

IBA GLOBAL INSIGHT

Dec/Jan 2012/13

IBA Annual Conference
Dublin highlights:

Joseph Stiglitz on the
financial crisis

Mary Robinson on
environmental justice

Bernard Kouchner on human
rights and rule of law

Making poverty history

Nobel Peace Prize winner Muhammad Yunus speaks
exclusively to the IBA



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International Bar Association

4th floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org
editor@int-bar.org
advertising@int-bar.org

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Vice President Michael Reynolds
Secretary-General David W Rivkin
Executive Director Mark Ellis

EDITORIAL AND DESIGN

Director of Content James Lewis
editor@int-bar.org
Creative Director Tim Licence
Managing Editor Tom Bangay
Senior Content Editor Ed Green
Senior Reporter Rebecca Lowe
Senior Artworker Penny Newton
Junior Sub-Editor Hannah Caddick

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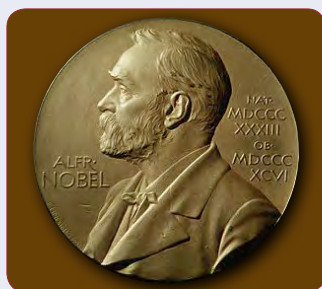
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From the Editor



Making poverty history. The bold claim on our cover is not something we're delivering on at present. It has, though, been the focus of one of the most inspirational speakers at the IBA Annual Conference in Dublin: Muhammad Yunus won the Nobel Peace Prize in 2006 for successfully developing microfinance, addressing poverty in Bangladesh. He shares his views on the shortcomings of traditional finance, the way banks serve the privileged, not the poor, and his vision of what needs to change (**Muhammad Yunus: Making poverty history, page 16**).

Yunus expressed his views during the exclusive in-depth interview with *IBA Global Insight* and at the session 'Lawyers against poverty' at the Dublin Conference (both can be viewed at tinyurl.com/Dublinfilms). He suggests the Millennium Development Goals (MDGs) that cover eight targets, including halving extreme poverty, halting the spread of HIV, addressing environmental degradation, and creating partnerships for development, are 'the best thing that the UN [...] and mankind as a whole ever did.' When drafted over a decade ago, the intention was that these goals be met by 2015. They haven't been, and UN Secretary-General Ban Ki Moon is currently re-focusing attention on them with the hope of speeding progress post 2015.

Yunus was one of several Nobel Prize-winners to grace the Annual Conference in Dublin, along with Professor Joseph Stiglitz who analysed the financial crisis and the shortcomings of current responses (**The Financial Crisis, page 22**). In the 'Agenda Setters' section of this edition, we include Stiglitz's opening ceremony address, and Mary Robinson's call to arms on the environment (**Environmental Justice, page 38**), which she delivered at the inaugural George Seward memorial lecture to commemorate the former Honorary Life President of the IBA. The Association has responded to Mary Robinson's plea to take inter-generational justice seriously by establishing a task force to address the issue. The third of our 'Agenda Setters' is Bernard Kouchner. Having witnessed the horrors of Cambodia, Rwanda, and Srebrenica, the former French Foreign Minister and Nobel Prize-winning co-founder of Médecins Sans Frontières is a passionate advocate for humanitarianism forcing reform of the law (**Human Rights and the rule of law, page 54**). It's a pleasure to be able to share – on the pages that follow – the views of these leading figures regarding the most pressing issues facing us today. Those considering what will follow the MDGs could do worse than take their inspiration from them.

James Lewis

The Allard Prize Nomination

The Allard Prize for International Integrity is a newly created CA \$100,000 prize to be awarded to an individual, movement or organization that has demonstrated exceptional courage and leadership in combating corruption, especially through promoting transparency, accountability and the rule of law.

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Alliance of Business Immigration Lawyers (ABIL);
Stephen Yale-Loehr, General Editor

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News

US presidential election: Obama still faces major systemic challenges

The President's victory over Mitt Romney may provide only a temporary fillip for the USA's beleaguered legislature

SKIP KALTENHEUSER

Post-election government resembles what it was before. What, then, to make of all that money – \$6bn at least – spent on the presidential and congressional contests?

The bets placed by George W. Bush's former Deputy Chief of Staff Karl Rove and his Super-PAC, American Crossroads, fizzled: the candidates he backed lost. The Sunlight Foundation, a not-for-profit transparency organisation, suggests only 1.29 per cent of the \$103,559,717 Rove spent (involving opposing two losing candidates) ended in his desired result.

Supporters of unlimited spending are quick to say 'see, democracy survived'. But high rollers wield important influence, kicking an already entrenched fundraising industry into overdrive. CBS News reported that President Obama attended 221 fundraisers across 24 states, while attending 101 campaign rallies in nine states. His day job is running the country.

Former Federal Election Commission Chairman Trevor Potter considers such fundraising demands a disaster for the country, taking a president away from addressing critical needs. Potter believes Romney's '47 per cent' comment reflects what Romney constantly heard from rich donors he embedded himself with.

'The Supreme Court has repeatedly gone out of its way to damage consumer protection and increase corporate power'

Ira Rheingold
Executive Director, National Association of Consumer Advocates

Interviewed by Bill Moyers, Potter, a Republican, said that, despite losses, big donors did get a return for their money: a grateful Republican party attentive to the donors' legislative agenda. Democrats are likewise beholden to their benefactors. The Virginia senate race cost \$80m, \$50m of it from outside groups. Winners are already focused on raising tens of thousands a day to counter Super-PACs, or on finding handy billionaires.

Consider that billionaire-backing for Newt Gingrich and Rick Santorum extended the Republican primary for months, forcing Romney to burn through his money. Even so, Obama

scrambled to counter a three-to-one Republican Super-PAC advantage. Next time, says Potter, Democrats won't have an incumbent president with a cash-and-carry campaign structure across battleground states, with millions of volunteers on tap. They'll have a primary.

The high rollers haven't gone anywhere, says Matt Sanderson, an election finance lawyer with Potter's firm, Caplin & Drysdale. They've learned their lessons about being ham-fisted and off-message. Sanderson predicts bigger donors will consolidate, gobbling up smaller groups. They'll move their emphasis to grassroots boots-on-the-ground efforts. And the parties, chasing the same dollars as outside groups, will seek an advantage, such as being able to coordinate with candidates. More lawsuits will arrive seeking to further deregulate campaign finance.

Beyond the wreckage wrought by the Supreme Court's *Citizens United* decision, other matters coming down the tracks will shape the way America chooses its leadership. The Supreme Court's upcoming consideration of whether section 5 of the Voting Rights Act is constitutional, for example. The law requires a number of jurisdictions, notably including states of the

Confederacy to get Federal permission when changing voting procedures. The law was considered imperilled, with conservative critics labelling it an anachronism. Then came the 2012 election, with naked efforts at voter suppression exposed in a number of states across the country. It's now tougher to pretend section 5 is an oddity out of its time. One doesn't need to be supervising elections in developing democracies to roll one's eyes at obvious ploys like cutbacks in voting hours, or misinformation campaigns on the right day to vote, or signs threatening criminal penalties if anything goes amiss. There's a long menu of dirty tricks.

In a nice slice of irony, the timely exposure of efforts to damp down minority voter turnout angered people across the country. This made voting all the more precious, strengthening the resolve to be heard, even if it meant standing in line for seven hours. Will the Justices surface sufficiently to take in the ugly scenery of voter suppression and instead suppress future dirty tricks?

Every presidential election, the press spills plenty of ink on changing the balance of the Supreme Court, even if the candidates downplay it. Often, it's spilled for naught. Consider Justice Kennedy, often the swing vote in important 5–4 decisions. He's 76, as is Antonin Scalia. But hidden within the Supreme Court building is a magic elixir. According to 'Smart Politics', from the Humphrey School of Public Affairs, the 42 deceased justices born after 1850 lived an average of 34.1 years longer than the average American born the same year. Every justice born after 1850 lived at least ten years longer than the average life expectancy of their birth year; all but four lived at least 20 years longer; three lived over 50 years longer. Thurgood Marshall lived to 84, 50 years longer than the average non-white male born in 1908. Of the 11 deceased justices born in the 1900's, their average is nearly 82.

A possible retiree is Justice Ruth Bader Ginsburg, 79, who's had health challenges – but she's from the liberal wing. Conservatives include spring chickens Chief Justice Roberts, 59, Samuel Alito, 62, and Clarence

Thomas, 64. Their elder conservative brethren are still well below the average retirement age of about 79, and may well hold fast for four more years. When he retired two years ago, John Paul Stevens was 90.

But there are other courts. Judicial selection for them is also important. Getting Federal judges confirmed has been difficult as Republicans held to their version of hope and change. Now Republican Senator Susan Collins of Maine is urging Senate confirmation votes during the post-election season on 19 appeals and trial court nominees blocked by Republicans since September. Utah Senator Orin Hatch said confirmation won't take place during the lame-duck session,

President Obama attended 221 fundraisers across 24 states, while attending 101 campaign rallies in nine states. His day job is running the country'

and the nominees will have to be re-nominated next year, this despite several Republican senators backing several of the nominees.

Obama's nominees to the three vacant seats on the second most significant court, the US Court of Appeals for the District of Columbia Circuit, have hit a filibuster wall. Court turf includes challenges to rules by regulatory agencies. The court's conservative activist judges have weakened regulatory efforts from environmental protection to financial reform. Here, big business does its best to hamstring government.

Washington Post economics columnist Steven Pearlstein points to recent decisions. One struck down an FDA requirement of graphic warnings on cigarette packets – the judge claimed they'd have no impact. Another downed an SEC regulation allowing shareholders

to nominate company directors, part of the Congressional response to the financial crisis. EPA rules established decades ago that made states accountable for coughing polluted air onto other states were just upended. This court is often the Supreme Court's proving ground.

Matters before this court will probably include an SEC regulation, mandated by Congress, requiring public companies to disclose payments to foreign governments for oil, gas and mineral resource rights. It's a long-sought rule for transparency that curbs corruption. The oil industry and the Chamber of Commerce argue that it violates free speech – as in their right to keep quiet.

Among the hazards in lower courts is the use of dubious cost-benefit grounds to vacate Dodd-Frank rules. Amit Narang, an advocate with the non-profit Congress Watch/Public Citizen, believes 'the Supreme Court could step in to clarify that courts should afford agencies more deference when conducting analyses to support their rules, as the Court has done in previous instances. That said, it's a long shot that one of these cases would make it to the Supreme Court.'

But some reform advocates, like Ira Rheingold, Executive Director of the National Association of Consumer Advocates, get nervous whenever issues go before the Supreme Court. 'The Court has repeatedly gone out of its way to damage consumer protection and increase corporate power,' says Rheingold.

A related tool of obstruction is the Senate filibuster, a delaying tactic that requires 60 votes and a good deal of time to overcome. It may be reined in, if Senate Majority Leader Reid retains his epiphany and gets about the business of modifying rules, with the additional clout of newly elected colleagues seeking a less dysfunctional Senate. Meanwhile, as fundraisers consider how to lure the big money, Potter has a novel idea: give a hundred dollar voucher to voters, to give to candidates of their choice. Give citizens the voice they deserve.

Skip Kaltenheuser is a freelance journalist and writer. He can be contacted at skip.kaltenheuser@verizon.net

IBA Annual Conference, Dublin, 30 September – 5 October 2012



Dublin 2012 in numbers

5,470 Total attendance
(4,873 speakers, delegates, press, and exhibitors; 597 guests/accompanying persons)

118 Nations/jurisdictions represented

2,500 Law firms, bar associations, businesses and other organisations represented

89 Percentage of attendees rating the conference as *Excellent* or *Good*

**Based on the Attendees Satisfaction Survey*

Dublin 2012 was another remarkable Annual Conference, from the opening remarks and speeches of the IBA leadership, the Taoiseach, and keynote speaker, Nobel Prize-winning economist Joseph Stiglitz,

through to the closing party. The IBA's coverage features films of the opening ceremony, interviews with delegates and speakers, including Nobel Peace Prize-winner Muhammad Yunus, the UN Under-Secretary for Legal Affairs

Patricia O'Brien, and former Irish President Mary Robinson. You can also find various sessions, addresses, photographs and the daily conference newspaper on the IBA website, see tinyurl.com/DublinCoverage

IBA and OECD sign Memorandum of Understanding to extend collaboration

On 9 October 2012 at the OECD headquarters in Paris, The International Bar Association and the Organisation for Economic Co-operation and Development (OECD) signed a memorandum of understanding to formalise their commitment to extend collaboration on improving legal frameworks, expertise, and development across a number of sectors. Sectors highlighted included employment, energy, environment and natural resources, financial services, migration, trade and investment, and the rule of law and democratic values.

Among the projects detailed, the IBA will assist in training initiatives and drafting guidelines for the G20 High-level Principles on Financial Consumer Protection, contribute to the OECD policy-making process, and promote the standard-setting role of the OECD with legal practitioners worldwide, while the OECD will participate in the



The signing of the Memorandum (left to right): Nicola Bonucci, OECD Director of Legal Affairs; Angel Gurria, OECD Secretary-General; Akira Kawamura, IBA President; and Gonzalo Guzman, IBA Head of Legal Projects

IBA Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights, in IBA conferences and other briefings and consultations with the legal profession, and in joint fact-finding missions and reports.

These commitments build on the successful partnership already

established, above all in anti-corruption work, where the two organisations have combined to drive awareness and standards, and to heighten the legal profession's focus on the contribution it can make to identifying and removing corruption from transactions in both domestic and international contexts.

IBA Law Firm Mentoring Programme

The Law Firm Mentoring Programme, relaunched at the IBA Annual Conference 2012, links managing and senior partners experienced in law firm management with lawyers from around the world to help them start or increase the size of their practice. The Programme was first set up in 2009 by the Law Firm Management Committee.

After the successful launch three years ago (the initiative attracted up to 80 managing partners/senior partners as mentors), the programme has been redesigned, forming a structured and coordinated mentoring programme on a much larger scale. The programme is expected to welcome a couple of hundred participants in the first year of the relaunch.

The aim of the programme is to facilitate the exchange of knowledge, experience and expertise of law firm management between senior members of the profession and younger partners in various parts of the world.

This initiative constitutes a unique opportunity for senior partners within the IBA to share their insight and experience with lawyers in other jurisdictions who, for financial, cultural or other reasons, do not have access to law firm management advice. Mentors under this programme are able to actively contribute to the expansion of law firm management best practices.

This programme is an illustration of the new approach to mentoring. Unlike the traditional mentoring many lawyers are familiar with – by which mentors are expected to guide, protect and promote

their protégés – the modern approach is for mentees to be responsible for the mentoring relationship. Mentees are now the ones who initiate and drive the mentoring relationships to achieve their mentoring objectives.

Another innovative aspect of the programme is the fact that it is a distance mentoring programme. Some mentors and mentees never actually meet and all mentoring is done by way of email exchanges, telephone conversations and Skype face-to-face sessions.

Far from being a barrier to having a good mentoring relationship, distance mentoring proves to be very effective and sometimes takes away some of the ‘burden’ that mentors can feel of having formal mentoring meetings.

Under this programme, participants have access to mentoring resources via the IBA mentoring website which includes:

- checklists about the skills and descriptions of what makes good mentors and mentees;
- guidelines to prepare for mentoring sessions;
- tips to review a mentoring relationship;
- podcast video interviews with mentoring experts;
- news and updates on mentoring best practices; and
- news and case studies about the programme.

Participants will receive quarterly mentoring newsletters with news about the programme, interviews, case studies and mentoring tips.



Starting at the IBA Annual Conference in Boston in 2013, there will also be an annual mentoring event for participants including a mentoring master class, a group discussion and a social event.

To join, register as either a mentor or mentee online at www.ibanet.org/lawfirmmentors/home.aspx.

On joining the programme, participants receive an email providing detailed information about the process and guidance about the next step. The programme coordinator contacts participants and monitors the programme on a regular basis.

As a guideline, mentors are required to spend around two hours a month working with their mentee for an average of 12 months (but in this programme, it is up to each mentoring pair to determine the time that they need to achieve the mentoring objectives and to inform the coordinator).

Lifetime Achievement Award for Klaus Böhlhoff

During the IBA Annual Conference in Dublin, former IBA President Dr Klaus Böhlhoff was presented with a Lifetime Achievement Award recognising his lasting contribution to the IBA and to the advancement of the rule of law worldwide.

Böhlhoff was admitted to the Bar in 1965. In 1966 he was made a partner in the German law firm, Hengeler Mueller Weitzel Wirtz in Dusseldorf, now called Hengeler Mueller. Among his many accolades, he was awarded in 2001 the Walter Oppenhoff Medal from the German Bar Association.

Böhlhoff joined the IBA as a young lawyer and has now been a member for 40 years and is one of our Honorary Life Members. He was Chair of the Section on Business Law from 1991–1992 and went on to become President from 1998–2000. He was very actively involved in setting up the IBA's Human Rights Institute (IBAHRI) with Ross Harper from 1995 and on receiving his award said it had given him ‘tremendous satisfaction’ to see the institution it has become today. In a letter to the IBA Executive Director after Dublin, he said ‘Receiving this award was a moving experience for me, and I was very touched to have been chosen for this special honour.’



Right to left: Klaus Böhlhoff; IBA Executive Director Mark Ellis; IBA Secretary-General David W Rivkin; IBA President Akira Kawamura; and IBA Vice-President Michael J Reynolds

Human Rights News

'Shadow of justice' is hanging over Syria, says UN legal chief

REBECCA LOWE

The shadow of justice is hanging over the perpetrators of crimes in Syria,' UN legal counsel Patricia O'Brien has declared, while admitting that the global legal system is currently 'in a paralysis'.

Despite the lack of action by the UN Security Council while civil war continues to escalate, Ms O'Brien said the role of the Council 'should not be underestimated'. Speaking at the IBA Annual Conference, she stressed that there was far more to the UN's 'responsibility to protect' (RTP) principle than military action alone.

Established in 2005, RTP states that if a state fails to protect its population from mass atrocities, the international community has a responsibility to assist the state to do so – or, as a last resort, to intervene militarily. In Syria, however, permanent Security Council members China and Russia have used their veto power to prevent intervention.

'There is much more to RTP than the controversial question of the use of force,' O'Brien told over 100 lawyers at the Convention Centre Dublin (CCD) on 1 October. 'This issue is very, very important to bear in mind. Moral and political pressure is being relentlessly placed on Syria.'

The 1982 massacre of around 20,000 Hama residents carried out by President Bashar al-Assad's father, Hafez al-Assad, was never brought before the UN, O'Brien pointed out, and never discussed 'even momentarily' by the UN General Assembly. 'Now,' she said, 'the world's attention is focused on Syria.'

Even the most passionate interventionists admit that military action may no longer be an option. former French Foreign Minister Bernard Kouchner, who founded Médecins Sans Frontières (MSF) in 1971, has long been an advocate of humanitarian intervention and was a seminal influence in the UN's adoption of RTP. Yet regional tensions would make war hugely dangerous, he told *IBA Global Insight*, as Hezbollah, Iran, Israel, Turkey, Saudi Arabia and other nations would almost certainly be forced into the conflict.



'At first it was possible, now it is impossible,' he said in an interview on 5 October. But this did not dampen his criticism of the UN, which he believes is in desperate need of structural and procedural reform. 'We cannot stay inert facing such a bloodbath in such a bloody war because of the veto power. We need to introduce other countries [to the Security Council], representing Africa and the Arab world [...] We are stopping the real progress of human rights and the rule of law by this stepping back in Syria.'

