and economic rights are often viewed as voluntary or 'programmatic' rights, subject to gradual rather than immediate achievement. Some scholars argue, however, that the entitlement of everyone to an adequate standard of living enshrined in the 1948 Universal Declaration of Human Rights may have achieved the status of customary international law, binding all states. Whatever the merits of this jurisprudential debate, more progress is essential. In Professor Pogge's view, it can be achieved only when the Millennium Development Goals move from detached goals to agreed responsibilities for meeting them.

Professor Pogge also addressed the issue of what a post-2015 anti-poverty agenda might contain. His suggestions include:

- a tax on countries providing subsidies or export credits that constitute trade barriers;
- a tax on pollution emissions;
- payment of a share of arms exports profits;
- a tax on multinational corporations to redress the effects of lost tax revenue on poor populations;
- sanctioning banks and countries that maintain secret bank accounts with anonymous owners;
- forbidding only minimally representative rulers to undertake debt burdens for their countries;
- taxing national resource purchases from unrepresentative rulers; and
- an option to reward new medicines according to their health impact, if sold at cost.

Muhammad Yunus, Nobel Peace Prize recipient and founder of the Grameen Bank in Bangladesh,[3] discussed his experience with microfinance and spoke eloquently about the causes of, and solutions to, poverty. The Grameen Bank, which is owned by borrowers, was set up because traditional banks will not lend to most of the world's population as not 'credit-worthy', a characterisation with which Professor Yunus disagrees. The Grameen Bank provides banking services to the very poor, especially in rural areas, and makes many small loans to encourage entrepreneurship, overwhelmingly (98 per cent) to women. There has been a 97 per cent repayment rate on the US$11.5bn in loans that have been made. The loans are based on trust and accountability rather than on collateral and legal documentation. In this model, credit is seen as essential for achieving the economic emancipation of the poor.

For Professor Yunus, poverty is created by the current financial system, and existing laws and institutions can be an impediment to alleviating poverty in a number of ways. The 'charity' nature of government social programmes, for example, serves to perpetuate poverty over generations. What is needed, in his view, is social entrepreneurship, in the form of non-profit and joint ventures, that empowers the young to innovate and breaks the cycle of dependence.

Sister Stanislaus (Stan) Kennedy discussed the state of homelessness in Ireland. She noted that one person in six lives below the poverty line in Ireland and that there are currently an estimated 5,000 homeless people and 93,000 households on the list for affordable housing. Homelessness greatly impairs the enjoyment of other rights, including privacy, employment, education and participation in the political process through voting. Children and young people are particularly vulnerable when

3 See Chapter 2 on page 19.

homeless people are often denied adequate healthcare, especially aftercare. One member of the audience argued that homelessness would continue unless there are systemic changes, including a greater role for government in job creation, and agreed with Professor Yunus that handouts will not solve poverty problems. Another member of the audience noted that constitutional protection of the right to housing exists in some countries, such as South Africa, and should be recognised elsewhere.

Each of these speakers, as well as some questioners from the audience, considered the impact of the global recession on meeting the poverty challenge. In many countries, including Ireland and Japan, the number of people on welfare has increased during the recession, placing greater pressure on scarcer government resources and heightening social tensions between welfare recipients and those who believe the claimants for enhanced need are to blame for their situations. Sister Stan remarked that benefits such as food and housing that are considered to be 'commodities' during boom periods become 'rights' during a recession, when budget cutbacks limit their distribution. Other recession casualties that affect poverty include official development assistance funds, incentives for job creation and the willingness of banks to make loans to stimulate business and of corporations to invest in schemes for enhancing development. Finally, as noted by Professor Yunus, access to justice suffers: without the availability of robust pro bono activities by lawyers, poor people will not have a real opportunity to have their rights vindicated.

The final speaker picked up the pro bono theme and discussed the role of lawyers in eradicating poverty. Yasmin Batliwala, Chief Executive of A4ID, explained her organisation's role in ensuring 'that legal support is available to those involved in the fight against poverty and that lawyers and development organisations have the skills and knowledge to use the law as an effective development tool'. With an explicit emphasis on the Millennium Development Goals, A4ID helps development organisations to understand what their legal needs are and, through a brokered matching programme, puts them in touch with thousands of lawyers worldwide who can provide free legal services to these groups as well as to bar associations, social enterprises and developing country governments. A4ID also runs training programmes on a variety of topics, including sessions for lawyers and law students on how to use their legal skills to promote development. Since 2006, A4ID has sponsored more than 1,000 legal projects that have provided approximately US$40m worth of free advice and services.

Apart from raising awareness about the accountability of lawyers and law firms for alleviating poverty, the A4ID model has advantages for law firm pro bono programmes. In some parts of the world where the legal profession has embraced pro bono, particularly North America, the emphasis has been on litigation opportunities, with transactional lawyers often remaining aloof. The social entrepreneurship model of A4ID broadens the range of work to encompass such transactional activities as drafting contracts, conducting due diligence and transferring intellectual property rights, offering to lawyers and firms not only a development focus but also a more comprehensive pro bono agenda with related training benefits.

Some IBA lawyers are in firms that work with A4ID, others whose firms are part of the Lex Mundi network have access to multinational social entrepreneurship activities through the matching programme of the Lex Mundi Pro Bono Foundation, and yet others may contribute to development and poverty alleviation through their firms' CSR enterprises. There is a role for the IBA to seek to extend these opportunities to the entire IBA membership.

Recommendations for reducing global poverty

- Lawyers could ensure that an adequate range of norms is in place to support development.
- They could monitor and assess the effectiveness of rule-making initiatives.
- They could evaluate the social impact of routine practice activities that may advance the interests of clients but harm the poor (for example, certain forms of intellectual property protection).
- They could help prevent predatory elites from embezzling resources that should be used for development, by examining the circumstances surrounding the award of contracts (eg, whether tendered, taxes paid and due diligence completed) and by challenging suspect transactions.
- Although specific rules of professional conduct vary from jurisdiction to jurisdiction, lawyers everywhere share the professional value of responsibility for implementing the rule of law. This responsibility transcends providing client service and preventing clients from engaging

in illegal conduct to encompass a commitment to ensuring that the law contains robust rights, including those that alleviate poverty and secure economic development.
- Another key component is providing the disadvantaged with means to redress rights violations. Activities such as participating in rule-making, assessing the effectiveness and social impact of laws, and engaging in pro bono work are essential to the wellbeing of a legal system and inherent in the role of lawyers.
- The IBA's Pro Bono and Access to Justice Committee might consider exploring ways of collaborating with A4ID, other like organisations, and bar associations to expand both the totality of anti-poverty legal projects and access to them by IBA members.

The dispossessed: an examination of groups on the edge of society, their legal rights, legal challenges, successes and failures

Joint Session of the Human Rights Law and Indigenous Peoples Committees[4]

This session, presented jointly by the Human Rights Law and Indigenous Peoples Committees, focused on the legal challenges facing peoples who live on the fringes of mainstream society. Specifically, it explored the situation of the Irish Travellers and, through case studies, initiatives involving an indigenous group in Canada and an ethnic group in Colombia that aim to improve their social and economic wellbeing.

Case Study: Irish Travellers

The Irish Travellers (ITs) are an ethnic minority numbering at least 29,573 in Ireland.[5] Their religion is the same as the Irish majority, Roman Catholicism. Although most ITs speak English, they do have a traditional language, Shelta. They also have a distinctive culture mainly related to a nomadic way of life that parallels that of the roughly 12 million Roma who live throughout Europe and has existed for at least 1,000 years. Typically self-employed, they make their living by selling portable consumer goods and recycling scrap metal. Many are on government assistance, due in part to employment discrimination. Often viewed by the general population as thieves, idlers and drunkards, they are subject to widespread prejudice, discrimination and ostracism.

Social problems within the IT community are serious, and discrimination is rife. At three times the national rate, infant mortality is high, with approximately ten per cent of children dying before their second birthday. Life expectancy is low: for men, it is around 15 years less than that of the general population. The suicide rate is estimated to be six times the national rate. Although many ITs live in social housing, at least temporarily, sub-standard housing with poor sanitation is a feature of nomadic life. Homelessness is also encouraged by the refusal of landlords to rent to ITs, of estate agents to sell to them, and of insurance companies to insure them. There is a high rate of illiteracy among ITs, and only about 15 per cent of children proceed to secondary education. ITs are often relegated to segregated education, though a 2010 ruling of the Irish Equality Tribunal in favour of an IT child may open the door to greater access to mainstream education.

Much of the discrimination against ITs is indirect, such as planning provisions that prohibit caravans except for 'indigenous' people. Access to justice exists, but many ITs cannot afford the cost of going to court (and some lawyers are reluctant to take their cases). Legal aid is available for some matters, but may not cover areas of particular concern to ITs, such as eviction from land. Although Ireland is a

4 Moderator: Steven Cooper, Ahlstrom Wright Oliver & Cooper, Sherwood Park, Alberta, Canada. Speakers: Susan Fay, Irish Traveller Movement, Dublin, Ireland; David Joyce, The Law Library, Dublin, Ireland; Victor Rodriguez-Rescia, international expert and consultant on human rights, San José, Costa Rica; Garth Wallbridge, Yellowknife, Northwest Territories, Canada. Prepared by John Claydon.

5 Figures at April 2011, compiled and presented by the Central Statistics Office: see 'Profile 7 Religion, Ethnicity and Irish Travellers – Ethnic and Cultural Background in Ireland', *Census 2011 Results*, (Government of Ireland 2012) available at www.cso.ie/en/media/csoie/census/documents/census2011profile7/Profile,7,Education,Ethnicity,and,Irish,Traveller,Commentary.pdf.

party to international human rights treaties and has anti-discrimination legislation in place, the official status of the ITs as merely a 'social' group, rather than an ethnic group, impedes protection and has been noted as a matter of concern by The UN General Assembly's Third Committee.

The GFC has not only had a negative impact on traditional IT occupations due to overall lower spending levels, but has also stimulated reductions in the legal protection and social programmes available to ITs. Access to justice has been further eroded by legal aid cutbacks. Special programmes designed to alleviate the accommodation and education problems of ITs have been undermined significantly by major budget cutbacks. In times of economic crisis, marginalised groups may be viewed as scapegoats and potentially subjected to collective violence, as reflected in recent attacks on nomadic communities in France.

The Irish Traveller Movement is a network of organisations devoted to securing the human rights of ITs and improving their economic condition. Its Law Centre, consisting of one lawyer and a few interns, engages in strategic litigation on behalf of ITs, typically about ten cases a year. It recently won two cases challenging planning and social housing regulations as indirect discrimination and has a case on education discrimination before the Supreme Court. The Irish Traveller Movement has also been active in trying to get lawyers more involved in helping ITs.

Case study: the Tlicho Investment Corporation

The Tlicho Nation is an indigenous population numbering 4,000 in Canada's Northwest Territories. In 2003 it signed the Tlicho Land Claims and Self-Government Agreement with the governments of Canada and of the Northwest Territories. This Agreement, which entered into force in 2005, created the Tlicho government and gave the Tlicho title to 39,000 square kilometres of land, including subsurface rights, as well as a share in the royalties from developing that land.

The Tlicho Investment Corporation is owned by the Tlicho Nation and operates a number of businesses and joint ventures with other groups and companies. Aided by the opening of three diamond mines on Tlicho land that provide significant employment for members of the Nation, the Corporation provides support services in a variety of sectors, including transport, construction, food services and property management. These enterprises have improved the life of all members of the Nation by supporting training and education, healthcare, a seniors' centre and other social programmes, as well as creating a sense of pride in a group moving to a more central position from the fringe. Although problems of drug and alcohol abuse still exist, this example demonstrates the value of entrepreneurial partnerships in a context where marketable natural resources can finance business activity.

Case study: joint development of natural resources in Colombia

Another example of corporate interaction with a minority group in the resource sector is a recently launched partnership in the Choco region of northwest Colombia involving an Australian mining company. The population of this region is mainly of African descent, having originally arrived in the 16th century slave trade to work in gold mines and on sugar plantations and cattle ranches. It has been generally poor, with a high illiteracy rate and inferior nutrition and healthcare. The region is, however, rich in natural resources, notably gold, silver, platinum and copper.

In 1991 the Government of Colombia recognised the Afro-Colombians' collective ownership of ancestral lands as well as cultural rights similar to those of indigenous people. Special mining zones were established on these lands in 2007, including the right to carry out mining activities. The local population subsequently negotiated a joint exploitation project with an international corporation that contains high labour and environmental standards, ensures transfer of technology and provides the people with health insurance and social security. The first of its kind in Colombia, this new project has the potential to improve the economic condition of local inhabitants while preserving the environment.

Beyond the tipping point: is mankind populating itself into extinction?

Public Law Committee[6]

The panel discussion addressed overpopulation and its impact on the developing world and on dwindling resources. Population issues are not a new problem. One view proffered in the panel discussion asserts that population growth and concerns about population are ancient themes. A Babylonian saying goes, 'The noise of humankind has become too much for me / With their noise I am deprived of sleep / Let there be a pestilence upon mankind' (Enlil, Babylonian Tablet, 1600 BC).

It's not that people everywhere are having more children, because in many parts of the world birth rates are decreasing. The concern is that the poor populations are having more children and this is putting great stress on resources, particularly resources in weak and failing states where population growth is unchecked.

We know that most of the world's population lives in India and China, and that the highest population growth is occurring in these two countries and elsewhere throughout the developing world. So what we have are superpowers, albeit each a developing nation, with strong centralised governments, on a collision course with how to deal with the rapid growth of mostly poor and disaffected citizens. How can these states deal with the demand burgeoning populations (particularly among the poor) place on services and resources while trying to sit at the table of First World nations?

The debate over population growth and control is between optimist and pessimist viewpoints. For the optimist, the population challenges will pass and may be a problem of government systems and policy-making. The pessimists see population growth as catastrophic, as resources continue to become limited and depleted and government is either unable to adjust to critical conditions, or resorts to draconian measures to deal with them.

The optimist view with regard to overpopulation is that:

- the environment is adaptable and resilient;
- technological progress allows increasing agriculture production and the efficient implementation of environmentally friendly measures;
- the prices of energy, resources and food are at historically low levels;
- markets have and will always 'regulate themselves' by adapting prices in case of scarcity;
- the material and economical wellbeing of world population has reached unprecedented levels and all fears that this might change are unfounded or, at best, exaggerated; and
- internalisation of pollution costs is a solution to environmental large-scale deterioration: the 'polluter pays' principle.

The optimists feel that negative population growth should be achieved through de-growth and a voluntary reduction of our standards of living to achieve 'sustainability in a changing world'.