'I don't believe in humanitarian intervention but I do believe in the "responsibility to protect", a doctrine that calls on the international community to act'

Juan Mendez

UN Special Rapporteur on Torture;
former IBAHRI Co-Chair

Without a green light from the Security Council, no humanitarian intervention is currently legal under international law. For Kouchner, however, the law should not pose an insurmountable obstacle. His influence was central to the NATO intervention in Kosovo in 1999, which did not have a Security Council mandate. Likewise, when he set up MSF in 1971, it was illegal for doctors to cross national borders to treat patients.

'Sometimes you have to be illegal to change the law,' he told a roomful of lawyers at the CCD on 5 October. 'And after the change, lawyers will follow.'

O'Brien admits the ethics of the issue are not completely clear-cut. 'For years, and particularly since the NATO intervention in Kosovo, there has been a significant body of thought that humanitarian intervention, even if it doesn't obtain the support of the Security Council, is a legal option,' she said. 'However, from our perspective, while this may be a legitimate use of force, it is not a legal use of force.'

Frustration among the international lawyers present at the conference was palpable. For O'Brien, the lack of action was 'egregious, intolerable', while Juan Mendez, UN Special Rapporteur on Torture and former Co-Chair of the IBA Human Rights Institute, told a crowd of delegates that he felt 'very strongly' that the Security Council's RTP doctrine should apply to Syria. However, he stopped short of advocating humanitarian intervention beyond that sanctioned by the Council.

'I don't see how a coalition of willing or individual states can act,' he said. 'It is not legally possible. But even if it was, the examples we have suggest it would not give the best results anyway.'

Mendez, O'Brien and Kouchner all expressed hope that Syria would one day be hauled in front of the International Criminal Court to answer for the atrocities. Yet Syria has not ratified the Rome Statute, which legislation that brought the court into being, and currently only the Security Council has the power to refer states that are not members to its jurisdiction.

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Jailed Iranian lawyer, Abdolfattah Soltani, wins 2012 IBAHRI Award

REBECCA LOWE

Leading lawyers persecuted by the Islamic Republic of Iran have highlighted the gross human rights abuses perpetrated by the regime and called on the international community to help.

Abdolfattah Soltani was awarded the 2012 International Bar Association Human Rights Institute's award at the IBA Annual Conference in Dublin. He is currently imprisoned in Iran's notorious Evin Prison and has spoken out about the lack of judicial independence, the discrimination against minorities and women, the use of physical and psychological torture, the denial of due process rights for the accused, and the increasing number of executions.

Soltani's concerns were outlined in a letter written for the award ceremony on 5 October, read out by fellow lawyer Mahnaz Parakand. 'The ugly truth is that the political establishment in Iran, in many cases by using a few non-independent judges, has turned the whole judicial system into a tool for implementing their own wishes. They are using these courts as a heavy hammer to suppress the legitimate and legal demands of the population.'

Soltani received the award for his work providing pro bono legal counsel to those in need, and for his courage in the face of persistent persecution. He was sentenced to 13 years' imprisonment on 4 March for spreading anti-government propaganda, endangering national security and co-founding the Center for the Defenders of Human Rights (DHRC), alongside Nobel Peace Prize-winner Shirin Ebadi.



Abdolfattah Soltani's daughter, Maede, accepts the IBAHRI award on her father's behalf at the IBA Annual Conference

According to Ebadi, who has been living in exile since 2009, the regime has imprisoned or harassed over 40 lawyers since June 2009. Prominent lawyers currently behind bars include Nasrin Sotoudeh, Khalil Bahramian, Mohammad Ali Dadkhah and Narges Mohammadi. All are serving sentences of between 18 months and 11 years for 'acting against the national security' or 'propaganda against the regime'.

Speaking to *IBA Global Insight* in a recent filmed interview, Ebadi explained how all human rights activists were forced underground after the failed 2009 uprising. There are now around 1,000 political prisoners in the country, she estimated, and opposition is growing daily. Outlining the violations of due process committed by the authorities, she called on the international community to use its

resources to raise awareness of the situation and help those whose voices had been silenced.

In accepting the Human Rights award, Soltani's daughter, Maede, described how the Iranian establishment had prevented her father joining the board of the Iranian Central Bar Association and subjected him to frequent 'threats, pressure and intimidation', including placing him in solitary confinement for six months. Her mother had also been held in solitary confinement for six days, she said, to convince her to testify against her husband.

'Prison life itself brings with it illness and my father, in addition to his previous health conditions, has to endure more illnesses arising from malnutrition and the appalling prison conditions,' she said. 'Up to now, he has not been provided with any medical care.'

Despite his damning indictment of Iran's human rights record, Soltani echoed Ebadi's hopes for a better future. Despite the majority of judges and lawyers having become effective employees of the state, he emphasised that many lawyers continue to respect their pledge to protect the rights of ordinary citizens. 'There is great sadness and regret that the Iranian Bar Association stands aside and is unable to confront the abuse of these lawyers,' he said. 'But I hope that access to a just judicial process and civil rights, a guarantor of the establishment and expansion of democracy, advances day by day.'

Read the full story at tinyurl.com/IBAHRIAwardSoltani

MENA Regional Congress on abolition of the death penalty

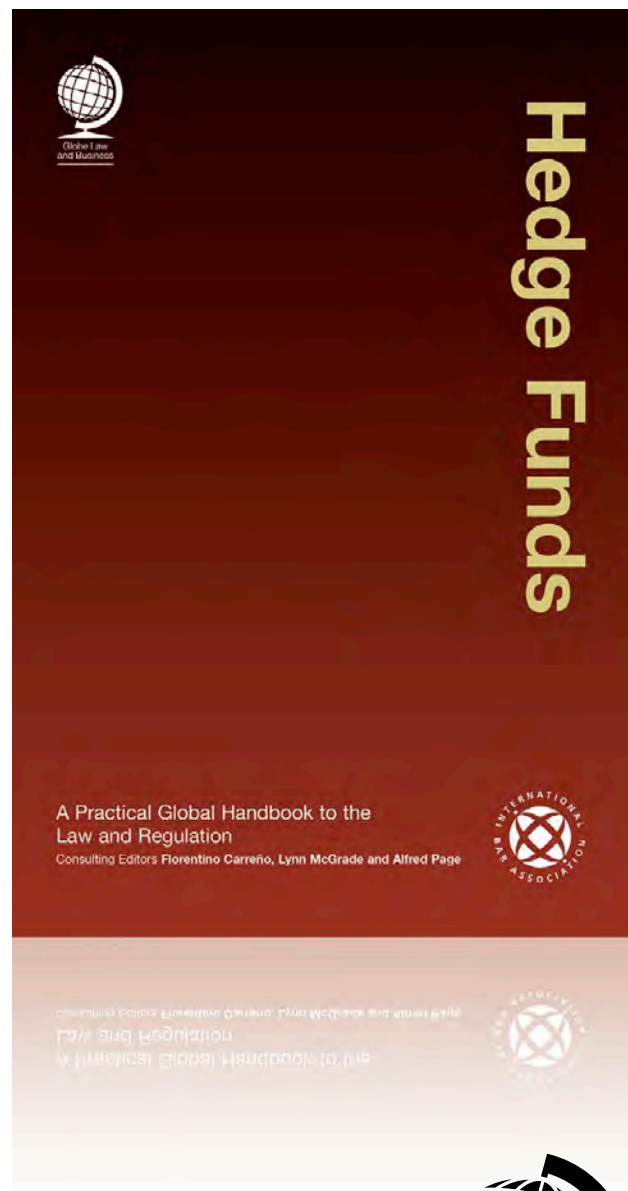
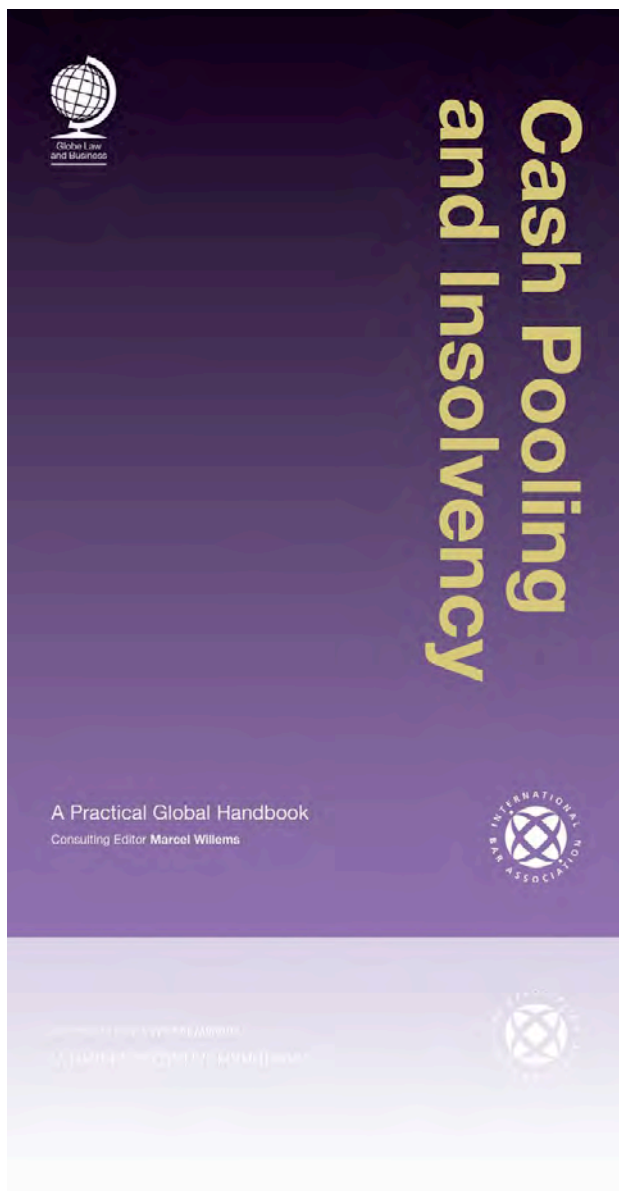
The first Regional Congress on the death penalty took place in Rabat, Morocco, in October 2012, with participants from MENA states, including Egypt, Iraq, Jordan, Lebanon, Libya, Morocco, Syria, and Tunisia. The Congress comprised three days of seminars, workshops and roundtables with the aim of establishing a clearly-defined approach to abolition. The IBAHRI hosted two seminars, working with the Moroccan legal profession, with presentations from international speakers, including William Schabas, Professor of international law; Alan Gogbashia, from the British Embassy Rabat; Emilio Gines, Member of the Subcommittee on Prevention of Torture of United Nations; and Dr Mohammed Ayat, former Senior Legal Advisor, Office of the Prosecutor, ICTR.

The IBA captured exclusive film footage of the event, including interviews with a former Moroccan death row inmate and other speakers. For more information and to view the film go to tinyurl.com/IBAHRI-deathpenalty



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Reforming Brazilian justice

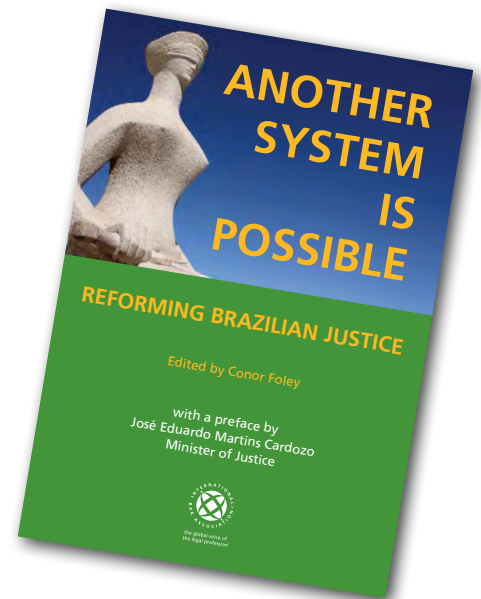
Another System is Possible: Reforming Brazilian Justice, the IBAHRI's latest publication, produced in partnership with the Brazilian Ministry of Justice, tells the story of Brazil's 'silent revolution' transforming the Brazilian justice system, challenging some of its most archaic practices through new innovations.

Edited by Conor Foley and including prefaces by the Brazilian Minister of Justice and Justice Richard Goldstone, the innovative programmes contained within the publication seek to provide a fairer, faster criminal justice service, but also to tackle the roots of violent crime. Many of the most creative innovations started locally before being scaled up to national projects. This publication brings together some of the voices of those involved in the reform process to reflect on their own experiences and their wider applicability. The Brazilian justice system has rightly attracted international notoriety in the past because of the scale of its problems.

However, the success stories contained in this book also show how reform is possible given political will. The process is ongoing and still faces enormous challenges. Brazil's experiences of justice sector reform may be of direct relevance to other countries of similar levels of social, economic and political development and some of the projects described in this book may provide models that others can learn from.

The English and Portuguese editions were launched in November 2012 at the House of Lords in London and the Brazilian Supreme Federal Court, respectively. In London, presentations were made by Baroness Helena Kennedy QC, IBAHRI Co-Chair, and Lord Daniel Brennan QC. The Portuguese edition was launched during the 2012 Innovare Award Ceremony in Brasilia presided over by Gabriela Knaul, UN Special Rapporteur on the Independence of Judges and Lawyers (**see below**).

Another System is Possible is part of a wider IBAHRI project, funded by



the UK Foreign and Commonwealth Office, on combating torture in Brazil. For more information – including a short film telling the story of a former young offenders prison in São Paulo – is available on the IBA website at tinyurl.com/IBAHRI-Brazil

Dramatic cut in Amazon deforestation secures 2012 IBAHRI/Instituto Innovare Award

Brazilian prosecutor Daniel César Azeredo Avelino has been awarded the 2012 IBAHRI/Instituto Innovare Special Category prize for 'Justice and Sustainability', for his ambitious 'Green Municipalities' project.

Avelino's innovative project aims to stop deforestation in the northern Brazilian state of Pará completely by 2020. The objective is to be reached through a series of incentive agreements between the Federal Public Prosecutor's Office, state municipalities, banks and rural producers that facilitate access to credit and tax benefits to programmes that reduce deforestation for livestock and stimulate sustainable agriculture practices. Since its inception in 2009, more than 50,000 landholdings and 90 state municipalities have registered with the scheme resulting in a dramatic 40 per cent reduction of deforestation in the region.

The Award was presented to Mr Avelino on 7 November 2012 by Gabriela Knaul, UN Special Rapporteur on the Independence of Judges and



Lawyers, during the 9th Annual Instituto Innovare Award ceremony in the Supreme Federal Tribunal in Brasília, Brazil.

The Instituto Innovare is a Brazilian non-profit organisation that aims to encourage the improvement of the Brazilian justice system through a prestigious annual award scheme. Since 2010, the IBAHRI has teamed up with Instituto Innovare to award a special category prize based on a particular theme.

Sri Lankan government must end intimidation of judges

The IBAHRI has expressed its grave concern about recent threats to the independence of the judiciary and called for the rule of law to be adhered to in Sri Lanka. The call follows disturbing reports of a physical attack on the Secretary of the Judicial Service Commission (JSC), Manjula Tilakaratne, on 7 October at a time of reported heightened tension between the JSC – an independent body made up members of the judiciary that deal with all judicial promotions and appointments – and the Sri Lankan government. The attack is widely perceived as an attempt to intimidate the judiciary and interfere with the independence of the profession.

For more information go to tinyurl.com/IBAHRI-SriLanka2012

IBAHRI Co-Chair Baroness Kennedy conducted an interview with BBC Asia on the issue, which, along with media response, can be viewed at tinyurl.com/IBAHRI-SriLankaKennedy

Selected films from the 2012 Annual Conference in Dublin



Joseph Stiglitz

The Nobel Prize-winning economist and former Senior Vice-President of the World Bank on the financial crisis, inequality and why austerity won't work.



Muhammad Yunus

The Nobel Peace Prize winner and leading banker on the failure of the Western financial system and how to tackle global poverty.



Patricia O'Brien

The United Nations Under-Secretary-General for Legal Affairs and Legal Counsel on the violence in Syria, the UN Security Council and reform at the UN.



Elena Borisenko

Deputy Minister of Justice, Russian Federation, on the major rule of law and human rights challenges facing her country.

To view these and other films from the conference, visit: tinyurl.com/Dublinfilms

Juan Mendez

The UN Special Rapporteur on Torture recounts his own personal experiences of torture and discusses whether torture is ever justified.



Mary Robinson

The Former President of Ireland on the magnitude of climate change as a human rights issue and the importance of inter-generational justice.



Patrick Honohan

The Governor of the Central Bank of Ireland on the errors that led to the abrupt end of the 'Celtic Tiger' years and negotiating with the Troika.



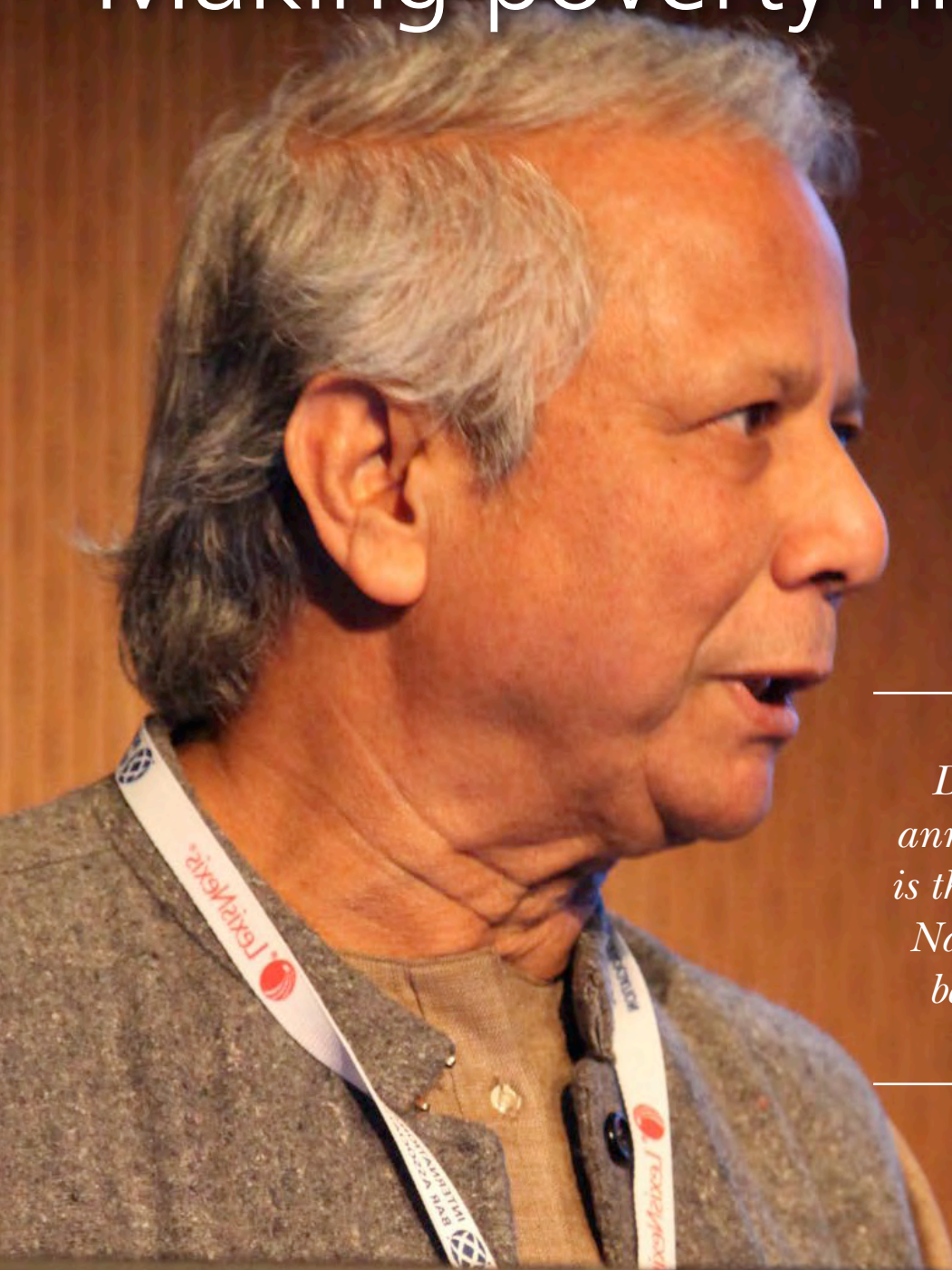
Kimberley Prost

The Ombudsperson to the UN Security Council's Al-Qaida and Taliban Sanctions Committee on the challenges of varying standards between the US, EU and UN.