The pessimist view sees the rise of an Orwellian omnipresence that takes drastic measures to control population growth. Eugenics and forced sterilisation come to mind, as well as the renunciation of international treaties and agreements that provides protection for individual rights and resources. Failing to address population growth now before it gets completely out of control could lead to the rise of a police state in which the government is in complete control of human destiny, human reproduction and all human rights.

The GFC affects growing vulnerable populations; there are more disadvantages to population growth than advantages. Among the disadvantages are: global warming; lack of food; lack of jobs; lack of minimum standards of living; increased political instability; and crime. The more population figures grow, the more is expected of the ecosystem to sustain that growth.

The pessimist view asserts that: current patterns of production and consumption are not sustainable; extinction is now on tomorrow's agenda; the indifference of most of the G20 governments, multinationals and large corporations is particularly alarming; and apocalyptic scenarios are like waiting for barbarians to come.

6 Chair: Bernard Bekink, University of Pretoria, Pretoria, South Africa. Speakers: Christo Botha, University of Pretoria, Pretoria, South Africa; Hachem El Husseini, Abou Jaoude & Associates, Beirut, Lebanon; and Tatiana Falcão, IBFD, Rio de Janeiro, Brazil. Prepared by Luz Nagle.

How is overpopulation and excessive population growth addressed by the state? Population can, to a significant extent, be controlled by legislation and implementation of public law. One of the questions asked in the context of population growth is, 'What if public law puts public policy (based on a public opinion of primal fears, racism, xenophobia and desperate interpretations of self-interest) into effect?'

Public law is the legal arm that puts government policies into place and controls government power. This good aspect of public law addresses socio-economic issues, health, public welfare and sociology, among others. When population growth cannot be stopped, those laws that regulate the structure and administration of the government, the conduct of the government in its relations with its citizens, the responsibilities of government employees and the relationships with foreign governments will be applied. Public law also addresses the protection of human rights, civil liberties, the weak and dispossessed and downtrodden.

Public laws are used to control certain crises and often those regulations have the most impact on the poor and disaffected. Public laws address present issues like global warming (shifting weather patterns, massive floods, prolonged droughts), severe economic instability, the demise of the welfare state, massive unemployment, famine, lack of food security, the scramble for scarce resources, water shortages and mass displacements and immigration issues.

The bad aspect of public law-making with regard to overpopulation raises uncomfortable and unpopular issues that government world forums would prefer not to address, such as compulsory birth control, one-child policies, immigration curbs and even forced population displacements and resettlement. These issues then raise fears, particularly among those most vulnerable (the poor and politically under-represented) that can lead to attitudes of ultra-nationalism and neo-fascism (eg, Eastern Europe), racism and xenophobia – and then violence and mayhem.

There was a question raised to the panel as to whether we ought to be looking at what is in the interest of one country, or should we be looking at what is in the interest of humankind?

Some suggest that as a society we have failed to pay attention to what has been happening in relation to population growth and now we have a global problem on our hands. For instance, if markets fail to address structural inequalities because investors are preoccupied with short-term gains and profit-taking, such as knowing that deforestation leads to climate deregulation but doing nothing about it. The instability and conflicts that arise due to lack of attention paid to the consequences of thoughtless natural devastation can lead to problems that may end up as all-out wars.

Some developing nations address the notion of demographic fatigue – the inability to cope with problems like poverty, food supplies, access to basic resources, limited access to education, employment and housing.

The third speaker took an interesting tax policy approach to address population growth, offering a plan for incentives and disincentives to regulate it. Using taxation proposals as a deterrent to population growth is possible, for instance, considering whether a government might introduce a family tax. How much should that state pay for family planning and population controls? Who should pay for what and how much should be spent on healthcare to cover abortions, birth control mechanisms and vasectomies?

The long view is that we need international law instruments (treaties) to reverse the steep slope of degradation of the planet (like carbon emissions and pollution).

Pillage: the corporate war crime?

War Crimes Committee[7]

Much of this summary is based on Professor Linda Malone's presentation, together with the rapporteur's views and knowledge of the topic.

7 Chair: Stuart Alford, Chambers of Francis Oldham QC, London, England. Speakers: Linda Malone, William & Mary Law School, Williamsburg, Virginia, US; Rupert Skilbeck, Open Society Justice Initiative, New York, US; and Jamie Williamson, International Committee of the Red Cross, Geneva, Switzerland. Prepared by Luz Nagle.

Pillage goes back centuries, but how does it affect poverty? Pillage depletes the resources of the state to have the treasures and resources that can be used for the benefit of the poor. Yet, pillage has yet to be considered a grave breach of conduct, particularly during conflict.

When countries occupy other countries, corporations can become involved in the plundering of those states. Also, when governments are weak or susceptible to corruption, corporations move in to take advantage and under the guise of development conduct a de facto pillaging of natural resources. The case in point discussed on the panel by one speaker is the *Kiobel* case in Nigeria. Plaintiffs sued Dutch Shell and a British firm for allegedly aiding and abetting the Nigerian Government's killing and torture of oil exploration protestors between 1992 and 1995. The case was brought before the US courts under the Alien Tort Claims Act. The outcome of the case when the US Supreme Court rules on *Kiobel* sometime in 2013 is that, according to Professor Malone, 'It portends the possibility of the end of an extremely important domestic enforcement mechanism for civil suits against individuals and corporations that engage in gross human rights abuses,' and that, 'The significance of this case can't be overestimated globally. It's not just a case of US litigation'. The precedents clearly suggest that the Act applies to abuses that occur outside the US, and Malone said it would be 'tragic, historically incorrect and legally incorrect' if the court rules that the Act does not apply extraterritorially.

There are other developments that impact on whether redress for pillage can be used to help poor or indigenous populations. Recently, after a long legal negotiation, Yale University began returning artefacts from Machu Picchu to Peru that had been taken by explorer Hiram Bingham a century ago. Repatriating cultural treasures brings actual value to the nations plundered, although it is up to the government to determine how valuable antiques should be used to help support impoverished communities and indigenous communities. In China, authorities are trying to crack down on the aggressive and well-organised destruction of archeological sites by trying to preserve the estimated five per cent of all archaeological sites on the mainland that have not yet been plundered. By preserving sites and bringing plundered objects back to their place of origin, tourism can be developed to bring people to archeological sites, which in turn helps support communities.

The role of the law to combat corruption and money laundering and to increase effective corporate social responsibility: lessons for improving the plight of the poor

The Presidential Priority Sessions included discussions of various regimes that have been developed to ensure that businesses engaged in both domestic and transnational operations observe both hard-law and soft-law standards of behaviour that have an often indirect effect of protecting the public interest, including economic protection, and the respect for human rights. While these standards were not introduced to deal specifically with the effect of the GFC on the poor, they do offer examples of regimes that have had some success in protecting them from various types of exploitation.

Anti-corruption initiatives[8]

Corruption, in the form of bribery and fraud, has a disproportionate impact on the poor. By adding an estimated minimum of ten per cent to the cost of doing business in many parts of the world, and as much as 25 per cent to the cost of public procurement, it increases the price and decreases the quality of goods and services to those who can least afford them, as companies seek to recoup money paid for illegal purposes. As a result, competition is distorted and economic inefficiencies created. Often the allocation of financial resources by governments to public projects depends more on the potential for illegal gain by unscrupulous rulers, bureaucrats and business facilitators than on considerations of the public interest. Especially in the case of developing countries, those resources may be diverted to the foreign bank accounts of wrongdoers rather than being used to develop local economies. This situation is inevitably compounded during periods of economic downturn, when investment is reduced and public projects and anti-poverty programmes suffer from budget cutbacks.

Recently there has been significant progress in the formulation, strengthening and enforcement of

8 Prepared by John Claydon.

a wide range of anti-corruption norms adopted at the global, regional and national levels. While many countries have introduced anti-corruption legislation, of particular importance nationally are the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act, which have broad extraterritorial application that brings many major foreign enterprises within their ambit. The FCPA prohibits companies and individuals from bribing foreign officials, while the UK Act prohibits commercial bribery as well, and holds a corporation liable strictly for failing to prevent bribery committed by an 'associated person', subject to a due diligence defence. The only truly global treaty combating corruption is the UNConvention against Corruption, which entered into force in 2005 and now has more than 150 States Parties; it covers ML as well as bribery and illicit trading. The OECD Anti-Bribery Convention, in force since 1999, requires subscribing states to make the bribing of a foreign official a criminal offence. The Organization of American States, the African Union and Council of Europe have adopted regional conventions, and the EU has anti-corruption instruments in place.

A series of non-binding norms has also provided additional stimuli to the global campaign to defeat corruption. In 2004 a tenth principle, stipulating that 'Businesses should work against corruption in all its forms, including extortion and bribery', was added to the UN Global Compact. Launched in 2000, the Compact is a strategic partnership between the UN and 8,700 corporations to promote human, labour and environmental rights. More recently, the Ruggie Guiding Principles on Business and Human Rights ('Ruggie'), which were adopted by the UN Human Rights Council in 2011, elucidate the corporate responsibility to protect human rights that flows from the first two principles of the Compact. Of particular relevance to fighting corruption is the requirement in Ruggie that businesses should exercise due diligence to prevent or mitigate adverse human rights impacts linked to business partners and the supply chain. Ruggie also stipulates the components of the diligence expected. Ruggie has significant potential in light of European developments: the EU has endorsed the Principles and asked Member States to submit, by the end of 2012, national plans for implementing them.

2012 Global update on anti-corruption legislation and enforcement

Anti-Corruption Committee[9]

One of three Dublin Conference sessions dealing with corruption analysed the implementation of anti-corruption laws and treaties. Over the past few years this issue has achieved prominence due in large part to aggressive enforcement of the FCPA by US authorities. In a number of high-profile cases involving major global corporations (such as Halliburton, Daimler, Baker Hughes and Monsanto), the US Department of Justice and Securities and Exchange Commission have assessed increasingly heavier fines and other financial penalties. The largest was in the 2008 *Siemens* case, where Siemens paid a total of US$800m as well as a similar amount to settle related German charges. In 2010 the overall assessment total was US$1.8bn in 74 enforcement actions, more than double the previous year's total, but the number of enforcement actions has subsequently declined. There has been only one prosecution under the UK Bribery Act, but this is not surprising since that Act only came into force in July 2011 and is not retroactive. There have, however, been prosecutions under predecessor legislation.

A panel of experts discussed the worldwide enforcement of anti-corruption laws, referring to a number of current or recent cases, including *Walmart* (Mexico), *BAE* (Tanzania) and *Safran* (Nigeria). The panel also considered possible amendments to existing instruments, surveyed the industry sectors in which corruption is the most and least prevalent, and discussed new legislative initiatives (eg, in Brazil). The overall consensus was that corruption remains a serious problem, but there is now heightened concern with it, greater corporate compliance and particularly an increase in national enforcement efforts. For example, in 2011, in the first significant action under Canada's 1999

9 Co-Chairs: Nicola Bonucci, OECD, Paris, France; Tim Dickson, Paul Hastings Janofsky and Walker, Washington, DC, USA. Speakers: Leah Ambler, OECD, Paris, France; Nick Benwell, Simmons & Simmons, London, England; Edward H Davis, Jr, Astigarraga Davis, Miami, Florida, USA; Hamidul Haq, Rajah & Tann, Singapore; Roberto Hernández, COMAD, Mexico City, Mexico; Marianne Klausberger, Ethical Risk Appetite, Darmstadt, Germany; Babajide Ogundipe, Sofunde Osakwe Ogundipe & Belgore, Lagos, Nigeria; Leopoldo Pagotto, Zingales & Pagotto Advogados, São Paulo, Brazil; James Tillen, Miller & Chevalier Chartered, Washington, DC, USA. Prepared by John Claydon.

Corruption of Foreign Public Officials Act, a resource company admitted in court that it had bribed a government official in Bangladesh to reduce compensation payments stemming from a natural gas explosion. The company agreed to pay a fine of CAD9.5m.

The presentations and questions addressed three themes relating specifically to the impact of corruption (and anti-corruption initiatives) on poverty.

First, a questioner stated it was important to examine systemic factors encouraging poverty, since in poor countries, bribes provide financial support for entire families. If bribery is eliminated, this support will not be replaced. Bribery will remain as an overwhelming incentive until the underlying causes of poverty are dealt with. Secondly, there was discussion of the topic of recovering assets tainted by fraud, corruption and other forms of illegality, as reflected in the stereotypical case of a dictator embezzling large sums of money and transferring them overseas ('kleptocracy') and the example of huge cost overruns on a building project. Gains such as these are likely to exacerbate poverty by diverting funds from initiatives that could reduce poverty, and have a devastating impact during a recession when funds are much more limited. Although some countries have regimes in place to trace and recover these gains, there is a great deal more to do. Thirdly, it was suggested that when there is recovery of any of these gains they, along with the large fines and penalties that have been levied in anti-corruption proceedings, should be returned to 'victim' countries to fund public development projects.

Reference was made in this session to the importance of the anti-corruption work undertaken by the IBA to raise awareness among lawyers of anti-corruption norms and of the roles lawyers play in fighting international corruption. This work includes the Anti-Corruption Strategy for the Legal Profession (in collaboration with the UN and OECD), the 2010 survey on 'Risks and Threats of Corruption and the Legal Profession', the training programmes that have been initiated and the ongoing work of the IBA's Bar Issues Commission to develop guidelines for law societies and bar associations dealing with anti-corruption measures for the legal profession.

Lawyers around the world are increasingly collaborating with corporate clients to conduct risk assessments and develop effective anti-corruption compliance systems in order to protect their clients' business reputation. The lawyer's task of instilling a level of trust in a client that induces them to accept costly and unwanted procedures is facilitated to some extent by the reputational risks inherent in aggressive enforcement. But ensuring that clients refrain from illegal conduct is, however, for the lawyer more than simply a matter of client protection: it is also required as a component of the shared responsibility of lawyers worldwide to promote respect for the rule of law.

Fair and equitable treatment: the issue of corruption in international investment arbitrations

Anti-Corruption Committee[10]

A second Dublin panel dealing with anti-corruption focused on the relatively narrow topic of what arbitrators, investors and states should do when confronted with corruption in international investment arbitrations. The evidence could relate to the awarding of a contract or to the conduct of the arbitration proceedings. One difficulty is that corruption is rarely admitted and is difficult to prove. Since arbitrators have no subpoena power, they may have to resort to national courts to obtain conclusive evidence. There may, however, be 'indicators' of corruption, such as questionable payments and previous convictions. Should an arbitrator who strongly suspects corruption deny jurisdiction, then report the suspicions to national authorities? Or should the arbitrator assume jurisdiction, investigate the matter (using circumstantial evidence and inferences if necessary) and deny the benefits of corruption to any party involved in it? If so, what standard of proof is required, and should the burden of proof be shifted?