Muhammad Yunus

Making poverty history



'When the Millenium Development Goals were announced, I thought this is the best thing the United Nations ever did. It is the best thing mankind as a whole ever did'

Muhammad Yunus was awarded the Nobel Peace Prize in 2006 having successfully developed microfinance to address poverty in Bangladesh. Starting with just \$27 over 30 years ago, his Grameen Bank has grown to become a multibillion enterprise lending almost exclusively to women. At the IBA Annual Conference in Dublin, he spoke to James Lewis.

James Lewis: The first thing I want to ask you is why you, as a banker, won the Nobel Peace Prize.

Muhammad Yunus: Well, I think the Nobel committee should be able to answer that! I'm very happy that they have recognised the work because this is a bank but a very unusual bank in the sense that it focuses on delivering financial services to poor women and this is a bank which is owned by poor people, poor women. So in that way it's unique in the whole world. And it gives loans for income generating activity. The basic principle of the bank is that people should not go to the bank; the bank should go to the people. So we are not an office-based bank. Our office is not our place of work; our place of work is the doorstep of the borrowers. Grameen Bank means village bank, we work in the villages. Today we have 2,600 branches over 80,000 villages in Bangladesh so we have covered every single village in Bangladesh. And it has changed their lives, improving their income with their own power of creativity in business and so on. And also we give loans to their children

The easy way is to get the people to move out of poverty. It's something that's doable; people have the creative power, people have the ways to make their own livelihood, so why don't we support that? All we need is a kind of institutional support to do that.

JL: It sounds so simple when you put it like that and yet 94 per cent of the world's income, on some estimates, goes to as few as 40 per cent of the population. What has to change to address that level of shocking inequality?

MY: It has to change because institutions are geared in that direction, so it's not just somebody inefficient who could not make money and somebody efficient who could make money; the whole system is pushing the money to the top. And the more you have, the more you can get. If you have less you don't get anything, if you have nothing you get nothing, so you remain in the same situation over and over again, you have no escape route for yourself. So you need something to push you from behind by means of institutions,

'The law creates the bank for the rich... You need a different kind of legal framework to create a bank for the poor'

for education. We give education loans so that nobody has to stop their education because they don't have money to proceed. So, because of that, thousands and thousands of children are in medical schools, engineering schools and universities and so on. Another feature would be it [the bank] doesn't take any money from the government and it doesn't take any money from international sources or anything. It generates the money inside the bank by taking deposits and then lending the money to the poor people in the area.

JL: Do you see a direct link between poverty and peace?

MY: Yes, there is a very strong link because peace is disturbed when people are disturbed; when people don't have any means for their survival and they're suffering and they have no hope for the future they will do anything drastic for society to pay attention [to] them. It's easy for somebody who is given some money and given a gun and asked to do the job that somebody wants him to do. Because he is hungry, he needs food, he needs a place to live and you are providing that. If you are well fed, well educated, it's not easy for people just to give money and convert the person and so on. So poverty is the breeding ground for all kinds of tension and instability of society, so why keep that tension point alive?

by policies. But one simple fact is that poverty is not created by the poor people. It's not because of something lacking in them that they became poor. It's because of the system which was not available to them. They fell through the system and that's what created the poverty, and they cannot lift themselves through the system, it's not there. So we need just that, institutions are designed wrongly, they work for the privileged people, they don't work for the poor people. Take the example of the banks: banks don't give loans to poor people, that's why loan sharks flourish in the world, in every city in the world you see loan sharks under different names. In some countries they call them 'payday lenders' in some cities they will be saying something else, but people need money and they provide the money...

JL: ...at punitive levels of interest which are crippling and don't develop enterprise and all the things that you've been trying to do with Grameen Bank. So if you were to change the institutions and the system are there key things you can identify which would be fundamental changes?

MY: Yes, first of all you have to admit that this is a vacuum of the institutions and policies, this is a barren land. So this is where you have to do something, make the institutions work for the

poor to get them out of the situation they are in. And also create new legal structure, because you think, all right the bank is there, why can't you create a bank to do that? But the law creates the bank for the rich. It's a different kind of animal you create with those laws, it's a bank for the rich, so you need a different kind of legal framework to create a bank for the poor. People say a bank is a bank. It's not true: a bank is not a bank, because conventional banks – even after 35 years of microcredit all over the world – still could not open their doors to the poor because their system doesn't allow them to open the door. So why can't we create a separate banking system, or a separate breed of bank, which is a bank for the poor as we have done in Bangladesh. So this is why we need a separate structure for that. Those are the kind of things we need: a structure, concepts are needed.

We always think jobs are the solution to poverty, give people jobs, but not many jobs are coming so what will other people do who haven't got jobs? People don't think that people themselves can create their own jobs, self employment. You can create self employment and that's how in most countries people survive: they're all self-employed, there is no kind of institutional job for them, either in the private sector or the public sector. They make a living by doing something on their own and that's how they survive. Why don't they recognise people's entrepreneurship, why should everything be job oriented, why should everybody be job seekers? Why can't you also feel you are job givers at the same time? So we can give jobs, anybody can give jobs, it's a question of institutional arrangements how you do that kind of thing. So those kinds of things have to be changed.

JL: So you seem to have a very clear view of how we might lift people out of this terrible situation of poverty where half the world's population, I think, are living on \$2 a day. You seem to have the answers but what's your assessment of the Millennium Development Goal of drastically reducing that widespread poverty?

MY: I always supported it right from the beginning; when it was announced I thought this is the best thing the United Nations ever did, it is the best thing mankind as a whole ever did to itself. These are very clearly defined laws, there are eight and the deadline is 2015, then you can compare whether you are moving in that direction or not moving in that direction. Year by year you can tell people whether you are on the right path or you are not on the path or above the path or whatever it is. So that's a fantastic thing as a set of goals. And another fantastic thing about this is all the nations of the world got together in

New York City at the United Nations and declared this as the Millennium Development Goal. For all the countries to agree on such a beautiful set of goals is again a remarkable accomplishment, and then we are following it up, who does what. And I'm happy that Bangladesh is very much on par with the progress to make the Millennium

'Institutions are designed wrongly, they work for the privileged people. They don't work for the poor people'

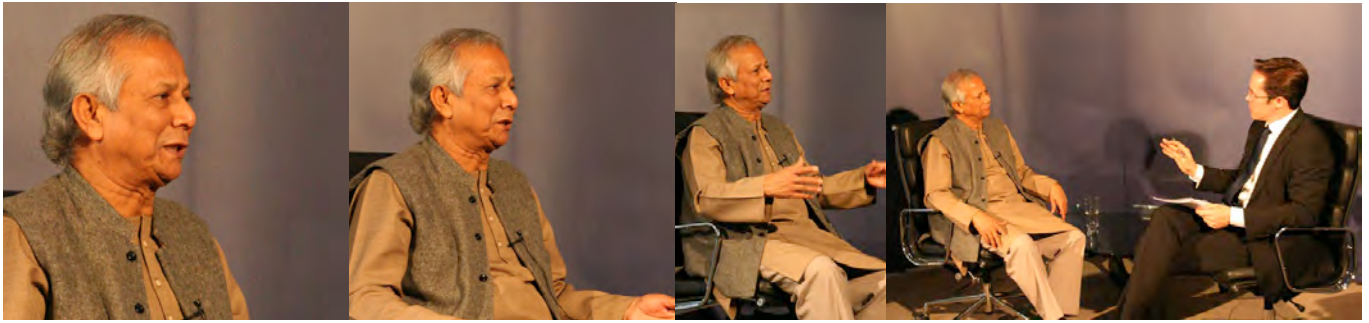
Development Goals happen, particularly on goal number one, achieving reducing poverty by half by 2015. We are very much on track right now. If the European crisis had not have happened, the financial crisis hadn't happened, probably we would be far ahead of the 2015, we would have achieved that. But today still with all those crises, all those difficulties that impose on us because of the crisis in Europe and the United States still we are on track to achieve that goal. And on other goals we are doing very well, except for one goal we are a little behind. [...] So we have to work harder than we did before so that even that can become an achievement. So a country which can achieve all eight millennium goals – that's a time for celebration for that country.

JL: How has the financial crisis and the five years that have followed affected your view of the way that wealth is generated in general and then distributed, and the consequent growing gap between the rich and poor?

MY: The financial crisis is a very strange kind of phenomenon that took place. It's almost like an earthquake which shook the whole world but the epicentre of the quake is one country, to be more specific, probably one city. Something happened in one city, it shook the whole world. This shows how vulnerable the whole economic system is. And in that one city there were probably only a few people who made those decisions and turned it around and made everything happen in waves, people lost their jobs, factories close down and economies collapsing and all those kinds of things. So that's not a very happy kind of thing to see, that all the power is concentrated in a few places or a few business houses or a few people.

JL: On Wall Street.

MY: On Wall Street, this is the whole thing. And you don't know, you are not a guilty person but you are punished, you didn't make the



problem that's been created, somebody else did it. But the punishment falls on you and you don't know why you are being punished through somebody else's fault. So that's something that shows in a very raw way how the system is wrong in assigning responsibilities and punishing the innocent and so on. So we need to address that on several levels. Should we have such concentrated economic power in one place or in a bundle of organisations like that? Number two, is this system working globally or is it just a system working for a few people and we're just dancing around them, that's the question. As you see, the concentration of wealth and income is with a few people, the rest of the world is not there. They are struggling for a square meal, they are struggling for survival, to get some treatment for diseases or suffering lifelong from diseases for which a simple cure is available but it's not there. So how to redesign the whole thing.

JL: Is it possible to redesign it?

MY: Yes, indeed. One of the things I keep talking about is [how] the whole system of what we call now the capitalist system is based on the fact that business's job is to make money. And everywhere people are busy making money because that's what's defined as the mission of all people and all businesses. Making money has become an obsession; it is

would make an enormous amount of money and they did.

JL: When you started what became Grameen Bank, you did it with as little as \$27 in total of loans given to 42 people, and in the three decades since it's grown to become a multibillion dollar enterprise. Perhaps you can just explain how that's happened.

MY: Again, Grameen Bank started in a very small way, in a small village, \$27, 42 people. I had no idea that it would ever become a bank. All I was trying to do was help people to get off their path of loan sharking businesses, so the loan sharks cannot touch them. And then people liked it and I put more money in out of my own pocket. I didn't think that this was something where I had to go to somebody else, I could do it myself. So I was not worrying about a big banking structure, nothing.

JL: Your contacts, a high level of trust, you got your money back.

MY: I really didn't know whether they would pay me back or not. At that time that was totally irrelevant. All I wanted to do was to disconnect them from the loan sharks and this was the only way I could do it, a very simple way to do it. And then I saw the enormous kind of sensation created out of it and I wanted to continue. Then I asked the banks to participate and the banks said no, it cannot be done. I offered myself as a guarantor, I said I will sign all your papers, you give the money and I will take the responsibility, and if they don't pay back I will pay it back. So in taking the responsibility I was trying to create a system, the first idea of creating a system came so that they would pay back regularly in a very clean transparent way. And it worked. And then we created a separate bank, Grameen Bank. Once we created the bank it was easy to now expand step by step. We started opening branch after branch, now today we have 2,600 branches all over the country and it works the same way. Each Grameen Bank branch is an entity on its own. So if you know how to run a self-

'Making money has become an obsession, it is not simply a business that you do for a certain reason, it has become an obsession'

not simply a business that you do for a certain reason, it has become an obsession. Even in some cases an addiction and that's why the financial crisis came, because of an addiction. At that time lots of editorial was written as an explanation of the financial crisis, why it happened, and everybody is saying that they used the marketplace as a gambling casino. They were betting on the chances that they

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sustaining branch of Grameen Bank, which generates its own money and lends the money to the poor then at the end of the year covers all costs and produces a surplus then you know you can produce not only thousands, you can produce millions of these branches all over the world, the same thing. Because that's the importance of designing a prototype, if we know how to do it as a prototype for a few people then millions and billions is no question.

'The financial crisis is a strange phenomenon...it's not a happy thing to see, that all the power is concentrated on Wall Street...it shows in a very raw way how the system is wrong in assigning responsibilities and punishing the innocent'

JL: So you've been the head of Grameen Bank since it started basically, and for more than three decades, what's the position on that now?

MY: Well, Grameen Bank was doing pretty well but somehow we got into a little trouble as far as Grameen Bank is concerned, I was removed from Grameen Bank on the grounds that I am too old to remain as the managing director of Grameen Bank. Their argument is I should have resigned when I was 60 years old because the government banks' rule is that at 60 years the managing director should resign, retire, and I didn't do that. I continued until...my age is 71. My position is I offered my resignation for retirement to my board and the board said no, what is the problem, you continue, we want you to continue. There is no restriction in our law why you can't continue. And when I turned 70 I did the same thing again, the board said we have no limitation, there is no age limitation or anything like that, so you continue, and I did that. The conflict came because government is interpreting Grameen Bank as a government bank, and we have been always interpreting it and operating as a private bank, because 97 per cent of the shares are owned by the poor people. So there is no reason why it should be made a government bank.

Government position is that it is created under a government statute, a statutory body, so as a statutory body you should follow government

rules. So we have this difference of opinion. Anyway I resigned, I retired from that. The recent one is a little bit more difficult, government is trying to appoint a managing director by empowering the chairman of the board who is a government appointed chairman. Government bank law doesn't allow that, government bank law says the board will create a selection committee and the selection committee will nominate some names, suggest some names to the board and the board will approve a person to be the managing director. But the government didn't want it that way, the government wanted to get directly involved in it and they amended the law, it has already been done, about a month back. They amended the law, empowering the chairman, who is a government appointed chairman, to create his own panel for selection committee and the selection committee will recommend...

JL: Is there a concern, then, if the government gets very involved with Grameen Bank that it will change the whole nature of Grameen and micro finance and the sort of social values and ideas you've talked about?

MY: That is my fear, but I'm absolutely sure that if government starts interfering with Grameen Bank's appointment of managing director and so on the government influence will come through in that and government means political influence. In Bangladesh anything taken over by the government doesn't have a very good record of management and so on. So the uniqueness, the unique feature of what made Grameen Bank as Grameen Bank is in the world, which brought Grameen Bank the Nobel Peace Prize, that uniqueness will be lost once the government starts interfering and getting involved in appointing the managing director and so on. So that's what our fear is and I hope whatever action has been taken will someday be re-amended to go back to the original in order to keep the integrity and authenticity of the bank as we created it. ☒



This is an edited version of the interview. The full interview can be viewed at tinyurl.com/Dublinfilms

The Public and Professional Interest Division showcase session entitled 'Lawyers Against Poverty' in Dublin featuring Muhammad Yunus' address can be viewed at tinyurl.com/pbajsession

To participate in follow-up work in this area, contact Peter Maynard or Tim Soutar

The financial crisis

Nobel Prize-winning economist Professor Joseph Stiglitz served as Chairman of the Economic Advisors under President Bill Clinton and Chief Economist at the World Bank, which makes him well placed to analyse the current financial crisis and suggest a possible way forward. He shared his views as the keynote speaker at the opening ceremony at the IBA Annual Conference in Dublin.





It's five years since the beginning of the recession, six years since the breaking of the bubble. The downturn continues with no recovery really imminent. In many of the countries – of Europe particularly – GDP is still less than it was before the crisis. The question, obviously, is asked, how long will it last? Well, one way of thinking about that is to think back to the Great Depression. This is not supposed to make you feel comfortable! The Great Depression is usually dated as beginning of 1929. If you remember, looking at this from a perspective of the United States, in 1937 we hadn't recovered, and we went back into a double-dip recession. The reason? President Roosevelt was persuaded to try a dose of austerity because of fear of deficits.

The economy remained weak, and who knows how long it would have lasted without World War Two. It was World War Two that brought the United States out of the Great Depression and, as I'll explain a little later, actually provided the basis of the long term recovery that happened in the years after. But there are some important lessons from this, and that is that economies don't recover on their own, or at least don't recover quickly enough. There's a famous quip when some economist said, 'Oh, don't worry about it, in the long run the economy will recover.' And Keynes' response was 'Yes, but in the long run we're all dead.'

'Remember, the recession caused the deficit, not the other way around'

The conventional wisdom focuses on the financial crisis. The diagnosis was fairly simple: the financial sector had caused the problem; bad banking, now it's regulations that allowed a whole host of bad practices to occur. So, what is needed is to put the banks back into the hospital to change the plumbing a little bit, it'll take a year and a half, two years, give it time to heal. Meanwhile, we'll have a mild stimulus to keep the economy going and then, with the financial sector healed, we'll go back to the good old days of before the crisis. It should be clear that that diagnosis was wrong. It's been far longer than two years and the economies, both in the United States, in Europe, are not recovered. The diagnosis was wrong and so, not surprisingly, the prescription was wrong. It was more than a financial crisis, even if the financial crisis played a critical role. So, what I want to do this evening is try to explain what I think are some of the underlying problems. I'm going to begin by talking about the United States, because I think the problems are simpler there, then I'm going

to talk about Europe, and then I'm going to talk about the one glimmer of hope, and that's the emerging markets.

USA: in need of structural transformation

Focusing on the United States, in some ways the analysis is simpler, and it's clear to me that it's more than a financial crisis. The story was that the absence of effective banking would impede investment, and once the banks were restored, investment would be restored. Well, investment outside of real estate has largely returned to normal in the United States. In fact, the large firms are sitting on large amounts of cash, estimated at a couple of trillion dollars. What that illustrates is, it's not the lack of finance that's holding back the US economy; the banks are not fully fixed, but clearly it's not the financial sector that's the problem. But the financial crisis has made the underlying problems worse. It did this in two ways: it left in its wake excessive household leverage and an overhang of real estate. And that has important implications, especially in those countries like Ireland and Spain where they outdid the United States in their bubble. It'll be hard to restore the economy to full employment, because of the gap in aggregate demand; just look at the numbers in the United States. Before the crisis, real estate represented 40 per cent of all investment. Today it's less than half of that. The only good news is that, in this period of the real estate bubble, the housing construction was really shoddy so, where houses won't last that long, maybe in ten or 15 years we will need to have more construction going. But it won't happen right away.

What about this issue of de-leveraging? There's a view that once we de-leverage, once the household debt comes down, consumption will go up. Every once in a while you hear from the administration or somebody in the Fed say the American consumer is coming back. I think it's not likely, and if he is coming back the way he was, we should be worried. The bottom 80 per cent of Americans were 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. That's still far below our traditional average, and far below what it ought to be. So, that's why I think even after de-leveraging, and there's been some de-leveraging, I don't think we're going to have consumption anywhere near back to where it was before the crisis. So, that means in terms of demand, what gives an economy its energy, these two elements, housing construction, real estate construction, and consumption, are going to be markedly weaker than they were in the years before the crisis.