10 Chair: Nicola Bonucci, OECD, Paris, France; Louis Christophe Delanoy, Bredin Pratt, Paris, France; James Crawford, University of Cambridge, Cambridge, England; Vladimir Khvalei, Baker & McKenzie, Moscow, Russian Federation; Khawar Qureshi QC, Serle Court, 6 New Square, London, England; Brigitte Stern, University of Paris, Paris, France. Prepared by John Claydon.

The 2006 World Duty Free arbitral decision found corruption to be illegal because it is contrary to 'transnational public policy'. In view of a plethora of national laws making corruption illegal, a strong argument can be made that, apart from international conventions, declarations and guidelines, corruption is also illegal under international law because its prohibition amounts to one of the 'general principles of law' under Article 38 of the Statute of the International Court of Justice. Though some arbitrators disagree, the general consensus among the panellists was that the current state of international law requires arbitrators to investigate to the extent possible claims of corruption by a state or company and to deny the fruits of corruption to complicit parties. It was suggested that the IBA could assist arbitrators by developing guidelines for the award of state contracts and for evidentiary inferences that could be drawn from the process (for example, relating to tendering and the use of intermediaries).

The role of financial institutions in the fight against corruption: can we bank on them?

Anti-Corruption Committee[11]

The third session dealing with the corruption theme addressed the role of the World Bank, the regional development banks and private sector banks in minimising corruption.

The World Bank has maintained a strong focus on eliminating corruption to alleviate poverty in the aftermath of the 1996 'cancer of corruption' speech by President James Wolfensohn. Since 1999, the Bank has imposed sanctions and generated prosecutions in hundreds of cases involving its funding. It has at its disposal a range of enforcement options, including early voluntary disclosure, suspension and requiring compliance checks before a suspended company is eligible to receive additional contracts. An example of the suspension sanction is the case of a company that received a three-year 'debarment' after being convicted of bribery by the courts of Lesotho. One panellist urged that the debarment sanction should be used sparingly, if at all, and only in the most extreme cases, because it could exacerbate poverty by eliminating direct and collateral jobs.

The regional development banks, including the European Bank for Reconstruction and Development (EBRD) the African Development Bank, the IDB Group and the Asian Development Bank, also exist to combat poverty and operate corruption sanctions regimes. In 2010, the multilateral development banks agreed to automatically reciprocally enforce sanctions for fraud and corruption imposed by any one of them. This cross-debarment agreement applies to sanctions for more than one year and does not cover the actions of government officials. As with the World Bank (a party to this agreement), suspensions are normally for three years, with reinstatement contingent on demonstrating improvement in corporate governance and compliance. The EBRD has found that voluntary disclosures and settlements have increased since the conclusion of this agreement because companies are concerned about the wide-ranging consequences now resulting from a single suspension.

Many private sector banks (currently 75), in addition to being subject to general anti-corruption norms, have also adopted the Equator Principles (2006), a set of voluntary standards for managing risk in financing projects exceeding US$10m. Based on the environmental standards of the World Bank and the social policies of the International Finance Corporation, the Principles require adopting banks to make loans only to borrowers able and willing to comply with them. Risks are identified and agreements made to manage them. There is independent review of assessment plans and a monitoring obligation. Lenders must report annually on implementation of the Principles, which cover such matters as protection of human rights, health, cultural property, land use, indigenous peoples, the environment, employment standards and 'disadvantaged or vulnerable groups'. While banks have a reasonable governance structure for dealing with ML, their record on corruption is mixed, but more attention is now being paid to the problem. These Principles offer the banks an opportunity to

11 Chair: Tim Dickson, Paul Hastings Janofsky & Walker, Washington, DC, US. Speakers: Raja Chaterjee, Morgan Stanley, New York, US; Pascale Dubois, World Bank, Washington, DC, US; Enery Quinones, European Bank for Reconstruction and Development, London, England; Frederic Raffray, Law Offices of the Crown, St Peter Port, Guernsey. Prepared by John Claydon.

intensify collaboration in this area.

The IBA, through its Human Rights Institute (IBAHRI), has recently convened a Task Force on Illicit Financial Flows, Poverty and Human Rights to explore how illicit financial flows affect poverty and the enjoyment of economic and social rights. In addition to including whether poverty is a violation of international human rights law, as well as the impact of tax evasion on poverty, the Task Force's ambitious mandate encompasses corruption and embezzlement of public funds, asset recovery and the role of lawyers in combating poverty. The study will be published in book form and include recommendations for states, corporations and lawyers. The IBAHRI has emphasised the importance of undertaking the study at this time because of the economic crisis that the global financial system is undergoing.

Should professional ethics regulate money laundering by lawyers?

Joint session of the Anti-Money Laundering Legislation Implementation Group and the Professional Ethics Committee[12]

Adverse societal effects of money laundering

In its January 2011 submission to the Financial Action Taskforce (FATF) Secretariat, the IBA's Anti-Money Laundering Legislation Implementation Group noted World Bank research suggesting that 'between US$20 billion and US$40 billion is taken from developing countries by corrupt leaders and applied for their own personal use, outside their own country'. In addition, in 2006, the IMF, using 1996 statistics, 'estimated that between US$590 billion and US$1.5 trillion' have been laundered. This amount could well represent 'between two and five per cent of the world's gross domestic product'.[13] Given these statistics, ML exacerbates the existence of poverty and further compromises the already precarious lives of the poor.

The FATF defines the term 'money laundering' as 'the processing of… criminal proceeds to disguise their illegal origin' in order to '"legitimize" the ill-gotten gains of crime'.[14]

Purpose and scope of the FATF Recommendations

The IBA session, 'Should professional ethics regulate money laundering by lawyers?' addressed the scope of the lawyer's ethical and legal obligations to report on a client's suspected ML activities. Central to the discussion were the revised 2012 FATF Recommendations that sought to establish an international standard, 'a comprehensive and consistent framework of measures,' that countries should implement in order to combat ML. The revised Recommendations are meant to 'address the new and emerging threats' posed by ML and 'clarify and strengthen' the obligations outlined in earlier FATF recommendations. They continue to use a 'risk based approach' that allows countries 'to adopt a more flexible set of [preventative AML] measures', so that they can concentrate on the higher risk areas in which ML can occur. (FATF Recommendation, 8). These higher risk areas would be 'subject to enhanced procedures such as enhanced client due diligence and enhanced transaction monitoring'.[15] Thus lawyers, in monitoring and preventing ML activities, are seen as the gatekeepers to the international financial system. Most are not aware that they are expected to fill this role.

12 Co-chairs: Nicole Bigby, Berwin Leighton Paisner, London, England; Stephen Revell, Freshfields Bruckhaus Deringer, Singapore. Speakers: Anne Birgitte Gammeljord, Council of Bars and Law Societies of Europe, Brussels, Belgium; Adrian Evans, Monash University, Melbourne, Australia; Eva Massa, Law Society of Ireland, Dublin, Ireland; Kevin Shepherd, Venable, Baltimore, US; Valentina Zoghbi, SJ Berwin, London, England. Prepared by Mary Gold.

13 Paul Allan Schott, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX,* (Washington, DC, The International Bank for Reconstruction and Development/ The World Bank/The IMF 2006) 6.

14 FATF, 'What is money laundering?' www.fatf-gafi.org/pages/faq/moneylaundering last accessed 27 March 2013 quoted in Schott (see above n 12) 3.

15 Kevin L Shepherd, 'The Gatekeeper Initiative and The Risk-Based Approach to Client Due Diligence' (April 2012) The Review of Banking and Financial Services, 33.

Preserving client confidentiality versus being a FATF gatekeeper

The interplay of these Recommendations with the confidentiality provisions to which lawyers are bound pursuant to their professional code of conduct, as well as other obligations imposed by law, place members of the legal profession in a precarious position. The Recommendations identify lawyers as members of 'designated non-financial businesses and professions' and place specific obligations upon them. When they 'prepare for or carry out' certain types of financial transactions for their clients, for example, real estate transactions (Recommendation 22), they are subject to the same recording and reporting requirements that are placed on financial institutions. Some of these reporting requirements may conflict with the principle of client confidentiality. Although the revised Recommendations acknowledge the importance of solicitor–client privilege in certain circumstances, it appears that a lawyer will not generally be able to raise privilege with respect to a client's suspected ML activity.

FATF's risk-based approach

The revised FATF standards result in more regulation. The requirement for increased clarity in the risk-based approach has led to specific reporting and monitoring requirements for both jurisdictions and regulated entities. Further guidance is needed on the types of clients, countries and transactions that can be classified as either higher or lower risk. A range of measures that can be applied to either type of risk needs to be identified. To further this end, in June 2012, the FATF initiated a typology research project to compile data on various matters such as: the types of transactions for which lawyers might unwittingly facilitate ML; examples of ML activities in which lawyers have been complicit; and the types of suspected ML transactions reported by lawyers. The hope is that 'red flag indicators' can be established. In addition, information will be collected that can, in the end, offer good-practice guidelines to lawyers on how to monitor and report on suspicious transactions.

The FATF standards also require lawyers to engage in client due diligence in order to know both the corporate client and the beneficial owner of the corporate client, that is, to know who is controlling corporate ownership. Authorities may want to see the record of the due diligence investigation of clients and make a determination on the adequacy of the background checks.

In circumstances in which lawyers have either domestic or foreign politically exposed persons (PEP) as clients, they have to engage in enhanced due diligence. These PEPs may hold positions at all levels of government. Because the FATF does not include a list of PEPs, as requested by the IBA, lawyers are left to decide which of their clients fall into this category. Thus they bear the risk of correctly assessing, identifying and reporting on, when necessary, such clients. It was noted that the CIA in the US does publish a PEP list of non-nationals. It constitutes an invaluable tool for name screening. The US Treasury also maintains a PEPs list.

Many EU countries have accepted the most recent version of the Recommendations. Although the EU continues to discuss the need to improve harmonisation among its Member States, nothing yet has been accomplished. As a result, different reporting regimes exist in different countries. For example, because UK law has made the non-reporting of suspicious circumstances a criminal offence, there is extensive reporting of suspected ML. Other countries that have weak requirements have few or no reports.

Are professional codes of ethics sufficient to curb money laundering?

The session raised the question of whether existing regulatory regimes and the criminal law might be sufficient to cover the obligation of lawyers to deal with client ML activities. Because the legal profession is regulated and members are subject to professional codes of conduct that impose disciplinary sanctions for breaches of the code, lawyers already have an obligation to serve the interest of justice and advise clients against engaging in criminal activity, such as ML. Furthermore, if lawyers assist in ML, they too become involved in a criminal activity and can be struck off or disbarred. There was, however, a view expressed that, because of the failure of law societies to enforce the rules at their disposal, AML laws/regimes became necessary. It was also recognised that because AML regimes have forced lawyers into having to report their clients' suspicious activities and not 'tip off' their clients

as to the reporting, they might, in fact, be acting as agents of the state and thus compromising their professional independence. The view was expressed that few instances exist of lawyers unwittingly facilitating ML. The examples of lawyers' involvement in such activities are in circumstances in which they have generally been engaged in criminal behaviour. Despite these apparent shortcomings and contradictions, some saw this use of 'whistleblowing' to authorities as a way of addressing corruption, particularly in poor countries.

Increasing awareness of a client's possible money laundering activities

One of the benefits of AML regimes is the fact that they help increase a lawyer's awareness of suspicious behaviour and provide guidance on how to handle suspected client ML activities. Also, in the absence of such regimes, lawyers have no protection from misconduct complaints if they breach confidentiality in order to report such behaviour. Furthermore the FATF has encouraged lawyers and others to develop practice directions as a means of implementing the Guidelines. For example, the ABA has provided voluntary practice guidelines, including practical examples on how to meet the FATF requirements. They focus on the risk factors that should be taken into account when engaging in client due diligence, and identify the 'red flags' that should be of concern to lawyers. The danger in implementing any regime is that compliance can descend to little more that a mechanical adherence to the requirements.

AML regimes are meant to expand a lawyer's obligations beyond the representation of a client; they emphasise the lawyer's duty to society as a whole by according some protection to the indirect victims of this type of criminal activity, who are frequently the poor.

Recommendations

- Advocate for clearer clarification on the intersection of FATF Guidelines and the lawyer's professional conduct code regarding the confidentiality of client matters so that lawyers are better apprised of their obligations.
- Distinguish between what is required of lawyers under AML regimes and under professional conduct rules.
- Support the FATF's initiative to create a clearly described typology of transactions that lawyers can access so that lawyers have more precise guidelines for identifying suspicious transactions.
- Support the creation of model practice guidelines on AML by professional bodies that can be adopted by lawyers and law firms to facilitate the necessary investigation of clients, PEPs, beneficial owners and transactions.

CSR, the financial industry and project financing

Joint Session of the Banking Law and Corporate Social Responsibility Committees[16]

Background

Developments in the area of CSR such as the Ruggie Principles (Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy' Framework), the Equator Principles (A financial industry benchmark for determining, assessing and managing social and environmental risk in project financing), along with more traditional sources of human rights such as the Universal Declaration of Human Rights and the ILO Conventions, are having a profound influence on the demands placed on transnational corporations seeking financing for large projects around the world. These companies are facing more stringent obligations to ensure that their projects do not result in human rights abuses and that the communities in which the projects are located are not adversely impacted. The imposition of such principles is seen as the use of soft law that can carry with it hard law sanctions.

Ruggie's tripartite framework: 'protect, respect and remedy'

The session on CSR, 'The Financial Industry and Project Financing', explored the nature and impact of these soft law approaches. The Ruggie Principles ('Ruggie') are based on the tripartite framework of 'protect, respect and remedy'. The state has an important role to 'protect' human rights, for example, pursuant to the adoption of human rights treaties/conventions and through the application of customary human rights law. The responsibility to protect against human rights abuses extends beyond the actions of state agents to those of third parties, thus including businesses operating within the state. The responsibility to 'respect' means that, in conducting its business, the corporation must respect the human rights of others, and, at a minimum, do no harm. This can often require companies to respect human rights in instances in which the state does not protect them or is too ineffective to do so. The company thus has an obligation to investigate the effect that the project might have on human rights and seek to prevent and/or mitigate any adverse impact. The scope of protected human rights extends to 'the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families… [In] situations of armed conflict, enterprises should respect the standards of international humanitarian law'. Thus the right to work, the health and safety of the local community, including environmental protection, constitute types of human rights that should be afforded protection.