There are some underlying problems. One I want to focus on particularly is the need for a

structural transformation in the United States. And what I'm going to say applies as well to Europe. The structural transformation is the movement away from manufacturing. In a way, we are a victim of our own success; there was such an increase in productivity – exceeding the increase in demand – that employment inevitably shrank. People have to move out of manufacturing and go elsewhere, mostly into the service sector. In Europe and America these problems are compounded by globalisation, meaning a shift of comparative advantage, so that a larger share of the shrinking global employment in manufacturing will be in emerging markets – a smaller share will be in the United States and Europe. Even China now has markedly decreased employment in manufacturing. A fundamental observation is that markets often don't make these structural transformations easily, and that's why government needs to take a major role. But unfortunately, government today is not doing what it should, and in fact is stepping back.

And that brings me to the second further problem of what is going on in the United States, and that is contractionary government policies. I know in Europe there's a lot of discussion about austerity, but in fact in the United States we've also had our dose of austerity, in a much more quiet way. Government employment today is more than 600,000 lower than it was before the crisis, and if we had a normal increase, reflecting the normal increase in the labour force, we would have added some 1.2 million workers to the government sector. So, the deficiency in government spending, in government employment, is one of the major factors contributing to the weakness in our economy. At the same time, these cutbacks are hurting our ability to make the transformation that I described before.

Where do we go from here? What are the answers? Well, first, let me say that monetary policy, QE3, won't make much difference. I know there's a lot of excitement about it; QE2 didn't make much difference, QE3 is likely to make even less of a difference. What I am afraid of is that political gridlock will prevent what is needed to be done. And there are two things, at least, that should be obvious and are essential. The first is that we have to deal with the foreclosure crisis. Remember, it was the housing problem that started it.

There are a number of proposals. Restructuring the debts, a Homeowners' Chapter 11. The second is a fiscal stimulus. The first fiscal stimulus worked. Had it not been for this fiscal stimulus, unemployment in the United States would have peaked at something like 12.5 per cent; it peaked at around ten per cent, so it did bring it down, but it was too small. The question that I'm often asked is, can we afford the stimulus? I would



'More than 50 per cent of the young people are unemployed. This is a period when young people ought to be increasing their skills; instead, their human capital is weakening and deteriorating'

respond that we can't afford not to do it; it's the best way to address our looming deficit and debt. Remember, the recession caused the deficit, not the other way around, and right now the United States can borrow, and at negative real interest rate, and one of the good news of the fact that we've under-invested in public sector, in technology, in infrastructure, in education, is that we have ample supply of investments yielding very high real rates of return. So, in fact,

these investments would improve our national balance sheet; it would enable us to address some of our fundamental problems, our structural transformation, our problems of inequality, and they would lay the foundations for our long term economic growth.

Europe: right politics, wrong economics

Let me turn now to Europe, having solved America in ten minutes! The only positive thing that one can say about Europe is that its problems make Americans feel that things could be worse. Europe faces some of the same problems that

experiment; in East Asia I saw it in the years that I was at the World Bank; they tried it in Latin America; each time it succeeded in converting downturns into recessions, recessions into depressions.

The fundamental problem with Europe is very simple: it's a flawed currency arrangement. Europe, the eurozone, was not based on economics, it was based on politics. The economics was very clear. My colleague at Columbia, Robert Mundell, got a Nobel Prize for his work on what were the conditions under which a group of countries could share a common currency. And European countries did not satisfy those conditions. And I think that the European leaders knew that at the time, but the hope was that somehow, in the ensuing years, there would be a change that would make the system work.

What is needed is actually a structural change of the euro arrangements. It's happening, but the problem is the speed of the political change is too slow for the economics. And let me give you an example of what is happening in the financial sector, in the banking sector. There's a kind of dynamic instability. Just put yourself in the position of somebody having money in a Spanish bank. You worry about the viability of the Spanish bank, and every country's banking systems are in effect backed up by their government – we saw that in the 2008 crisis. Backing any banking system is actually the belief that the government will bail it out in times of crisis. But, if the Spanish government is weak economically, there's no confidence and so money starts flowing out of the Spanish banking system. But it's even worse because then people start worrying: will they be able to stay in the eurozone? And so then there's a risk of currency loss, a devaluation. But as money moves out of the Spanish banking system, the Spanish economy gets weaker. The viability of credit gets weaker and without access to credit, especially for small-to-medium-sized enterprises the economy gets weaker. Tax revenues get weaker and the result of that is confidence in the government and its ability to bail out the bank gets even more eroded and that process then reinforces itself.

This was a problem. This kind of dynamic instability, the financial system was apparent from the beginning, but attention wasn't focused on it. What is needed is quite clear. You needed to have a common banking system, but a common banking system not just with common supervision but common deposit insurance and common resolution and unfortunately the discussions in Europe so far have focused only on common regulation, common supervision and the two other pieces haven't been there. And as long as those two other pieces are not there, the system will continue to unravel.

‘One should remember austerity has almost never worked. This is an idea that’s been tried over and over again’

I talked about in the United States, such as the problem of structural transformation. The depth of the problems should be clear. Spain and Greece are in depression, and that's the only word you can ascribe to a situation where 25 per cent of the people are unemployed, which was the unemployment rate in the Great Depression. More than 50 per cent of the young people are unemployed. This is a period when young people ought to be increasing their skills; instead, their human capital is weakening and deteriorating – they're becoming alienated. I think the future of these countries, the stability, the democracies are in jeopardy; the political consequences are becoming clear as separatist movements such as in Catalonia grow. Again, I think the problem is that the diagnosis in Europe of what went wrong was wrong and, as a result, the prescription was wrong.

What one hears commonly is that the problem is excessive debt; but Europe's debt-to-GDP ratio was actually better than the United States. If Europe changed its economic framework, it could have access to credit, access to funds – at the same negative real interest rates that the United States could. Before the crisis, Ireland and Spain had a surplus, not a deficit; they fulfilled all the conditions of what are called the Maastricht Convergence Criteria. Because they misdiagnosed the problem as over-spending, the prescription has been, quite naturally, to cut back on spending: austerity. But one should remember austerity has almost never worked. This is an idea that's been tried over and over again; back in 1929 Herbert Hoover tried it, succeeded in converting the stockmarket crash into the Great Depression – there were some other factors too. The IMF has tried this

The second thing that needs to be done is the mutualisation of debt. Again, the viability of countries that are highly indebted, they can only borrow at very high interest rates that make them, because of the high interest rates, uncompetitive. So that weakens their economy and it's, again, a downward vicious circle. So, among economists, I think, what I just described are two of the minimum reforms that have to be done. It seems clear that either there will need to be more Europe or less Europe. The current in-between state is not really viable. More Europe would entail, as I say, mutualisation of debt and in a common banking framework. Less Europe will mean a breaking up of the 17-nation eurozone – at least in the way that we know it.

There's another increasing consensus among economists that if the euro does break up, the easiest, least destructive way would be for Germany to leave. The alternative, actually both ways, will be a boon to the legal profession. The opportunities that it will afford you for restructuring contracts, bankruptcies, it will be a godsend. Well, the easier way probably won't happen, but the bottom line is that Europe is likely to face turmoil for some time to come, no matter which direction it takes.

Some cause for optimism

Finally, let me turn to the one part of the world where there is a little basis for optimism: the emerging markets. They weathered the 2008 storm much better than any of us thought they would. China, of course, was the most resounding success, but India was too. Now, there's a slow-down in both China and India, but one has to keep it in perspective. The slow-down, they're talking about gross slowing down from nine per cent to seven per cent. I think all of us would be quite pleased if we could grow at half of that seven per cent. Actually in China there's a lot of support for slower growth. The focus is on quality of growth, not quantity and the belief that a slightly slower growth would lead to a higher quality of growth. I believe that China has the instruments, the resources, the incentives and the knowledge to make sure that growth doesn't slow significantly below the seven per cent level. What is clear is that growth in the emerging markets would not be strong enough to pull Europe and the United States out of their doldrums.

Even in the years before the crisis, in most countries, there was growing inequality. But the economic downturn has exacerbated these problems greatly. Median income

(that's half above, half below) in the United States today is roughly back to where it was in 1996 and median wealth is back to where it was in the early 90s. Median real incomes for full-time male workers are back to the level that they were more than 40 years ago, in 1968. So there's been a dramatic increase in inequality. Just one more number highlights the role of that economic downturn, in 2010, the year of recovery, 93 per cent of the growth in the United States went to the upper one per cent – probably many of you in this room. So what that indicates is that somehow things have become unbalanced.

Economic inequality leads to political inequality and for those of you in the legal

'There's a risk that the promise of justice for all will become justice for those who can afford it'

profession it presents, I think, a particular challenge. There's a risk that the promise of justice for all will become justice for those who can afford it. In the United States, and I know some other countries, legal aid is being cut back and so those who can't afford access to legal assistance can't get it and I think it's important that the IBA does what it can to make sure that in all countries there is this access to justice for all.

I believe that in both Europe and America it is clear what the economic agenda should be.. The problem is, will America's divided politics allow this to happen? And will Europe have enough solidarity to allow this to happen, to allow the 'more Europe' solution that I described before, the kind of 'more Europe' solution that is absolutely necessary if the euro is to survive? In any case, what is clear is that these are as troubling times as we have faced in three-quarters of a century. ☒



This is an edited version of Joseph Stiglitz's speech. To view it in full on film, along with the IBA's exclusive interview with him, and the opening ceremony, with speeches from Ireland's Prime Minister and the IBA leadership, go to: tinyurl.com/Dublinfilms



The rebirth of Africa?

A key market for multinationals eager to capitalise on global demand for natural resources and cater to rapidly urbanising populations, the continent of 54 states at varying stages of economic and legal development nevertheless presents unique challenges.

SCOTT APPLETON

Angola and Mozambique in Sub-Saharan Africa share a common recent and colonial history but remain at opposite ends of this investment spectrum. The former is Africa's second-largest oil producer after Nigeria, having experienced double-digit growth over the past decade, placing it firmly on the radars of multinationals. Mozambique meanwhile remains one of Africa's smallest economies, largely reliant on international donors, but recent exploration has revealed some of the continent's largest gas reserves, offering the prospect of a wave of multi-billion dollar investment.

With economies in Europe and the US experiencing considerable uncertainty even five years on from the start of the financial crisis, ever-greater investor interest is focused on the so-called 'emerging markets' of Latin America, Asia and particularly Africa, which are experiencing increased political stability, population growth, rising consumer demand and an expanding middle class.

'There is no doubt that countries like Angola, and particularly Mozambique, have much to gain

from increased international investment. Both have significant natural resources and a need to develop their infrastructure, but significant in any success is confidence in their respective investment regimes, which are evolving to encourage more sophisticated and longer-term commitments,' says Claudia Santos Cruz, Managing Partner of the Lisbon and Maputo offices of AVM Advogados, and Senior Vice-Chair of the IBA European Regional Forum.

To this extent, she sees a growing focus being placed on new legislation meeting international expectations in areas such as finance and investor protections and national demands in revenue collection.

'Good regulation helps encourage investment and both Angola and Mozambique are clearly open to learning from the success of other countries, across Africa and elsewhere. Each is following its own path but there is already a common goal to encourage greater transparency in the way investment decisions are being made. Challenges remain but there is a strong momentum towards embracing foreign influences and international practices.'

Peace dividends

The economic success of Angola is even more striking given that it is celebrating only a decade of peace. The country saw almost constant conflict in the second half of the 20th century, including a bloody civil war following the end of Portuguese colonial rule in 1975. An end to the fighting was finally called in 2002 by which time the country's infrastructure had been devastated and it had seen an exodus of most of the professional class.

'The civil war not only brought a halt to most foreign investment, except notably in the oil sector, but it also had a profound effect on the country's legal institutions, prompting the migration of many lawyers and freezing most laws in the colonial era,' says Alberto Galhardo Simões, Partner at Portuguese law firm Miranda Correia Amendoeira, which has been involved in projects in the country in association with local firm Fátima Freitas Advogados for almost 20 years.

Since the cessation of violence, Angola has however recorded almost consistent double-digit growth as it has sought to capitalise on abundant, oil, diamond and copper reserves. The country is now Africa's second largest oil producer, and China's major supplier, with the sector accounting for an estimated 85 per cent of the country's \$120bn GDP.

But even with such riches Angola has not proved immune to the global downturn. A drop in royalty payments as a result of reduced demand for the country's oil prompted a hiatus of many government construction projects, but also proved to be a key driver behind the a drive to diversify the economy and to rewrite of much of the investment framework, say lawyers.

The oil sector has always stood out, in legal terms, because the multinational oil companies exert a strong influence over the way deals are done. But the fall in tax revenues led the Government to reassess not only the types of investment the country had been receiving, and which it wanted to encourage going forward, but also the adequacy of the legal frameworks this would require, adds Galhardo Simões.

'The goal is to promote greater economic development beyond the oil sector, to speed-up the rebuilding of the country's infrastructure and, crucially, to encourage international companies to reinvest more of their profits back into Angola.'

Reversing the resource curse

With the extra-territorial application of legislation such as the US Foreign Corrupt Practices Act and the UK's Bribery Act, multinationals more

than ever need to ensure that their business dealings are transparent. In Angola the issue is particularly acute, admit lawyers. President José Eduardo dos Santos has ruled the country since 1979 and political and economic power in the country are often closely linked – already Africa's second-longest serving leader after Equatorial Guinea's Teodoro Obiang Nguema Mbasog, August saw dos Santos win a further five-year term.

Last year however saw Angola enact a new Foreign Private Investment Law, while 2012 has seen significant regulatory changes intended to open up the country's banking and finance sector and a major reform of the tax laws; intended to encourage larger-scale investment and to keep more of companies' revenues and profits within the country.

Foreign oil companies paid in US dollars for their Angolan oil with the payments channeled through offshore accounts... very little of the revenues generated went through Angola's financial system'

António Vicente Marques
Founder, AVM Advogados

The Foreign Private Investment Law significantly altered the ability of foreign companies to repatriate profits, transforming a largely opaque system in to one that now sets minimum investment level thresholds (\$1m). A new Exchange Law for the oil and gas sector was also published in January, which means that from October this year state-oil company Sonangol, its associates and operators, are required to make payments for services through Angolan bank accounts; and by 2013 to make payments to local Angolan suppliers in the national currency, the kwanza.

'Historically the standard structure has seen foreign oil companies paid in US dollars for their Angolan oil with the payments channeled through offshore accounts. This meant that very little of the revenues generated actually went through Angola's own financial system,' says António Vicente Marques, the Angola-based Founder of AVM Advogados. 'One of the main drivers behind the banking and foreign exchange law changes is to ensure tax is paid on revenues generated in the country and to replace US dollar transactions with local currency. It is also likely that these measures will increase the domestic banks' sophistication, transparency and technical capabilities, vital if they are to compete better internationally.'

Most of Angola's leading banks were originally local subsidiaries of Portuguese institutions but the impetus of new banking rules brings the potential for a wave of consolidation as they look to build deeper corporate expertise. A larger pool of capital is also bringing renewed talk of an Angolan Stock Exchange, reflecting greater stability also in the international capital markets as well as wider investor interest in taking equity in Angolan banks even as new players begin to enter the market. South Africa's Standard Bank recently announced its intention to expand its corporate operations into Angola.

Portugal's colonial legacy means that it remains a major point of reference when it comes to developing and interpreting new Angolan legislation. Much of the country's existing regulation still dates from before 1975 but the recent success of other Portuguese-speaking (Lusophone) economies, including Brazil, is having a growing influence.

'Angola's civil war brought a halt to most foreign investment, except notably in the oil sector, but it also had a profound effect on the country's legal institutions... freezing most laws in the colonial era'

Alberto Galhardo Simões
Miranda Correia Amendoeira

'For some years Angola has been looking to develop its own capital markets. The financial crisis across Europe and the US may have helped stall things but the rules governing the operation of an Angolan Stock Exchange are already written; much of this is influenced by Portuguese securities rules but also that of Brazil's Bolsa de Valores, Mercadorias & Futuros de São Paulo,' says Vincent Marques.

Likewise the reform of the country's tax system, introducing concepts such as transfer pricing, stamp duty and the potential for a VAT-style sales tax for the first time, is strongly influenced by the Portuguese system. The new framework was announced in February but took retrospective effect commencing 1 January. The coming year may also see Angola sign its first-ever double taxation treaty, with Portugal.

'This transfer of legislative know-how means not only that as lawyers we are comfortable with developments, and can advise multinational investors accordingly, but it also presents the potential to use Portuguese jurisprudence and structures as a starting point for the interpretation of the new rules,' says Tiago Marreiros Moreira,

Head of Tax at Vieira de Almeida in Lisbon, and who leads its *VdAtlas* which coordinates operations in both Angola and Mozambique.

Mozambique's gas-powered growth

Mozambique may this year be celebrating 20 years since the end of its civil war, which also escalated following the end of Portuguese rule, but the country's subsequent economic trajectory has proved far less dynamic when compared to Angola.

Nonetheless, recent years have seen it open up to greater international investment and influence, say lawyers. Mozambique has significant coal reserves, Africa's largest hydroelectric plant – the Cahora Bassa Dam – and is a major aluminium producer. But a lack of transportation and communications infrastructure has meant that much of the country's development to date has been underwritten by international donors, including The World Bank, IMF and African Development Bank, which this summer announced a willingness to part-finance the \$1.8bn construction of new electricity grid connecting Cahora Bassa to the capital Maputo. Currently much of the country's electricity network passes via neighbouring South Africa and Zimbabwe.

However, change may be coming. Significant investment has already been made in the country's coal sector – Brazil's Vale began operations in 2009 and in 2011 announced a \$6bn expansion of its Moatize coal project doubling output to 22 million tonnes per year – and in the aluminium sector, where Anglo-Australian BHP Billiton is a majority shareholder in the Mozal Smelter Major, Africa's second largest. But it is the nascent gas sector that holds the potential to transform the country's economic direction.

In the last two years gas reserves estimated in excess of 100 trillion cubic feet have been found off of the country's eastern coast – among the largest recent finds anywhere in the world – with new finds being reported monthly. 'There have already been sizeable investments in Mozambique's coal industry. Coal and the scale of the gas finds are potential economic game-changers. Mozambique may evolve from a net importer of energy to one of Africa's largest exporters,' says Markus Weimer, a Research Fellow with Chatham House who specialises in development issues in Angola and Mozambique.

Realising the gas finds will however first require building the necessary, transport, storage and distribution networks. The location and scale of which will require significant international expertise as well as capital, adds Santos Cruz at AVM Advogados. 'Major investments are already being made but a challenge is to ensure that the legal frameworks are in place to truly enable the

country to move forward, in terms of developing Mozambique's infrastructure and to facilitate the types of investment that need to be made. In this sense much of the current regulation simply does not contemplate the scale of what is required or the nature of modern project finance, concessions or development models.'

As companies look to protect or capitalise on increasingly valuable exploration and production licences legal issues are already emerging. UK-based Cove Energy which holds an 8.5 per cent stake in one of the largest offshore gas finds, the Rovuma Basin, put itself up for sale at the end of 2011 attracting a \$1.6bn bid from Royal Dutch Shell and a rival \$1.8bn bid by Thailand's PTT. The Mozambican government subsequently announced it would apply a capital gains tax (CGT) in relation to the sale – Cove having acquired its Mozambican rights for \$11m in 2009. 'The decision is part political, part economic, but has doubtless clarified the issue for future investors. The government had previously received criticism for failing to apply CGT on natural resources-related sales but has now set out its position going forward,' says Santos Cruz. 'This decision may have been perceived by some as controversial but the application of CGT arguably represents a first step in the government capitalising on the wealth the gas sector may generate.'