The responsibility to 'remedy' the adverse impact of a project takes into account the use of grievance mechanisms that the company can put in place to address community concerns and issues as they arise. Engaging in ongoing collaboration and dialogue with the community improves relationships and avoids costly disruption and delays. More formal types of dispute settlement mechanisms can also be used if problems arise.

Thus under Ruggie, corporations have the responsibility to 'identify, prevent, mitigate and account for how they address their adverse human rights impacts'. It is not uncommon for large companies to create a code of conduct that is made public and can be cited as a means of self-regulating corporate behaviour. In addition, the company has the responsibility to carry out ongoing HRDD to ensure that it knows the actual and potential human rights risks its business could cause and devise mechanisms to avoid and, when necessary, rectify problems that arise.

16 Co-chairs: Michael Steen Jensen, Gorrissen Federspiel, Copenhagen, Denmark; Ignacio Randle, Estudio Randle, Buenos Aires, Argentina. Speakers: Stéphane Brabant, Herbert Smith, Paris, France; Ade Ipaye, Attorney-General and Commissioner of Justice, Lagos, Nigeria; Liisa Jauri, Nordea Group, Helsinki, Finland; Patricio Leyton, FerradaNehme, Santiago, Chile. Prepared by Mary Gold.

CSR: environmental protection in Latin America

In the Latin American context, large project financing and development have been aimed at improving economic growth and increasing employment opportunities. Of growing importance is the recognition of the need for more environmentally friendly growth that addresses the goals and aspirations of local communities. This can be achieved by following pertinent ILO convention rules:

- a company should engage in informed consultation with the local community prior to the implementation of a project;
- it should acknowledge the territories and land the communities have used but do not own; and
- it should share the investment decision-making process.

The process that is used must be inclusive and thorough so that discussions occur and decisions made at the community, industry and government levels to ensure that community concerns are effectively and efficiently addressed. The use of inclusive processes can help to achieve legitimacy for the project and improve its competitiveness. Finally, the parties should take an approach aimed at preventing the adverse impact of large projects on human rights and the environment.

The key to the implementation of Ruggie is the belief that protecting human rights is good business. The gap that frequently exists between what the law mandates and what society requires might be successfully closed by the implementation of the kind of CSR regime contained in these principles. Furthermore, companies are increasingly finding that banks involved in financing large projects are concerned about the long-term health of these projects and identify a commitment to CSR as a condition that must be met in order to obtain financing.

Using the Equator Principles as a tool to decide project financing

The Equator Principles (EP) constitute another approach to CSR that complements Ruggie. Major banks around the world have adopted these Principles 'to ensure that projects [that they] finance are developed in a manner that is socially responsible and reflect the sound environmental and management practices'. This includes such factors as labour, health and safety concerns. The Principles apply to projects that have 'total capital costs of US$10 million or more'. Furthermore, the EP particularly target projects located in non-OECD countries and in OECD countries not designated as high income. Borrowers are required to comply with the Principles in order to obtain financing and must begin by conducting a due diligence assessment of the social and environmental impact and risks of the project.

A review of the practices of the Nordea Group provides an example of how a bank has successfully implemented the EP in projects it financed. Nordea's shareholders adopted the EP in 2007 because of their desire to engage in responsible lending for projects that would have a social and environmental impact. Nordea explains the EP 'as a credit risk management framework for determining, assessing and managing environmental and social risk in project finance transactions'. The bank also wanted to provide transparent and clear information about its products and services. In addition, in 2007, Nordea signed the UN-initiated Principles for Responsible Investment. This initiative 'reflect[ed] the view that ESG can affect the performance of investment portfolios and therefore must be given appropriate consideration by investors'.

Nordea has produced its own EP Manual (toolkit) that provides guidance to the bank's project finance deal managers on how to proceed. The ten EP principles are reflected in the workflow steps the managers follow:

1. initial project review;
2. project appraisal;
3. project negotiation, commitment and monitoring; and
4. external reporting.

These steps are integrated with Nordea's general credit evaluation and decision workflow. Specialists in ESG provide assistance to the managers. Nordea's EP Advisory Group can then make recommendations on all project finance cases. With respect to the successful ones, the Advisory Group will establish the terms and conditions governing the participation in the project, including those related to environmental and social issues.

CSR: impediments to implementation

The role of corporations in socio-economic development, particularly in Africa, was also addressed in the session. The development of CSR regimes constitutes an approach to using a non-statutory instrument of development to promote ethical ways of doing business. Such regimes support the view that corporations are entities that have social responsibilities. Furthermore, the adoption of both Ruggie and the EP by corporations and banks raises an expectation that we are moving towards the adoption of internationally established principles.

However, despite the fact that banks and corporations seek to adhere to CSR principles, there are circumstances that threaten their successful application to project financing. The present economic situation compels bankers to focus sharply on profitability. If money cannot be made and loans, carrying high interest rates, cannot be paid, CSR goals are threatened. The assessment of projects for possible financing is very strict due to the presence of high interest rates and the probability of default.

In Nigeria, for example, many companies have seen long-term risks in the environmental and human rights impact of large projects and have sought to shift responsibility to the government. The existence of poor infrastructure in the countries in which the projects operate can hamper environmentally friendly operations. Because a fair amount of corruption still exists, project fairness is compromised and ethical behaviour is penalised.

Government has an important role to play in ensuring that a company meets its CSR. First, it must improve the regulatory structure, the laws and their enforcement. In the absence of laws and enforcement, governments should encourage voluntary compliance with CSR principles. These principles should be built into the way business is done and should be an integral part of business policy and practice.

Three conclusions can be drawn from this session:

1. The key to the success of CSR in protecting human rights is the notion of trust, credibility and partnership as well as the notion of soft law and hard enforcement.
2. CSR should be built into the project financing decision-making process and not left until the end.
3. Responsible business practices are a prerequisite to a sustainable result and such practices definitely pay.

Guidelines for advising clients on CSR responsibilities

Lawyers must be aware of their responsibilities in advising clients about their CSR. Companies seeking project finance no longer have a choice as to whether to meet these obligations. If lawyers do not correctly advise corporate clients, they may bear responsibility if clients do not meet their obligations. In fact, severe breaches of human rights might well be declared to be breaches of international law. Lawyers must also be able to advise clients about the importance of preserving the integrity of their brand and reputation. The wide media coverage of human right abuses that CSR aims to protect can cause great harm to the image and integrity of the company. Furthermore, lenders for big projects are concerned about their long-term sustainability and will look at CSR issues very carefully. They do not want the projects they are funding to collapse. Thus the use of CSR principles and the EP provide a means of safeguarding the bank's loans. Sometimes law firms have to decide that they will not represent clients unwilling to meet their CSR obligations. To represent such clients can adversely affect the reputation of lawyers and their firms.

CSR in Africa: effective tool or convenient escape?