CGT is not putting new investors off of Mozambique. Another major player in the gas discoveries, ENI, has put up for sale 20 per cent of its stake in the offshore Area-4 field – described as the largest gas find in the company's history – with bids expected to be around \$4bn.

US oil and gas company Anadarko, which has also made major discoveries, has likewise announced plans for a liquefied natural gas (LNG) plant in Mozambique with an estimated project cost of \$18bn. Many expect the government to contribute financially and to help facilitate the development of the transport infrastructure required to support the plant, which will be located in the north east of the country. Nonetheless the cost of the project, which is expected to be in operation by 2018 and will be the first on Africa's east coast, is almost double the \$10bn GDP of the country itself.

Maturity attracts local talent

Mozambique and Angola may share a common language, colonial history and post-independence experience, but lawyers familiar with both countries also emphasise the differences, including in the way each is looking to develop new legislation and attract major new investment.

Investors in one country cannot assume a similar experience in the other cautions Vanda Cascão, Co-Head of the Projects, Energy & Infrastructure Practice at Vieira de Almeida and who has worked on deals in both countries. 'Angola and Mozambique have a common Portuguese legal background but the countries are obviously different in both legal and socio-economic development terms and clients need to take that into account when structuring projects. Obviously the recent gas discoveries in Mozambique will impact positively in the development of new projects.'

In response to the prospects facing Mozambique, the government has in recent months put out to public consultation or published new Mining, Oil and Gas and Project Finance Codes, while a revision of the Foreign Investment framework is underway. But the source of investment funds has also impacted on the way infrastructure projects are undertaken in the two countries, note others. Mozambique has to date been the recipient of much more donor-led investment which brings with a more established formula for doing business. Angola meanwhile has been able to finance much of its new infrastructure off of the back of the country's oil wealth, and where a more idiosyncratic approach has been developed.

'Countries like Angola, and particularly Mozambique, have much to gain from increased international investment... there's already a common goal to encourage greater transparency'

Claudia Santos Cruz
Managing Partner, AVM Advogados;
Senior Vice-Chair, IBA European Regional Forum

Nonetheless Mozambique is looking to learn lessons from Angola in relation to exploration and production issues and the two countries have signed a number of cooperation protocols, including in relation to environmental issues. There is also a common push towards promoting 'local content', the use of local companies for supply and services and setting employment quotas for nationals, say lawyers. 'In the past in Angola there simply wasn't the local technical expertise to facilitate the deep water drilling undertaken by the oil companies but, as the economy and the industry has matured there has been a clear move by the Government and the multinationals themselves to recruit

Africa in numbers

7 of 10	The proportion of the fastest growing economies in the world (2011–2015) that are projected to be in sub-saharan Africa
5.4%	The percentage by which Africa's GDP is expected to rise this year, well above the global growth rate of 3.5%
4	The number of major African wars today down from 12 in the mid-1990s
48	Percentage by which secondary school enrolment in Africa rose from 2000–2008
100,000	The number of Portuguese living in Angola last year, up from 21,000 in 2003. This is more than triple the number of Angolans living in Portugal
\$1.4tn	The level that annual consumer spending in Africa is projected to reach by 2020, nearly double the \$860bn in 2008
1,400	The number of KFC outlets that Yum Brand plans to have in Africa by 2014, twice as many as in 2010
20%	The annual growth in mobile phone sales in Africa in each of the past five years
60%	Percentage of the world's uncultivated arable land in Africa

Source: Globe and Mail, Geoffrey York, McKinsey, Renaissance Capital

more local talent,' adds Galhardo Simões at Miranda. 'Arguably however companies don't need regulation to make them do this, it also makes sense economically. Angola remains a very expensive place in which to do business and it can be significantly cheaper to develop local employees' expertise than continue to pay ex-pat compensation packages.'

Major traditions merge

Africa's borders are in any event proving increasingly porous in terms of both the flow of technical and legal expertise. Legislators are increasingly open to learning and applying the lessons learnt elsewhere. Portuguese jurisprudence may still exert a major influence on both Angola and Mozambique, but common law concepts are playing an increasing role, while arbitration remains the preferred dispute resolution method for foreign investors. 'Across Africa we see three major legal traditions – common law, Napoleonic French law and mixed Roman Dutch/common law – but there is a clear movement towards common law, and these legal family distinctions are quite blurred when it comes to specific industry sectors such as mining' notes Camille Astier, who coordinates the Africa practice at global firm Hogan Lovells. 'At the national level we also see a growing willingness to incorporate international best practice into legislation in order to better compete for investment.'

Rwanda has notably transformed its entire legal system from civil law to common

law since 2010, a model that neighboring Burundi may also follow. Less extreme, but no less significant, was the announcement in July 2012 that The Democratic Republic of Congo is to adopt OHADA (Organisation pour l'Harmonisation en Afrique du Droit des Affaires) – a French-law-influenced initiative harmonising business rules and institutions that now encompasses 17 African states.

Angola and Mozambique will likely retain their Portuguese-influenced legal models, but the two countries' desire to attract increased international investment will see a continuation of the evolution of their legal systems. 'In order to commit the tremendous sums required to enable Angola to diversify its economy or to build the necessary infrastructure Mozambique requires, investors want certainty. This means that regardless of who is in power investments are safe, there is transparency of decision-making and companies are able to repatriate profits,' says Santos Cruz.

'Angola and Mozambique also want to build sustainable economies and the only way to meet the ambitions of both governments and investors is through the rule of law – the two countries may be on different economic trajectories and there will always be a strong local veneer to any new legislation, but both are increasingly open to outside guidance in order to help achieve their goals.'

Scott Appleton is a freelance journalist. He can be contacted at scoot.appleton@hotmail.com

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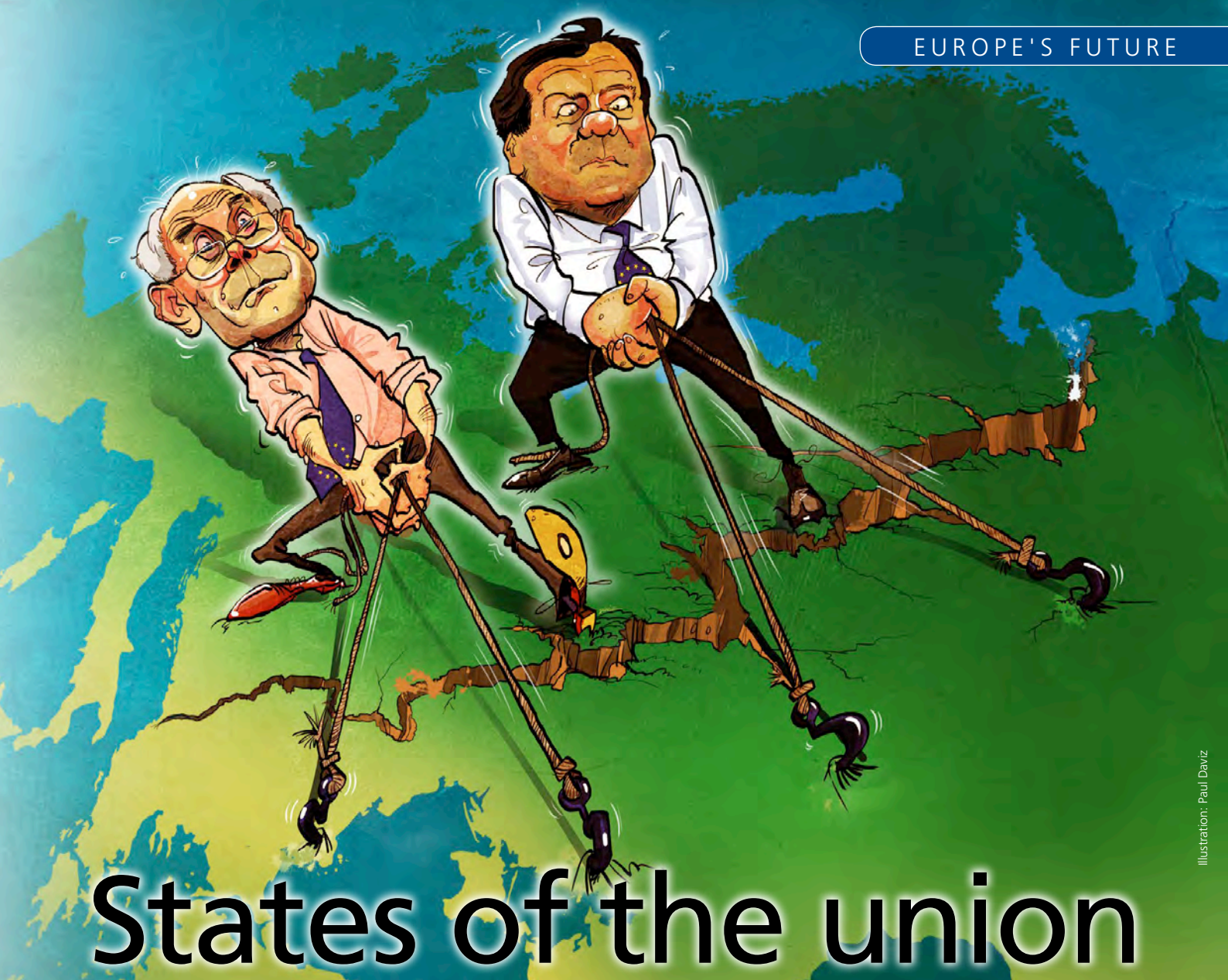


Illustration: Paul Daviz

States of the union

Despite the recently awarded Nobel Peace Prize, the position of the European Union looks precarious. As the debt crisis continues, tensions are mounting between Brussels and member states outside the eurozone.

POLLY BOTSFORD

When the EU was awarded the Nobel Peace Prize recently it raised a particularly EU-style dilemma: who should receive the award on behalf of the EU in Oslo? Should it be the current Commission President, Jose-Manuel Barroso? But that could be viewed as a prize for him rather than the EU itself; should it be the whole Council then? But that's to brush aside the elected parliament. So should it be the parliament? But that is impractical and no one knows who any of the MEPs are. Someone even suggested it should be the EU citizens themselves represented by, say, a group of school children or Second World War veterans.

Such a quandary is not a real quandary, of course, but a symbolic one of a collective entity which is peculiarly self-conscious, renowned for

not being very good at making decisions and, by definition, has to make awkward compromises (in the end the EU settled on the leaders of the three main EU institutions to go to Oslo).

With the debt crisis in the eurozone, however, the EU project has hit on a real, not symbolic, problem which has caused even the most avid europhile to call into question the shape and direction of the EU. And it is not only within the confines of the eurozone that EU relations look strained. In some member states outside of the eurozone (there are ten of them in total) tensions have mounted. There have been spats with the governments of the most recent joiners to the EU such as Hungary where its prime minister has spent the past year openly criticising the EU – and vice versa, and such as Romania and Bulgaria where ongoing EU monitoring is

creating suspicion and resentment. Then there are the likes of the Czech President, Vaclav Klaus, whose negative views on the EU project are so strong that he has decided to write a book about it, and Britain's Coalition Government whose education minister has reportedly told friends that he wants the UK to leave the EU altogether.

It is no surprise that the debt crisis in the eurozone has had a significant impact over its borders into its non-euro EU neighbours: not only is it their biggest trading bloc, but there is also significant cross-border investment (the Greeks have invested heavily in Romania and Bulgaria, the Austrians into Hungary, for instance) and their own banks are inextricably linked with banks within the eurozone even if they have not been directly lending into it.

Alongside the economic effects of the debt crisis there has been political turmoil in some of these countries too. In member states such as Hungary and Romania, as austerity measures and contracting economies have taken hold, so there have been power grabs at the top and protests on the streets. Criticism of the EU has come from governments and people alike – and the EU has had a few words to say back.

The starkest example of this has been Hungary which, under the guidance of the authoritarian Prime Minister, Viktor Orban, changed its constitution in an attempt to concentrate power in government hands. This included reducing the compulsory retirement age of judges from 70 to 62 thereby enabling the regime to fill the vacated judicial posts (estimates are that over 200 judges were affected) with their own people. It also created a new post of president of the National Judicial Office into which many new powers have been poured.

The European Commission responded by launching infringement proceedings against Hungary at the beginning of this year. These proceedings are deliberately designed to allow parties to negotiate through a series of 'notices' and 'letters' before actual court proceedings are started. But in Hungary's case, it went all the way to the European Court of Justice (ECJ). Hungary has backtracked on some of the issues, for instance, on the retirement age of judges whereby it has agreed to take the age back up to 65. But the Commission is still pursuing the country through the courts, and the ECJ recently decided to continue its investigations despite Hungary's concessions.

There were similar concerns from the EU when the Romanian government, led by its Prime

Minister, Victor Ponta, used a parliamentary majority to suspend Romania's President, Traian Basescu, from office, and to change the impeachment rules to be able to impeach him more easily. There was public criticism from the influential German Foreign Minister, Guido Westerwelle, of Ponta's actions (Westerwelle told the press that Ponta was acting in violation of 'European values') as well as from Merkel's office.

Romania is still the subject of what was supposed to be temporary monitoring and reporting by the EU on matters of judicial reform and the fight against organised crime under the so-called 'cooperation and verification mechanisms'. These were introduced at the time that the country acceded to the EU (and also for Bulgaria) and their continuance reflects ongoing concerns from Brussels.

Romania and Bulgaria are in almost permanent stand-off with the EU over them gaining Schengen status (the status which entitles citizens to cross EU borders without a passport). The EU had originally said that the countries had failed to meet various technical standards but then later the Commission, and in

particular, the Dutch, stated that the countries had also failed to meet standards guarding against corruption and organised crime. In one particularly acute phase in these discussions, the Romanian authorities blockaded trucks of imported tulips on the Romanian border. The EU has said in the latest round that until greater political stability is restored, Schengen status is off-limits, which, for Romania, means waiting, at the very least, until after its legislative elections this month.

Another bone of contention is the meting out of IMF loans to member states. Because the actual financial bases of IMF loans derives from the EU, it has become inextricably linked with the granting of, and in some cases refusal of, IMF loans; member states such as Hungary, who have had a loan turned down, blame the EU as much as they blame the IMF for their misfortunes.

When Hungary's loan was turned down (because Hungary had introduced a new law threatening the state capture of the country's central bank by putting the appointment of its head in the government's hands), Orban publicly accused the EU of treating it like 'a colony' and declared his refusal to 'live according to the commands of foreign powers'; in October his government launched a nationwide ad campaign calling for a 'nem' against any demands for austerity by the IMF.

'We believe that the EU has reached a critical moment in its development'

Open Europe think tank

Will anyone still use the Eurostar if Britain leaves the EU?

The crisis in the eurozone has created fertile ground for eurosceptics in the UK (as one tweeter so charmingly put it: 'Unelected EU fools in their ivory towers with fat salaries and pensions supported by idiot Europhiles killing Europe'). Recent policy moves by the Coalition Government (such as opting out of the 135 EU measures relating to policing and crime) and comments in the press (such as when Michael Gove reportedly told friends that if there was a referendum on the EU he would vote for the UK to leave it) have indicated a change in direction for Britain and its relations with the EU.

Opinions are, as one might expect, divided. Clara O'Donnell, research fellow at the think tank, the Centre for European Reform, says that this will hinder the UK's ability to influence at the top level: 'The Coalition Government has made a significant departure from previous governments. Until recently, Britain wanted to be in the room whilst decisions were being taken even if they were not part of the eurozone, and they were successful in that and influenced policy accordingly, such as the liberalisation of financial services. But now the Coalition has changed tack. They now say: "We know that for the eurozone to survive you will need greater integration and we won't be part of that and we don't even want to be in the room," and it is that last bit which matters.'

On the other side of the fence is Open Europe, another think tank, also calling for reform of the European Union but in a slightly different direction, as it says: 'We believe that the EU has reached a critical moment in its development. Globalisation, enlargement, successive "No" votes in EU referenda and the eurozone crisis have discredited the notion of an 'ever closer union' espoused by successive generations of political and bureaucratic elites.'

What is less clear is how Brussels views Britain as a result. O'Donnell says that the UK is held in 'very high regard' in Brussels and that many other member states look to Britain for support in negotiations and drafting. She says EU wants to see Britain 'engaged and constructive' even if they are not in the eurozone.

'It is easy to blame the EU because it feels like a distant power. This involves no intellectual capital at all'

Professor Jerzy Makarczyk

Former Polish Foreign Secretary; ECHR and ECJ judge

Professor Jerzy Makarczyk travelled to Hungary with the IBA as part of a fact-finding mission earlier in 2012. A former judge of the European Court of Human Rights and the European Court of Justice, and former Secretary of State for Foreign Affairs of Poland, Makarczyk believes that this anti-EU stance is to be expected: 'It is absolutely normal in every state that these governments are looking for the guilty ones and that is why there may be some anti-EU sentiment. It is easy to blame the EU because it feels like a

distant power. This involves no intellectual capital at all.'

But another leader in the region, known for his vociferous dislike of the EU, Klaus, would seize on the notion of 'a distant power'. His argument is that the EU does not *feel* like a distant power to member states, it really *is* one and, what's more, it is a power with no legitimacy, as he proclaims on his website: the EU is 'post-democratic' and is witnessing 'the undemocratic consequences of the denationalisation of Europe.'

Though Klaus is known in his country for having an eccentric standpoint, there are many who agree with him on his attitudes to the EU, as Tomas Rychly, managing partner of Austrian-based law firm, Wolf Theiss, and a member of the IBA European Regional Forum, says: 'though the Czech Republic is a quiet nation, there has been criticism of the effects of the EU's fiscal treaty as there has been elsewhere.'

For it is not only the leaders who are having strained relations with the EU; on the streets there has been a robust response to the eurozone crisis too. Romania and Bulgaria saw protests against EU-driven austerity measures; when the fiscal treaty was signed earlier this year, the unions organised protests in Romania's capital, Bucharest; in Prague there were demonstrations in the streets for the first time since the 1989 revolution.

Where once the EU was considered at worst a regulatory burden and at best a donor of substantial grants and funds, now it is seen as strangling suffering economies and the funds and grants may yet dry up. As Ruben Zaiotti, an assistant professor of Political Science at Dalhousie University in Canada, says: 'These concerns on the streets, in the cafes and blogosphere, reflect a disappointment of an institution they believed in or an institution they were at best neutral about. Now that they are directly and negatively affected by the crisis in the eurozone, they do care about it.'

This switch from positive to negative demonstrates that attitudes are closely linked to economic instability (regardless of whether EU policy is actually to blame for that instability). In Poland, for instance, where the economy had managed to avoid, until very recently, the problems in the eurozone (mainly because it is a relatively large economically independent market and not so dependent on exports), euroscepticism has not surfaced. But, as Dariusz Wasylkowski, partner at the Warsaw-based firm, Wardynski & Partners, and an advisory board member of the IBA European Regional Forum, warns, if the Polish economy goes into recession next year, then 'the eurosceptic engine will gain momentum.'

Yet looked at more closely most of these protests at their core were not against the EU



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pure and simple, more they were against their own national governments and their perceived incompetence or, worse, corruption. Protestors outside Budapest's opera house carried a slogan on their march: 'the phantom of the failure'. But the figure alongside that slogan was not Merkel or Barroso or Van Rompuy, but Orban.

And in Bucharest, protestors did complain of the 'brutal' austerity for which the EU is held responsible but they also waved a flag which they had deliberately defaced by cutting a circle out of the middle of it. This was not the EU flag which they had defaced but the Romanian flag and it was the Romanian's ancient coat of arms which had been cut out. This disfigured flag was of huge significance for it was the same symbol which Romanians used during the revolution of 1989 against Ceausescu.

'When the Czech people compare the EU with what we had before, the communists, we prefer the EU'

Tomas Rychly
Managing partner, Wolf Theiss

It is also worth bearing in mind that protesters from former communist states look at the EU in relative terms, as Rychly says of the Czech people: 'when we compare the EU with what we had before, the communists, we prefer the EU.'

Of course, these countries are destined to join the eurozone. Of the ten member states currently outside the eurozone, there are only two which have chosen to opt out of the euro indefinitely, namely the UK and Denmark. The rest, Hungary, Romania, Bulgaria, the Czech Republic and Poland in Eastern Europe, and Lithuania, Latvia and Sweden in the north, must sign up to the euro, (their Accession Treaty obliges them to do so) and are timetabled to join over the next few years. For these eurozone-in-waiting countries, any criticism of the EU's handling of the eurozone is with an eye to the future and how not to let it happen again.

And the future may look very different: perhaps the next generation of EU citizens will be more unambiguously EU-friendly than this one. Wasylkowski, for one, thinks so: 'the younger generation see the advantages of a united Europe. They are often better educated and more open-minded but also more mobile and many will have seen other parts of Europe and may feel more "European".'

Indeed, some see the EU as a safety net, as the only way to police their own national governments and are frustrated that the EU does not take a tougher line: the Hungarians

expressed disappointment that when Angela Merkel took to the stage with Orban to make a joint press statement at the most recent EU summit, she did not take the opportunity to give him the public dressing down which they believe he deserves. As Professor Makarczyk says: 'Hungary is in crisis by itself and the country needs the EU not only because of the funding but because it is Hungary's only hope against the regime. Any good will can only be brought about through EU pressure. In Poland, when we had an authoritarian government, there might have been a coup but for the EU when the military knew they couldn't act.'

Bryan Jardine, a resident of Bucharest and managing partner of Wolf Theiss's Romanian office, agrees. He says: 'it would be helpful if the EU could continue to put pressure on Romania's politicians to stop their games. In the upcoming elections in December, the ruling party may be punished for its attempted ousting of the president.'

Perhaps this pressure will come; perhaps much of the tension between Brussels and member states is frustration felt by Brussels at countries where the political culture is so very different: of authoritarian regimes where, for instance, altering voter registration is being used as a means of entrenching power. None of that has really mattered up until now, until the crisis in the eurozone; because the crisis brings to the fore the question of the 'ever closer union' (the aspiration written into the original treaty which created what is now the EU).

In June 2012, the Gang of Four in the EU (which is the president of the European Council, Herman Van Rompuy, of the European Commission, Jose-Manual Barroso, of the European Central Bank, Mario Draghi, and of the Eurogroup, Jean-Claude Juncker) published a plan to federalise the eurozone. It was a bold and radical step and perhaps will never see the light of the day. But if it is taken up, even in part, then greater political unity will result. When the member states of former eastern Europe join the euro over the next few years then they will be part of this federal plan; Brussels is acutely aware that there are aspects of the former communist countries which will fit uncomfortably in that federation.

The fact that the EU is often referred to as 'the EU project' tells us much about how it is viewed: for its proponents, it is as yet unfinished, work in progress. For its critics, it is a temporary structure whose time is up. Either way, the crisis in and outside of the eurozone has created one of the biggest challenges to that project, for all member states. ☒

Polly Botsford is a freelance journalist. She can be contacted at polly@pollybotsford.com

George Seward Memorial Lecture

Delivered by
Mary Robinson



Environmental justice

In the first memorial lecture in honour of George Seward – the former Honorary Life President of the IBA – Mary Robinson, formerly President of Ireland and UN High Commissioner for Human Rights, takes the opportunity to emphasise the moral imperative to act on climate change.

George Seward led a long life filled with purpose and was very closely identified with the International Bar Association we know today. I'm sure many of you remember him, as I do, with fondness and with deep respect. I want to use George's great age, 101 when he died in February of this year, to embark on my theme for this lecture, ending with a challenge to the IBA.

George's life spanned a period of great change, innovation, development and growth. There were world wars, expeditions to the moon, great technological developments, including television, computers and mobile phones, and

while shaping a world of opportunity for all of humankind is a daunting task.

For these reasons I approach climate change as an issue of justice and human rights. I describe the justice involved as more developmental than legal, although there are a number of interesting court cases on climate-related issues around the world that no doubt some of you will be familiar with. For those of you who would like to know more about climate change and litigation I highly recommend the book *Climate Change Liability Transnational Law and Practice*, which is a collection of essays and contributions from different parts of the world.

Climate justice links development, human rights and climate change. It's a human-rights-based approach to combating climate change which seeks equitable outcomes to both protect the vulnerable and provide access to benefits arising from our transition to low-carbon development. Climate justice has a focus on people. It looks at the causes, the impacts and the solutions to the problem from a human perspective. Climate justice is fully informed by science, but it communicates and identifies solutions from the perspective of human needs and rights.

As such, it seeks equity in the way we deal with the negative impacts of climate change. For example, which countries take the lead on cutting greenhouse gas emissions. And equity in accessing benefits, for example access to off-grid renewable energy for communities living without access to electricity.

It's worth noting that there's an increasing trend towards linking the international human rights framework with the climate change process. Just over a year ago, the UN Human Rights Council adopted a further resolution on human rights and climate change. It 'reiterates its concern that climate change poses an immediate and far-reaching threat to people and communities around the world and has adverse implications for the full enjoyment of human rights.' Earlier this year, the Human Rights Council appointed John Knox as UN independent expert on human

'Climate change will be one of the defining attributes of the next century, and our ability to deal with this challenge while shaping a world of opportunity for all of humankind is a daunting task'

significant improvements in human well-being, access to education and human rights. While these changes brought benefits to society their distribution has not been even across the world or within societies and the economic growth we have experienced comes at a cost.

Climate change didn't exist as an issue when George was born. The Industrial Revolution was in its heyday and the effects of burning fossil fuels on the climate were yet to be understood. In George's lifetime human kind found solutions to all sorts of global problems, from combating diseases such as polio to finding more effective ways to communicate, while at the same time creating a new problem. We will need to use the same kind of ingenuity and resourcefulness to tackle the challenges posed by climate change in the century ahead. Climate change will be one of the defining attributes of the next century, and our ability to deal with this challenge

rights and environment. John Knox will now play a key role in building consensus, both for the global recognition of the right to a healthy environment and for the development of strong substantive content to that right.

Both of these initiatives respond to the growing body of evidence demonstrating the links between climate change and human rights. Climate change impinges on the right to food, the right to water and the right to health. In doing so it undermines the significant gains we have made in upholding and strengthening these rights across the world in recent decades. As we work towards the internationally agreed millennium development goals we're making real progress on reducing hunger, maternal and child mortality, access to clean water and sanitation. But, left unchecked, climate change may wipe these gains away.

It's the recognition of the human rights dimensions of climate change that inspired me to establish the Mary Robinson Foundation – Climate Justice. The foundation articulates a vision for a world where global justice and equity underpin a people-centred developmental approach to addressing the impacts of climate change. There's clearly a role for the legal profession in pursuing this vision because climate change is not just an environmental or economic issue, it's a human rights issue and therefore it creates a concomitant moral imperative to act. The focus of this action must be on protecting the vulnerable and motivating world leaders to take the action needed to avoid dangerous climate change.

A new window of opportunity opened at the end of the last round of negotiations on climate change in Durban last December, with the decision to have a new global deal on climate by 2015, to come into effect by 2020, which many think is leaving it late, but it is a case of late is better than never. Issues of equity, justice and rights will be central to the discussion between now and then.

Parties to the climate convention are struggling with important questions that I believe the IBA must become involved in considering. Questions such as how can we support the right to development of developing countries by taking meaningful action on emissions reductions? Can we find ways to share the burden of reducing greenhouse gas emissions equitably? Is the principle of common but differentiated responsibilities and respective capabilities encouraging us to act or actually holding us back? Are we focused enough on sharing the benefits of low-carbon development equitably?

With these questions centre stage it became clear that the time had come for a climate justice narrative, a narrative that places people at its centre, that is informed by human rights,

that strives for equity and that protects the most vulnerable. We need a new set of arguments and moral and ethical imperatives to motivate people and decision makers to act and to bring the urgency and ambition we need to agree a new climate agreement that will avoid dangerous climate change. Until there's a greater demand from people in all walks of life, for meaningful action on climate change, political leaders will continue to be able to return home from unsuccessful climate conferences with little fear of retribution.

That's one of the problems now. I've been at the recent conferences in Copenhagen, in Cancun and, most recently, in Durban. And the ministers who came were not under any great political pressure; they were more under pressure to hold their cards as if it was a trade agreement and not really agree what is needed going forward, which would require brave and badly needed decisions to be taken. So we need to take the urgency that I feel when I talk to those directly affected by climate change, and I really do feel this when I'm talking, for example, to my friend, Constance Okollet, who lives in Northern Uganda.

When she was growing up in her village they had seasons. They were poor but they had enough food because they knew when to plant and when to harvest. Now that has changed for over a decade and they're afflicted with long periods of drought and then flash flooding and then more drought. Of course, it's not all attributable to climate change. There may have been cutting down of trees and bad soil management, but on top of vulnerable climate situations anyway the impact of climate change is, I would say, at this stage, deadly. It is extraordinarily serious.

I saw it when I travelled with one of the other leaders of Bangladesh Muhammad Yunus of Grameen Bank, who's a good friend, and who I know addressed you, while there's also the other wonderful organisation, Bangladesh Rural Advancement Committee (BRAC), headed by another visionary man, Fazle Abed. And I went with BRAC supporters down to the Bay of Bengal to see the situation for fisherman in Bangladesh and how they'd had to change their way of doing, learning to plant seeds and rice that would withstand the brackish salty water, and the difficulties that they had.

If you take the small island states, my friend Ursula Rakova is busy working out how to transfer 1,500 people from the small Carteret Island where they can no longer live, to Bougainville in Papua New Guinea. She has negotiated for land. She's trying to make sure that relationships between the 1,500 who are coming to Bougainville and the people resident there will get on well. And she says with great sadness that there's nothing she can do about the fact that they are leaving the

land of the bones of their ancestors. And when an indigenous woman says that, you can feel the pain. There will be a lot of people leaving the land of the bones of their ancestors because of the climate shocks and the climate changes and the rising seawater.

So we need the urgency to motivate those who have responsibility to act. In this way, a climate justice narrative informed by the voices of the most vulnerable can create strong constituencies of demand and the political will needed to solve the climate crisis.



‘There’s clearly a role for the legal profession in pursuing this vision because climate change is not just an environmental or economic issue, it’s a human rights issue and therefore it creates a concomitant moral imperative to act’

I believe the IBA has a role to play in the climate justice dialogue, which my foundation and the World Resources Institute based in Washington are facilitating. This is a global dialogue that will create safe spaces for different actors to listen and discuss a solid evidence base, informed by regional workshops and commissioned research and it will shape a new climate justice narrative to mobilise political will for an ambitious climate agreement in 2015. I invite the IBA to work with us to expand the concept of justice to include climate justice and to inform the legal aspects of this work. If we’re to reach an agreement in 2015 that puts us on a new course to climate-compatible development we need allies across the world and in all disciplines, working for a common purpose.

So I’d like to be bold and propose that the IBA develop a working group on climate justice or, if you prefer, human rights and climate change to provide leadership over the coming three to

four years, which will be critical in shaping our response to climate change. In so doing, the members of the group could interact with the climate justice dialogue by contributing to the evidence base, for example bioresearch papers or a commissioned series in a law journal, as well as helping us to shape and carry the climate justice narrative that the dialogue will articulate. We need many strong voices from all parts of the world to carry this narrative and to make the case for a human-centred and equitable global deal on climate.

As George Seward, whom we remember here today, had a life that spanned several generations, the challenge climate change poses to us is intergenerational. George was a father, grandfather and indeed great-grandfather. Hence, his time horizons reached far into the past and way into the future to encapsulate the lifetime of his great-grandchildren. Climate change threatens to be one of the greatest injustices that we inflict on our grandchildren and great-grandchildren. Sometimes these days I wake up and think to myself, what will they say about us? What will they reflect on the decisions that were taken in the first 20 years of this century? My fear is that they will say, how could they have been so neglectful, so ignorant, so stupid, so short term?

Our problems now are so much worse because decisions were not taken when they should’ve been. We need to look at the potential impacts of climate change 100 years hence and plan for a world very different to that in which we live today. The world George was born into was very different from the world of 2012. We need to decide what kind of world we want our great-grandchildren to live in in 2100 and to take the steps needed to set them on a safe path to achieving that vision.

So, as I have been saying, I think the IBA has an important role to play in this discourse and I encourage you to take up this challenge. You have a very powerful voice because you are the International Bar Association, so I challenge you to be with us on this journey to bring about greater climate justice. ☒



To view films of Mary Robinson’s full speech and an in-depth interview with her go to tinyurl.com/Dublinfilms

Following Mary Robinson’s address, the incoming President of the IBA, Michael Reynolds, announced that the Association would be establishing a Taskforce on the issues raised.



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Devout democracy

The Taliban's shooting of a young activist in the name of sharia law confirmed many people's worst fears about the attitude of Islamists towards human rights and the rule of law. As Islamic parties come to dominate the fledgling Arab Spring democracies, IBA Global Insight examines whether such concerns are justified.

REBECCA LOWE

Fourteen-year-old Malala Yousafzai was leaving school in Pakistan's Swat Valley on 9 October 2012 when a man stepped onto the bus, pulled out a gun and shot her in the head. The assailant was from the Taliban, the fundamentalist Islamist force in the region. Yousafzai had been targeted for criticising their rule and campaigning for women's rights. For the Taliban, such behaviour is contrary to sharia law – the religious law of Islam – and is punishable by death.

The story, broadcast across the world, rightly caused a global outcry. It is a powerful tale of gross injustice and oppression. Yet for a secular

audience, already ignorant about the workings of sharia law, it proffers a deeply skewed perspective. The Taliban may be acknowledged as 'extremists', wildly out of kilter with the vast majority of ordinary Muslims, but a haunting image of the potential brutality of political Islam remains.

The problem with the concept of 'extremism' is that it suggests the Taliban is at the limit of an Islamic spectrum: at one end, tolerant moderates who promote justice, equality and peace; at the other, violent megalomaniacs who brandish guns like judge's gavels. This is not the case. It sits off the scale, in the scrublands of indecency

and criminality. Its rule is not about Islamism, but despotism; not about religion, but power.

When it comes to the new tide of reform surging across the Arab world, such distinctions become important. Much has been written about the 'wave of extremism' hitting the region as new Islamic political parties take control, but language here is muddy. Social conservatism is conflated with terrorism, moderates with fundamentalists. Despite what some media may suggest, even the most orthodox political factions are not advocating jihad.

'When you are dealing with national security and the future of the Middle East then labels must be used accurately,' says Reema Ali, Managing Partner of Ali & Partners, which specialises in commercial law in the Middle East. 'There is a very thin sliver of Islamists who are going to deadly means, so we should be very careful in defining who they are. It's not wise to muddle things up when talking about serious threats.'

Moral compass

For some, the term 'sharia' is enough to evoke reactionary shudders and images of stoning and amputation. Yet few Muslims would recognise such a depiction. Physical punishments are hardly ever carried out, and stoning is extraordinarily rare. In most countries, sharia courts sit alongside civil courts and primarily rule on family matters [see box].

As the nascent Arab Spring democracies – Egypt, Tunisia, Libya and Yemen – fashion new constitutions to outline their identity and ideals, debates on sharia have proved fierce. Should the rulings or simply the principles of sharia form the main basis for legislation? Should sharia be the main basis or the sole basis? What is not questioned, however, is that religion will inevitably play a significant role in both law and politics.

'The struggle isn't between people who say that they believe in the sharia and people who don't, because any Muslim worth their salt or who wants to be elected is not going to reject the sharia,' says human rights barrister Sadakat Kadri, author of *Heaven on Earth: A Journey Through Sharia Law*. 'If they went to the UK, they wouldn't understand how it works. They would say, where is your moral compass?'

In many ways, discussions about sharia law are not so dissimilar from those about cultural identity elsewhere. Christian values often play a role, whether in terms of family law or attitudes to punishment. 'Britain is a country with Christian roots and traditionally legislation reflected that,' says Norton Rose Islamic Finance partner Farmida Bi. 'The word "sharia" has become a reason to instantly panic in the West,

but it doesn't have to be like that. It reflects a failure to engage with the issue.'

For Egyptian UN war crimes expert Cherif Mahmoud Bassiouni, the goals of the Muslim Brotherhood are comparable to those of socially conservative political parties in the US. 'The Republicans in the US have the same goal as the Muslim Brotherhood,' he says. 'They want to take over America as much as the Brotherhood wants to take over Egypt. They have their ideology, which is the Protestant Christian right. They will use their power to advance their goals and try to transform society.'

The key constitutional concern for liberals like Bassiouni and Bi is that drafters avoid hard-wiring clauses on personal issues such as dress codes and alcohol, whilst insisting on specific provisions protecting minority rights and freedoms. In contrast, for conservatives, it is about controlling social freedoms whilst upholding socio-economic justice.

In Tunisia, the ruling moderate Islamic

'There is a very thin sliver of Islamists who are going to deadly means, so we should be very careful in defining who they are. It's not wise to muddle things up when talking about serious threats'

Reema Ali

Managing Partner, Ali & Partners

Ennahda party has already announced it will not call for sharia to be the main source of legislation, but arguments over protections for 'sacred values' and the phrasing of clauses on gender equality are yet to be resolved. In Libya, it has been agreed that sharia will constitute at least one source of law, but the extent to which Islamic principles will colour other features, such as the judiciary and human rights, remains controversial.

In Egypt, the ruling moderate Freedom and Justice Party of the Muslim Brotherhood and the ultra-conservative Al-Nour Party dominate the 100-person assembly tasked with writing the new Constitution. In the draft version released in October, the sharia provision remained unchanged from the 1971 Constitution, which stated that only the 'principles' of sharia would form the main basis for legislation. However, other clauses have proved less acceptable to liberal factions, including one that balances the right to protest with considerations of 'national sovereignty' and another that permits women

Sharia law explained

Literally translated as the 'path towards a watering hole', sharia law effectively means justice. It is understood to be the means by which God guides his people to happiness and salvation.

The law is derived from a combination of sources, including the Qur'an (the Holy Book), the Hadith (the sayings and conduct of the prophet Muhammad) and the rulings of Islamic scholars. There are different interpretations depending on five main schools of thought: four Sunni and one Shia. Within Shia there are also a variety of sects.

Sharia law sets out rules of conduct for men and women and covers all aspects of human life. Classical sharia manuals are often divided into four parts: laws relating to personal acts of worship, laws relating to commercial dealings, laws relating to marriage and divorce, and penal laws. The most detailed teachings in the Qur'an involve family matters, with specific instructions on marriage, divorce and inheritance. However, there are no teachings that require women to wear a burqa; the rule of dress for women is modesty.

Criminal law is the most controversial aspect of sharia. There are a specific set of offences known as the 'hadd' offences, which receive specific penalties, such as stoning, lashing or amputation. The five hadd crimes are: sex outside marriage and adultery; false accusation of unlawful sexual intercourse; drinking alcohol; theft; and highway robbery. Punishments for hadd offences get a significant amount of media attention when they occur, but these sentences are extremely rare, and occur primarily in Saudi Arabia and Iran. Stonings are exceptionally uncommon. The majority of Middle Eastern countries have not adopted hadd offences as part of their state laws.