Joint Session of the African Regional Forum and the Corporate Social Responsibility Committee[17]

Framing the problem

The session, 'CSR in Africa: Effective Tool or Convenient Escape?' explored whether transnational companies operating in Africa have demonstrated a sufficient commitment to their corporate social responsibilities. At best, a company should view the use of CSR as an investment that is mutually beneficial to the company and the community, that by protecting and promoting the interests of the community, the financial wellbeing of the company is also protected and enhanced. Many examples exist in which companies view their CSR community projects as a duty they would place upon themselves that is part of the cost of successfully doing business, rather than as a commitment to the local population. Thus these companies might view their CSR obligations narrowly, eg, building the promised hospitals, schools, etc, and proceed to exploit the local community and ignore its legitimate interests. The problem with limiting CSR to 'feel-good' projects is that the corporation is not making a meaningful contribution to development, resulting in CSR being nothing more than window dressing. What is needed is compliance with environmental safeguards as well as a commitment to protect human rights.

Justifications for CSR

One of the speakers, referring to a December 2006 *Harvard Business Review* article, outlined the four prevailing justifications for CSR:

1. moral obligation (commercial success is linked to ethical values and respect for people, communities and the natural environment);
2. sustainability ('environmental and community stewardship');
3. licence to operate (companies need 'explicit or tacit approval from governments, communities and… stakeholders to do business'); and
4. reputation (commitment to CSR principles enhances a company's brand, etc).

The most successful CSR initiatives are those that: meet the needs of society and are anchored in the company's activities; are productive for the company and the community; and constitute a long-term commitment to development goals. Some companies try to incorporate CSR into all aspects of their business, have complaints divisions to handle problems and treat respect for human rights seriously.

Impediments to effective CSR

In some instances, companies, viewing CSR projects as charity, pursue tax breaks from the host country for making the investment. It would be an interesting and helpful exercise to determine whether companies doing business or seeking to continue to do business in Africa actually do pay taxes there. It would not be unreasonable for companies to expect to be subject to local taxation, regardless of their engaging in local philanthropy.

The effectiveness of CSR is also compromised by the fact that corporations are based offshore and have no owners in Africa who can be reached by the judicial system, thus making it much harder to enforce CSR non-compliance. Furthermore, company directors are protected from liability and are thus able to escape responsibility for ensuring that CSR obligations are met.

17 Co-chairs: Toyin Bashorun, Churchfields, Lagos Nigeria; Jacob Saah, Saah and Company, Accra, Ghana. Speakers: Jack Blum, BakerHostetler, Washington, DC, US; Babatunde Raji Fashola, Lagos House, Lagos, Nigeria; Kayode Oladele, Juris International, Detroit, Michigan, US; Thomas Trier Hansen, Nordic Law Group, Copenhagen, Denmark; Ashwin Trikamjee, Garlicke & Bousfield, Umhlanga Rocks, South Africa. Prepared by Mary Gold.

Problems that impede effective state oversight of CSR

The state has an important role in promoting CSR initiatives; it must see itself as a major stakeholder to ensure that multinational corporations meet their obligations. There is a need for the state to enact legislation and regulations to ensure CSR compliance. Regrettably, because of the existence of government corruption in many African countries, little effort is made to promote ongoing and sustainable development. Even if corruption is not present, governments can tend to be complacent with respect to monitoring the implementation of a company's CSR goals. In some instances, companies form affiliations with particular sectors of government when seeking to develop business opportunities, thinking that these government actors can help the company if it runs into difficulty meeting its CSR obligations. Finally, if the rule of law is weak in a country, it becomes more difficult to enforce CSR obligations.

Initiatives to strengthen CSR obligations

There have been initiatives to strengthen CSR obligations and their enforcement. The EC, in a 2001 policy statement, addressed the issue of permitting lawsuits to be filed in the European Court for activities that occurred in Africa and, in terms of choice of law, permitting the application of the national standards of the European country. In South Africa, the King Report on Corporate Governance and the King Code recognise that because a company has an impact on the community, it should be obligated to report on its CSR performance. The International Organization for Standardization, in its ISO 26000, sets out comprehensive standards for companies to use for identifying and meeting their CSR. Although the adoption of the standards is voluntary, it does provide another mechanism for the furtherance of CSR goals. The use of certification has been used to monitor and ensure CSR compliance. This approach does not always work because of the need to access public information about the trail of responsibility that was established to meet the CSR goals. Finally the UN, with Ruggie, has established human rights as central to its CSR regime; this approach is gaining wider acceptance. However, it is always better to have structures and processes in place to monitor CSR activities and ensure that they are met, rather than depending on imposing sanctions after the fact.

Lawyers' role in promoting CSR compliance

Lawyers have an important role in promoting CSR compliance. First they must advise clients on the importance of meeting CSR obligations and not on how to escape them. There is also a need to ensure clients understand that they must comply with the laws of the host country. One of the speakers made reference to a rule promulgated by the NYC Bar Association that makes it unethical for a lawyer to assist another person in violating the laws of another country. Lawyers should also seek to ensure that multinational corporations do not use their corporate structure and residency to escape liability in countries outside their own in which they do business.

Lawyers also have to be aware of the fact that civil society organisations have become active in Africa in monitoring and publicising both CSR initiatives and instances of non-compliance and human rights abuses. They play an important role because the reports they disseminate garner broad-based media attention that can affect the reputations of companies whose activities are suspect. Clients need to be advised about the adverse effect that negative publicity could have on a company's image and integrity.

Recommendations for government

- Institute or improve the regulatory structure, laws and the means for their enforcement that ensure CSR compliance by corporations.
- Find mechanisms that can be used to ensure that non-resident corporations and their owners cannot escape liability (eg, require the posting of performance bonds as part of the cost of doing business).
- Enact strict and transparent conflict-of-interest and AML laws to address issues of corruption.

Recommendations for corporations

- Revise the corporate code of conduct to ensure that it clearly states the organisation's CSR goal.
- Institute or re-examine the processes for assessing CSR compliance and for conducting effective due diligence reviews.
- Build CSR into the project financing decision-making process.

Recommendations for the legal profession

- Institute or review law firm protocols and oversight provision that will be applied when advising clients on their CSR obligations.
- Advise clients on the importance of meeting CSR obligations and on complying with the law of the host country.
- Support the implementation of provisions like those of the NYC Bar Association Code of Conduct that make it unethical for lawyers to assist another person from violating the laws of a host country.

Glossary of Acronymns

A4ID	Advocates for International Development
ABA	American Bar Association
ABA ROLI	American Bar Association Rule of Law Initiative
AML	anti-money laundering
CSR	corporate social responsibility
EC	European Commission
ECSR	European Committee of Social Rights
EP	Equator Principles
ESG	environmental, social and corporate governance
EU	European Union
FATF	Financial Action Taskforce
FCPA	US Foreign Corrupt Practices Act
GFC	global financial crisis
HRDD	human rights due diligence
HRIAs	Human Rights Impact Assessments
IBA	International Bar Association
IBAHRI	International Bar Association Human Rights Institute
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDB	Inter-American Development Bank
IDLO	International Development Law Organization
IMF	International Monetary Fund
ISLP	International Senior Lawyers Project
IT	Irish Traveller
J4P	Justice for the Poor (World Bank programme)
LPD	IBA Legal Practice Division
ML	money laundering
MSF	Médecins Sans Frontières
NGO	non-governmental organisation
ODA	official development assistance
OECD	Organisation for Economic Co-operation and Development
OECD-DAC	OECD Development Assistance Committee
PIL	public interest law
PPID IBA	Public and Professional Interest Division
SRI	socially responsible investing
UK	United Kingdom
UN	United Nations
UNCESCR	UN Committee on Economic, Social and Cultural Rights
UNDP	UN Development Programme
US	United States of America
WTO	World Trade Organization

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