However, despite official reluctance to use hadd punishments, vigilante justice such as honour killings remains a problem. There is significant debate over what the Qur'an sanctions, though it is generally agreed that such acts are not condoned by Islam.

Countries differ widely on how sharia is interpreted and applied, from those where it only applies to Muslims and is limited in scope, such as Malaysia, to those where it applies universally according to a rigid set of codes, such as Saudi Arabia. Many countries – such as Pakistan, Indonesia, Afghanistan, Egypt, Sudan, and Morocco – employ a dual system, whereby sharia courts sit alongside civil courts.

Islamic finance is a global industry that modifies modern business practices to conform to the rules of sharia. A 2008 report by the General Council for Islamic Banks and Financial Institutions estimates the Islamic banking industry is worth \$442bn. Banks such as Citigroup, HSBC, and Deutsche Bank are developing Islamic finance sectors to cater to the demand.

equal rights with men as far as 'this does not conflict with the rulings of sharia'. In a literal interpretation of the Qur'an, women have fewer rights than men when it comes to inheritance and marriage, prompting fears this will open the door to discriminatory laws.

Negad El Borai, one of Egypt's best known human rights lawyers, believes the Constitution is flawed and should be delayed until the country has more experience of democracy. 'I am afraid about freedom of belief, freedom of speech, and for equality between men and women,' he says. 'It is not a Constitution for the next century, it is a Constitution from the past.'

Egyptian President Mohamed Morsi did little to allay those fears by passing a decree in November 2012 shielding his decisions from judicial review until a new constitution is approved, a move critics fear will usher in a new autocracy. Morsi fired the country's Mubarak-era Prosecutor General, Abdel Meguid Mahmoud, and ordered the retrial of Mubarak and his officials, who were accused of causing protester deaths last year during the uprising which led to the fall of his regime.

For Habib Al Mulla, founder of the eponymous UAE law firm, the danger of having religious parties in charge of writing the Constitution is clear. 'My concern is that these religious parties leave no room for other views,' he says. 'The state, which is normally an arbiter between different parties and views, is becoming a party in the debate itself.'

Distorted rhetoric

For some, the debate is being couched in the wrong terms. The Arabic word for 'secular' suggests irreligious or sinful, they point out, and many people are scared by it. Rather than pitting religion against amorality, the debate should be framed as dogma versus adaptability. 'The problem is that Islam is used as a sort of anaesthesia for the people,' says Amin Madani, senior partner of Elkarib and Medani law firm, based in Sudan, and former representative of the Arab regional office of the UN High Commission for Human Rights. 'The people are generally very simple and religious. They would be intimidated by saying they don't want these Constitutions.'

Sabah al-Mukhtar, president of the Arab Lawyers Association, stresses that the religious argument is a little more than a chimera. Essentially the whole debate is a political game. 'What I found in Egypt is that all these heated discussions are really based on semantics,' he says. 'It is mostly politics. If you are in a different camp politically, you find any means to differentiate yourself from the other side.'

A sharia 'ruling' may be deemed more rigid than a 'principle', after all, but everything ultimately hinges on interpretation. Put a moderate government in charge, and 'rulings' may mean equal rights for minorities. Put a fundamentalist group in charge, and 'principles' may mean shooting a schoolgirl in the head.

For many, the structure of democratic institutions and the rule of law are therefore more significant than the wording of constitutional clauses. 'The substance is not the most important issue,' says Salam Kawakibi, acting director of the Arab Reform Initiative. 'The process is more important, because it helps us know how to manage the future, with the public consultations, the debates, the transparency. We know that before the revolutions, the Constitutions were ok. They were just not respected by the governments.'

Where democracy and Islam are concerned, the spectres of Iran and Saudi Arabia hang heavy. Yet they no longer need be the yardsticks of what is achievable. In a debate before the Tunisian elections this year, Ennahda leader Rachid Ghannouchi asked: 'Why are we put in the same place as a model that is far from our thought, like the Taliban or Saudi model, when there are other successful models that are closer to us, like the Turkish, the Malaysian and the Indonesian models; models that combine Islam and modernity?' Indeed, with moderate Islamic parties participating in parliamentary elections in Morocco, Jordan and Kuwait, the once heralded paradox of Islamic democracy is already looking outdated.

Former secretary-general of the Arab League Amr Moussa, who sits on the assembly drafting the Egyptian Constitution, admits that in Egypt the transition to democracy has been far from smooth. Yet he stresses that the most significant point is that the Constitution will ultimately go to a public vote. 'More than two-thirds of the assembly may be Islamist, but it will be hard for them to impose their beliefs,' he says. 'They are accountable to the public now, and the public needs to accept it.'

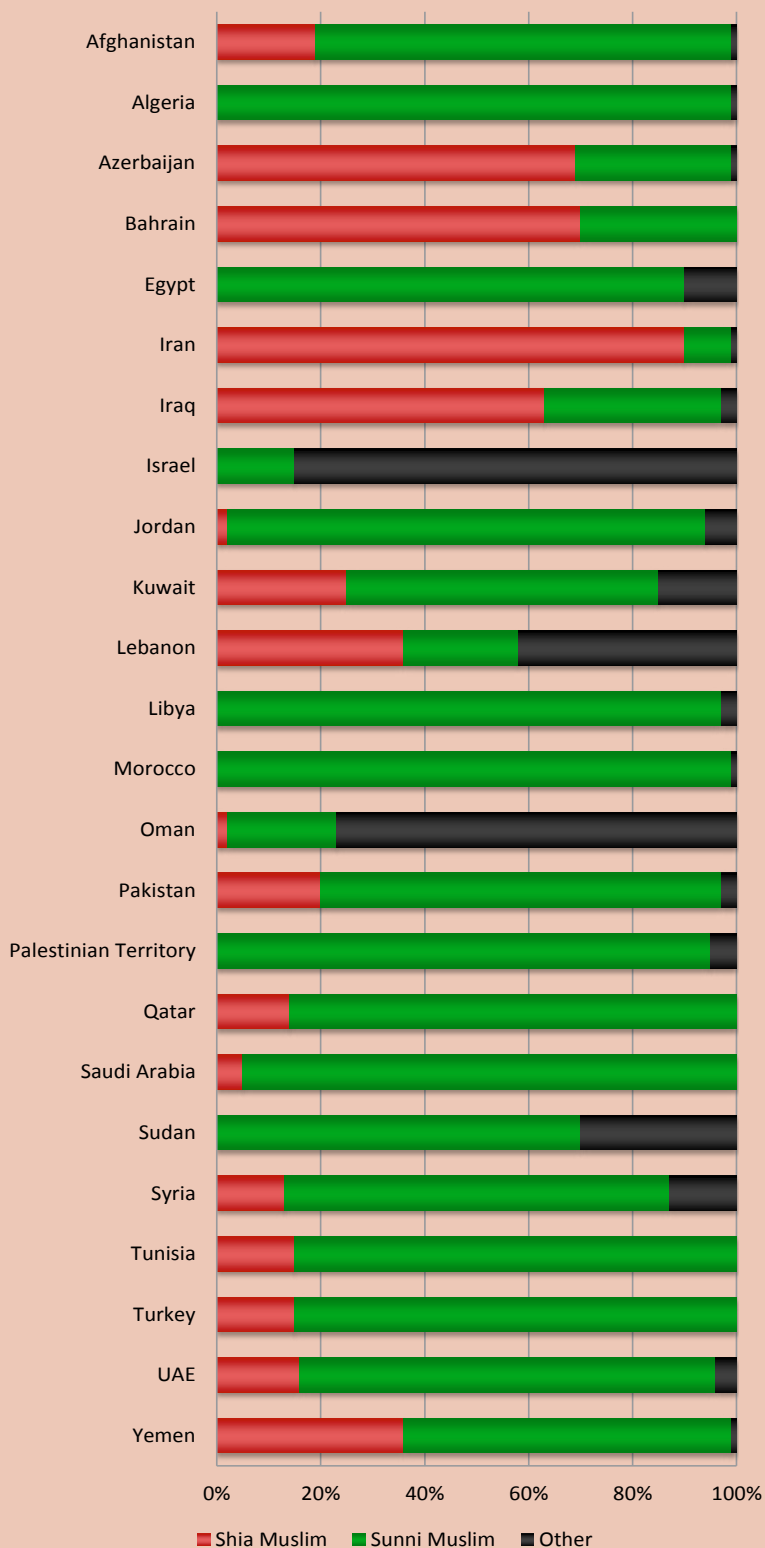
But in a strongly religious culture, where many people are poor and uneducated, is democracy as dangerous as autocracy? Will people be overly influenced by cultural beliefs or prejudice? Will they elect a hardline party to power, which could undermine future freedoms, as with Hamas in the Palestinian elections in 2006? Will the police, among the poorest paid and least educated professions in the region, play by the rules?

Where women's rights are concerned, many scholars point out that repressive practices such as honour killing and genital mutilation have no basis in the Qur'an and are instead the product of centuries of patriarchy. This is why Maha Azzam, associate fellow of the Middle East and North

Sunni and Shia in the Arab world

The Islamic world predominantly comprises Sunni Muslims, with Shia only accounting for around 10–15 per cent of the global Muslim population. However, Shia Muslims dominate the population of Iran, compose a majority in Iraq, and form significant minorities in Saudi Arabia, Lebanon, Pakistan and Syria. Very few Shia live in countries outside the Middle East, with only tiny minorities found in countries across North Africa.

Data: CIA World Factbook



Africa Programme at Chatham House in the UK, says she felt more unsettled by the 'cultural' references in the draft Egyptian Constitution than the religious parts. 'I thought the reference to the upholding of "Egyptian values" was more disturbing,' she says. 'Islamically, there is nothing that mentions genital mutilation, which exists very much in the countryside. There is a great deal to do with sexuality and so on that society is uncomfortable with, which Islam if anything may be slightly more liberal about.'

'What I found in Egypt is that all these heated discussions are really based on semantics. It is mostly politics. If you are in a different camp politically, you find any means to differentiate yourself from the other side'

Sabah al-Mukhtar
President, Arab Lawyers Association

For Azzam, the answer lies in education. 'When it comes to all the baggage of culture that diminishes certain rights for women, it is a battle that needs to be fought not just on the level of law, but on an educational level – in schools, by religious scholars, in the media.'

Societal illness

Lack of education notwithstanding, it is apparent is that most people in the Arab world do not want a repressive, system of governance. In Tunisia, Salafis – Sunni Muslims known for strict approaches to Islam – are banned from running for office and in Egypt they are already losing support. Many put their success in the last election down to little more than a backlash against the previous regime, pointing out that they will now be judged on what they can deliver – and what people want, first and foremost, is a decent wage. 'The Salafis will never ever get into power,' Al-Mukhtar says. 'Not because the West doesn't want them; because the Egyptians don't want them. They are a minority. They are like the National Front.'

As far as the Muslim Brotherhood is concerned, the jury is still out. Some view them warily, recalling their beginnings as a breeding ground of militant Islam. Salafi jihadism – a minority of the Salafi sect – originated in the Brotherhood, and radicals Sayyid Qutb and Ayman al-Zawahiri both came from the organisation. Yet others stress this is a highly distorted picture,

pointing out that Al-Qaeda was created in part as a corrective to the perceived moderation of the Brotherhood, which espoused social programmes over violence.

In light of President Morsi's recent decree, concerns as to the Brotherhood's commitment to democracy could yet prove to be well-founded.

After years of being drowned out by jihadis on one side and autocrats on the other, the voice of moderate Islam is finally being heard. Fundamentalist rhetoric may be spreading across Mali, Yemen, Libya, Somalia, Syria and Lebanon, but it is yet to find a foothold of political legitimacy. Indeed, the Arab Spring is believed to have severely undermined the credibility of Al-Qaeda's message by showing that Western crony governments can be overturned in the name of democracy rather than jihad. 'The fundamentalists don't have solid ground to gain more support among the population,' says Wassim Harb, founder of the Arab Center for the Development of the Rule of Law and Integrity. 'In our view, the violence we have seen is a reaction. It is a symptom of a certain illness in society.'

Nowhere is such illness more apparent than in Syria, where anger has exploded into civil war. Here, calls for democratic rights have been answered by artillery fire, providing a breeding ground for radicals. While the majority of rebels have voiced no interest in a militant Islamist agenda, around one in ten fighters is now believed to be a jihadi.

The Syrian struggle is increasingly being played out in sectarian terms. Unlike other Arab revolts, where Sunni rebels clashed with Sunni governments, here battle lines have been drawn between the Sunni majority and the minority Shia Alawite regime. Such sectarianism makes the country a magnet for regional powers. In fear of losing its main Shia ally, Iran is bolstering the regime, while Saudi Arabia has thrown its lot in with the rebels. If, or when, the Assad regime falls, Iran will have only Iraq – led by a Shia government – to help fend off its neighbours.

Such sectarian tensions run through the heart of the Gulf states. Religious groupings provide excuses for geopolitical power games, coagulating into Sunni, Shia and Jew. Sandwiched between the opposing powers of Iran and Saudi Arabia, the tiny island of Bahrain risks becoming the Berlin of the region, as the Shia majority continues to protest against the minority Sunni regime, which has failed to bring in key reforms. Here, as in Syria, calls for democratic freedoms are swamped by power battles in the name of religion, with Iran and Saudi Arabia acting as puppet masters and power brokers on either side of the divide.

Neither Iran nor Saudi Arabia is enjoying the shifting of tectonic plates in the region. Though

Iran at first championed the rebellions, claiming such defiance owed its origins to their 1979 revolution, their cries swiftly became strangled gasps when the protests shifted to Syria. For Saudi Arabia, a country dependent on stability and conformism, the unpredictable spread of democracy has proven an unwelcome shock. Scared and unsettled, the two regional titans have moved swiftly to befriend Egypt's Muslim Brotherhood – both, to a degree, through clenched teeth. Iran will have to overcome its pariah status in the region, as well as its Shia credentials, while the Saudis will have to brush years of theological conflict under the carpet with a sect it views as abhorrently moderate, and a potential threat to its own regional dominance. To whom the Brotherhood will turn is yet to be seen – but, where billions of dollars of aid and investment may be up for grabs, its decision seems unlikely to hinge on ideological fervour.

Inseparable bedfellows

The Saudis have long been unaccountable both domestically and on the international stage, as firm allies of the West. A fervent funder of Salafi sects across the world, the Saudi royal family is also believed by many to condone a certain amount of jihadi funding by members of the establishment. 'We should look into who is pushing these types of groups,' says SOAS Professor Salwa Ismail, who specialises in Islam and politics. 'When you look at the jihadis being trained in Afghanistan and Pakistan, now making their way to Syria, there is very strong Saudi backing. That is where the problem is.'

With Saudi Arabia's grip on the region looking increasingly desperate, others will be quick to step into its shoes. One contender for the Arabic crown is Qatar, a prosperous nation that funds both Egypt's Muslim Brotherhood and Tunisia's Ennahda Party. Having led Arab League efforts against Gaddafi and Assad, and with 'free speech' credibility derived from its ownership of Al Jazeera, the country seems well-equipped to embrace a modern Islamic world. By contrast, Al-Ghannouchi is banned from Saudi Arabia, where deposed Tunisian dictator Zein al-Abidine Ben Ali received political asylum after his fall from power.

Another player keeping a watchful eye is Turkey, the literal and figurative bridge between Europe and Asia. Having kept the majority of its neighbours onside – including Iran, until Syria exploded – and with a democratic system acting as a blueprint of politico-religious harmony for the region, the country's power seems only likely to grow.

The future for Israel, on the other hand, is less clear. The recent eruption of violence in Gaza was only brought to a standstill by a fragile ceasefire, brokered by Egypt's President Morsi, after the loss of scores of lives. A stark symbol of western hegemony, the Israel/Palestine issue has the potential to unite all Muslims in mutual condemnation – and as such, must be a priority of any foreign government seeking to build bridges in the region. The extent to which the new Arab democracies will respect the Camp David accords remains to be seen.

'My concern is that these religious parties leave no room for other views. The state, which is normally an arbiter between different parties and views, is becoming a party in the debate itself'

Habib Al Mulla

Founding Partner, Habib Al Mulla & Company

Indeed, international powers are far from innocent bystanders in Middle Eastern geopolitics. While Russia and China stymie UN action on Syria, the West says nothing about gross human rights abuses in Saudi Arabia, Yemen and Bahrain. Opportunism and politics may be inseparable bedfellows, but it is exactly this kind of hypocrisy that has earned the US the role of number one villain in the region, for some. Caught out over their support of autocratic regimes across the region, now perhaps is the time for a new foreign policy based on long-term principle over short-term gain.

What the Arab Spring has shown is that, unlike many of the autocracies propped up by the West, Islamic movements are not inevitably opposed to the rights and will of the people. Beyond religion, beyond sectarianism, beyond Shia and Sunni and East and West, a clarion call for democracy has been raised across the Middle East and beyond. And it will echo until it is heeded.

'After the revolution in Egypt was the first time in my life that I have ever seen an army afraid of the people,' says Al-Mukhtar. 'In Tunis, in Morocco, in Algeria, in Cairo, in Jordan, in Syria, in Yemen, in all these places, people have broken the wall of fear. And once you have let the genie out of the bottle, you cannot put it back.' ❦

Rebecca Lowe is Senior Reporter at the IBA and can be contacted at rebecca.lowe@int-bar.org

The long road of reform

Burma has recently made rapid progress along the road to democracy. But legal uncertainties and the rise of an untested opposition party make foreign investment a very complicated prospect.

PHIL TAYLOR

In May 2012, everything changed for Burma—again. Aung San Suu Kyi's victory in the country's by-elections, along with wins for 42 other members of her party, came only 18 months after her latest release from house arrest, and two years after the start of a series of significant but controversial democratic reforms.

The success of the progressive National League for Democracy (NLD) triggered a significant easing of sanctions on direct investment by the USA and a year-long suspension of EU restrictions. Some say the by-elections have put the country firmly on the path toward true democracy and an open investment environment, and one senior UK government figure recently described the Burmese government as 'fresh and full of ideas [...] an enlightened government which wants to try.'

'For the first time, there is a sense of real hope in the country,' commented Lord Williams of Baglan, distinguished visiting fellow and acting

head of the Asia programme at Chatham House, during a seminar hosted in London by law firm Orrick Herrington & Sutcliffe. 'Aung San Suu Kyi and President Thein Sein have made a clean break with the past and are bringing Burma into the 21st century.'

There are undeniably huge opportunities for investors in a resource-rich country of 60 million people which is desperately in need of revamped agriculture, communication, energy, financial and transport infrastructures. 'There is tremendous interest and enthusiasm in the possibility of establishing a presence in Burma and exploring the possibilities – the kind of initial enthusiasm that often accompanies this kind of relaxation,' says Nicholas Coward, chair of Baker & McKenzie's global trade and commerce practice group.

Foreign investors who've visited the country recently have largely come away impressed with what they have seen. There is, they say,

a 'dramatic and telling' contrast with China in terms of the openness of Burmese society. Others report a huge amount of interest, energy and enthusiasm for reform and doing business, and an enterprising culture.

But Burma is never a straightforward proposition. Rapidly increasing land prices and under-developed electricity and transport networks make it very difficult to establish a viable business in the country in the short term. Investors may also encounter a serious lack of human resources as a result of a whole generation of people missing out on higher education in the 1990s (the country's universities were completely closed twice during that decade, for two to three years each time). Completing what should be straightforward formalities can be extremely time-consuming: simply to incorporate a company, an applicant must arrange a personal meeting with a senior official in Naypyidaw, Burma's new administrative capital, which is located approximately 200 miles north of Yangon (tellingly, no foreign governments have yet taken up the invitation to move their missions there). The entrenched interests of a small group of crony businessmen who have grown extremely wealthy from opportunities provided by the military regime will continue to create barriers in certain areas.

Stuart Witchell, senior managing director of the Asia Pacific global risk and investigations practice at FTI Consulting, adds a number of risks to this list, including corruption (which remains endemic particularly at the lower levels of administration and will take a long time to disappear), the spectre of political and military involvement in business, regional conflicts and the question of ethnic minorities, and geopolitical uncertainties arising from the aspirations of China and the US.

The country's human rights record cannot be ignored either. As *IBA Global Insight* went to press, there were 100 boat people missing in the Bay of Bengal, fleeing ongoing sectarian violence raging in the Western province of Rakhine. Many commentators argue that sanctions should have remained in place – and foreign investors should stay away – until all human rights issues are dealt with. They are critical of international corporations which are looking for ways to make money in Burma, saying events such as the release of political prisoners, the holding of by-elections and even the lifting of pre-publication censorship on the media do not go far enough. 'The reforming regime is all about reforming the economy, not the politics. Any political reform is only enough to reform the economy [...]. They are trying to normalise the dictatorship,' Mark Farmaner, UK director of the Burma Campaign UK, told *IBA Global Insight* recently.

A contrasting view is that multinational companies are largely welcomed by local people and can be a force for good, providing they proceed carefully and put corporate responsibility first. Orrick partner Robert Pé, who has a strong family connection with Burma, points to the example of French oil company Total, which has had a presence in the country since 1992 according to its website.

'Aung San Suu Kyi and President Thein Sein have made a clean break with the past'

Lord Williams of Baglan
acting head, Asia programme, Chatham House

'It is viewed as a model employer by many people in Burma, and they are saying "We need more of this,"' he comments. 'There's an opportunity for cautious and responsible Western companies to play a meaningful role and do successful business [in Burma].'

The use of the word 'cautious' illustrates the middle ground in what can be a highly-polarised debate. Although companies such as Total appear to have done much to present a positive image of foreign companies, others – including several Chinese state-owned enterprises – have left a negative impression. The government is understandably keen to protect the country from exploitation by foreign investors, which may account for its failure to provide a clear plan for the development of the economy in general, and the foreign investment programme in particular. Specialists say, therefore, that now is a good time to investigate investment opportunities but not necessarily to go any further. 'It's not too early for foreign investors,' says Jeremy Kloiser-Jones, CEO of Bagan Capital, Burma's first investment bank. 'The time is right to start engaging and set up channels of communications, but not to write big cheques straight away.'

Burma has only been open in any realistic sense of the word for a matter of months, and outsiders are beginning to see the problems of any economy that has been closed for decades coming to the surface, including licensing issues, bureaucracy, protectionism, political influence, vested interests, and difficult visa requirements. But analysts agree that these issues are negotiable, provided an investor is patient and forward-looking, taking time to establish relationships and become familiar with local culture and business practice. This could make the difference between a smooth investment experience and complete failure.

Corrupt judges

Restrictions or permissions provided for by law are a big concern for any foreign investor. Much of the law affecting foreign investment in Burma is archaic: on the statute books are the Companies Act 1915 (with its rules from 1940 and regulations from 1957), Arbitration Act 1944 and Special Companies Act 1950.

The age of these laws is not necessarily a big problem, however. Those dating from British colonial times use principles familiar to many commercial lawyers and have been well tested. More confusion may result from the ongoing effort to reform a huge amount of legislation (about 400 statutes, according to one estimate). 'Half of the local newspaper is taken up with new regulations, for example

rush to do things quickly is commendable on one hand, but by the same token if the laws put in place are not carefully thought through in advance, [the country] may end up with imperfect legislation that would be very difficult to undo and change.'

The progress of legal reform is rarely smooth, and can also be hampered by political considerations. A revised version of the Foreign Investment Law (replacing the 1988 one) was set to come into law on 21 September 2012 after being passed by Parliament earlier in the month. It was expected to clarify many areas of doing business in Burma by, among other things, allowing foreign exchange at a prescribed rate, describing a mechanism for dispute settlement, extending the tax holiday for foreign investors, providing for the establishment of special economic zones and laying out more detailed employment rules. Reportedly, though, the law was delayed by order of President Thein Sein due to its arousing 'concern among investors because of its protectionist provisions.' A revised bill was returned to Parliament a month later, and was finally passed on 1 November. It has been widely reported that law is now more foreign investor friendly, with certain of the more controversial provisions removed.

Although progress with this particular statute was, in the end, positive, there are doubts over how well Burma's legal system can deal with commercial disputes that may arise in future. Commentators say the courts are not viewed favourably by anyone, even domestic companies, while judges are held in very low regard with bribery being a serious issue as a result of low wages. Local lawyers, although enthusiastic, have also suffered from the lack of a high-quality education system in the past few decades. The

'The reforming regime is all about reforming the economy, not the politics. They are trying to normalise the dictatorship'

Mark Farmaner
UK director, Burma Campaign UK

improving labour law, the minimum wage, or the implementation of a stock market in 2015,' comments Baker & McKenzie dispute resolution partner Chirachai Okanurak. '[Doing business in Burma] is getting easier when compared with the past, but [...] it takes time to improve regulations.'

'The greatest concern would be that in the rush, insufficient thought and care is being taken over what is done,' adds Coward. 'The



best of them are now in their 60s. 'There is lack of international experience among local lawyers, so much so that, for cross-border transactions, rising and ambitious local companies are seeking out law firms or lawyers in Burma who have been trained overseas,' says Alessio Polastri, managing partner of P&A Asia.

The good news is things are likely to improve: delegations from various parts of Burma's legal sector have been actively seeking out assistance from other countries, and lawyers such as Pé are working hard to pass on their knowledge. Progress will take time, however, and most practitioners agree that international arbitration could play a very important role in helping to fill some of the gaps created by the weak court system. 'If you look at China, when they opened the country arbitration was the best type of dispute resolution at the time. Burma is probably the same,' says Okanurak.

'I believe that being a signatory to the [1959] New York Convention [on the Recognition and Enforcement of Foreign Arbitral Awards] is an essential requirement for a country wanting to promote itself as a worthy destination for investments,' adds Polastri. 'I am certain that more foreign investors would be able to commit after Burma becomes a signatory.'

The country is already signed up to the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards which provides one theoretical means of enforcement of awards from other countries. Accession to the New York Convention would, however, result in two positive outcomes: a more reliable way for foreign investors to enforce their legal rights (which does not depend on an arbitral award being consistent with the domestic law of the country where it is being enforced), and a clear indication that Burma is open for foreign business.

During a visit to Burma in May 2012, Pé met with the country's Minister for Industry, U Soe Thein, and the Attorney-General, both of whom he describes as being very receptive to the idea of signing up to the New York Convention, and very aware of the significance of the step. There were also discussions over the importance updating the Arbitration Act 1944 and the possibility of adopting the Uncitral Model Law on Arbitration – although signing the Convention was the main focus of the discussions.

According to Pé, those officials appeared genuinely committed to change, and were not saying only what they thought Western businesspeople would want to hear. This is

backed up by Kloiser-Jones, who describes a tender process in which his firm participated being conducted 'with rules and transparency one would expect in a developed economy', even during closed meetings when there was no need for a performance to be staged.

Elections, sanctions, stability

Casting a shadow over much of this discussion is the question of Burma's political future. It is widely accepted that, after the next election in 2015, the NLD will become the majority party. Although human rights advocates welcome this prospect, it throws up various practical issues for those taking a more commercial viewpoint. 'It will definitely affect investment – political stability is always a big influence,' says Coward. 'At least from a US sanctions standpoint, while sanctions have been relaxed, it's with a keen eye to the political situation.'

Some have criticised Western companies for becoming too close to Burma's current government in their attempts to gain a financial foothold. There is a sense that some investors may prefer not to see a party with limited political experience and business acumen coming to power, an opinion echoed by Junko Ogushi, a partner of Japanese law

'Be cautious and hold the Burmese government accountable to international labour and human rights standards before joining the "Burma Rush"'

British Chamber of Commerce

firm Atsumi & Sakai. 'I personally would prefer to see the current party remain in power. The President appears willing to move forward on democratic reforms,' she says. 'There's no doubt that Aung San Suu Kyi is an iconic figure, but I wonder if this alone is enough to move the country's economy forward. I don't know how business friendly she is in terms of foreign investment.'

If it should attain power, the NLD would certainly have a lot of work to do in order to build investor's confidence. During its rise, it has depended quite heavily on Suu Kyi's leadership and has not spent time building the apparatus normally associated with a shadow political party. 'The NLD is aware of these perceived shortcomings and is making every effort to address them,' says Pé. 'Among other initiatives, they are encouraging

educated and experienced overseas Burmese to move back and help out.'

Suu Kyi has also formed a good relationship with President Thein Sein, and it is likely she will continue to develop this partnership with him and other members of the present government. It is noteworthy, for example, that Parliamentary speaker Shwe Man, who

'The entrenched interests of a small group of crony businessmen who have grown extremely wealthy from opportunities provided by the military regime will continue to create barriers'

is viewed as being politically astute, recently appointed Suu Kyi as chair of the new Parliamentary committee on the rule of law.

Some argue that if local companies are not fearful of political changes, then international companies should not be afraid of either the new policies of the current government or the rise of the NLD. James Finch, a partner of DFDL in association with Myanmar Thanlwin Legal Services, says he has never been told by any foreign company that democratisation would be a stumbling block or setback to economic progress. 'All look forward to democratic change in Burma. One of the most interesting features of the democratisation is that many stakeholders are included, including members of earlier governments,' he says.

Expect uncertainty

At a time of dramatic changes and great uncertainties, it certainly pays to venture slowly into Burma. After sanctions were eased earlier this year, artist and NLD candidate Saw Hlaing was quoted by the magazine of the British Chamber of Commerce in Japan as urging companies to 'Be cautious and hold the Burmese government accountable to international labour and human rights standards before joining the "Burma Rush".'

At a lower level, thorough due diligence is important, including properly understanding the political and military connections of local partners, and their track record with other foreign investors.

Investors must also be prepared for more political and legal changes in the future, and should expect to hear some mixed messages from the top. In September 2011,

for example, President Thein Sein publicly announced the suspension of a hydroelectric project in the north of the country which was to be developed by China Power Investment Corporation, a state-owned enterprise. Although the President cited public opposition to the project and its potential environmental impact as the main reasons, some analysts say the decision was motivated by fears over the recent aggressive expansion of Chinese companies, and those enterprises' questionable governance standards. Recent large-scale protests over plans to expand a copper mine jointly owned by another Chinese state entity seem to support this hypothesis. 'One reason for government reforms has been the over-reliance on China – there are concerns China has been exploiting the country for its own benefit,' says Witchell.

Senior leadership figures from Burma have also been actively courting support from Western countries such as the US and Britain. However, during his recent trade visit to China, President Thein Sein was quoted by *Reuters* as reassuring China that ties are still strong and that Burma continues to see it as a true friend. This seemingly contradictory approach may simply be a good example of diplomacy at work; it may also indicate that Burma's present government is trying to please all of the people all of the time – something that is notoriously difficult to do. ☒

Phil Taylor is a freelance writer and editor. He can be contacted at phil@phiine.com



The IBA's Human Rights Institute undertook a fact finding mission to Burma in August this year and its report – focusing on the rule of law issues that need to be addressed – to be published at the end of 2012 – will be available at www.ibanet.org



Human rights and the rule of law

Having witnessed the horrors of Cambodia, Rwanda, and Srebrenica, former French Foreign Minister, the Nobel Prize-winning co-founder of Médecins Sans Frontières, Bernard Kouchner, is a passionate advocate for humanitarianism reforming the law. He shared his views at the Rule of Law Symposium during the IBA's annual conference in Dublin.

Human rights are conceived as universal. That is to say, applicable everywhere and egalitarian. The same rights for everyone – and that conception is, of course, the beginning of trouble. Nevertheless, the same rights for everyone: let's share that dream.

But, with the rule of law, the term is widely used in many different contexts as if the meaning is unequivocal. Unfortunately there is no agreement concerning its definition and contents. You would certainly agree with me, dear lawyers, that our Russian friends are not following exactly the same rule of law as our American friends, Irish, or French friends.

I am not a lawyer but a medical doctor. Over 40 years ago, in creating Médecins sans Frontières (MSF) and then Médecins du Monde (MDM), and responding to the duty to intervene, to interfere, we, the French doctors, were law makers. If we had respected rule of law when we started MSF, we would have been unable to cross any borders. Sometimes you have to break the law to change it. And that is my advice: act illegally to change the law, and you will see, although you're lawyers, afterwards, the change will follow you.

The name of our failure is Syria

I will discuss human rights, the rule of law and all the challenges we face across the world. But first let me strongly underline the progress we have been making. Considering the state

of the world 40 years ago; 20 years ago; the number of states at war in the late 1980s; the number of democratic states; and the gender conditions, thanks to your commitment and dedication we have made progress in both human rights and the rule and law – with, of course, some significant steps back. Today, the name of our failure is Syria.

One question I will be discussing with you: is the UN Security Council a normative body? Or the 'professor of law'; the academics; these famous national cultures and behaviours; the grass-roots actors; the NGOs; the activists; or the political leaders: who is in charge?

Several theoretical approaches have been proposed [to explain 'rule of law']. Oldest western philosophies of human rights, and some religions, situated the Flood as coming from the source of natural law. Other theories believe that it is a process of economic and social evolution. Is it so easy to separate civil and political rights, and economic, social and cultural rights? On the ground it is not at all; it is very difficult. It is difficult to convince local people, in the name of the so-called 'international community' – and, if we have time, we can talk with Hans Correll about the way we [convinced people] in Kosovo. The way, at the beginning, we did not! But [eventually] did, more or less. And I remind you that Kosovo is now an independent state, as of two or three weeks ago. Though that is not the end of the story...

So, to convince the local people in the name of the international community that, for their own personal interests, they should follow our advice – concerning relations between men and women, for example – is difficult. Or to set up a health or social welfare system – not easy. Easy to say. Another criticism, and it is the major subject of discussion: universality has led to persistent contestations, and the cultural, economic, educational factors are the most important reasons *not* to change anything, for them, for the local people. And when I say ‘local people’, of course you have to distinguish between politicians, people in charge, and people on the street.

And certainly the most influential argument to remain constant has been male power over female. Was it custom that made the Chinese women suffer with mutilated feet? Aesthetic reasons? The Chinese men were pretending that the women were not suffering for these poor feet. And Doctor Sun Yat-sen – because the founding father of the Republic of China was a medical doctor – he took off the bandages [...] This barbarian behaviour lasted until 1,000 years ago. Are we making progress in prohibiting sexual mutilation? Yes, but not completely. Are we supposed to make change, forcibly? It is difficult.

*‘A thought for the people in Syria now...
We are as inert as we were facing Rwanda
or the Second World War’*

In fact, while many successes have been achieved, the 1993 World Conference on Human Rights held by the UN in Vienna, almost 20 years ago, in the programme of action, signed by all the participants: ‘all human rights are universal, indivisible, interdependent and related. The international community must treat human rights in a fair and equal manner, on the same footing, and with the same emphasis.’ And this statement was again endorsed by the world summit in New York in 2005. That is to say, to underline, the role of the UN people, and the role of the international organisation, the UN. It’s not the only one, but it is to be respected.

But the signatories to this text do not in practice give equal weight to the different types of right. The western union has often given priority to civil and political rights, sometimes at the expense of social and economic rights, such as the risk to work, to education, to health and housing. Similarly the former Soviet bloc tended to give priority

to economic, social and cultural rights, but often failed to provide civil and political rights.

We should also discuss who is able to lead. All nations follow the human rights declaration, and I just want to quote some particular examples. The UN Security Council has the primary responsibility for maintaining international peace and security, and this is the only body of the UN that can authorise the use of force. But what about Darfur, Srebrenica, Rwanda, Syria today? We are all subject to a veto; for the time being, China and Russia are not in agreement on Syria, and [the situation in Syria] has lasted for more than a year. Now there is the risk of war in the whole region, bombing Turkey, Turkey bombing Syria in response, et cetera.

So, let’s turn to the rule of law. This very important concept (because human rights, people know about; the rule of law is still a very mysterious galaxy to some people): if local people accept this message or pressure, it’s OK. But I remember how difficult it was to get Sergei Lavrov – still the Russian Minister for Foreign Affairs – to accept, after bloody massacres, just the *idea itself* of the autonomy of Kosovo. It has taken months and months, years and years.

While the term ‘rule of law’ is widely used in many contexts [...] a considerable amount of confusion and misunderstanding surrounds it. This ambiguity explains the various uses of this expression by experts and political leaders of very different ideologies.

The rule of law affirms the supremacy of the legal system over all individuals and organisations, including the state. It also implies other features: the principles of legality; accessibility of justice; and independence of the judiciary. The dividing line is between the formal and institutional dimension of the rule of law, and the normative and substantive dimension. This is a very crucial line in transitional justice, in conflict and post-conflict societies.

These boundaries appear particularly acute around the inclusion (or not) of the human rights perspective. It contains, in a way, the guarantee of human rights; the rule of law is, theoretically, a guarantee for human rights. In fact, it was a very important obstacle in peace-building missions in Africa and, more recently, in the Western Balkans – even if the UN Secretary-General defined the rule of law [as being] at the very heart of this kind of mission. It refers, he said, to a principle of governance in which all persons, institutions and entities, public or private, including the state, are accountable to laws that are

publicly promulgated, equally enforced, and independently adjudicated. Easy to say! It takes centuries. 'Centuries': I exaggerate, but let's say it takes many years.

It requires, as well, measures to enforce compliance of the principle of the supremacy of the law, equality before the law, separation of powers, et cetera. If such a definition is accepted, human rights should be part of the package, with strong respect, adherence.

Rule of law as a western export

In the wake of decolonisation, rule of law became very popular where economy, trade, banking were concerned. The rule of law was a synonym for law and development programmes – education, mainly. But after ten years, this conception faded, [and was replaced] with a negative view of the rule of law. A vast movement of critics saw it as an attempt to export a western, and particularly US, model without sufficient concern for local needs, and specificity was accused of being the cause of many failures. It was absolutely not right, but it was the feeling of the people. You are imposing, coming from afar, coming from the rich countries, your way to control, your way to govern, et cetera, and your banking system. I was going to talk about debt, but...! ...I'm strongly opposed to this interpretation, even if the reality is often different from the theoretical approach.

Post-conflict and transitional societies offer another opportunity to develop a broader concept of the rule of law. After the fall of the Berlin Wall, in 1989, the major focus was on human rights promotion, [in the form of] the preamble of the Universal Declaration of Human Rights: it is essential, if man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law. The UN Security Council also used the words 'rule of law' in a paragraph of the resolution 1014 to promote, in 1996, national reconciliation in Burundi. And, from 1993 to 2002, the General Assembly's third committee was working hard on the rule of law.

Rule of law has, in recent years, been expanded from the national to the international dimension. But this is, however, a conceptual definition with no complete legal value. Some academics believe that a realistic approach should aim at a minimalist interpretation, with no substantive political content – democracy, promoting certain human rights, redistributive justice or laissez faire capitalism.



A lot of people are now involved in human rights and rule of law. Many NGOs – for good and bad reasons – specialists in political approaches; human rights; economy; etc. It is difficult to separate all these sounds and make music with them. But, we have to try. A lot of experts – often with experience on the ground, sometimes with none – who is in charge?

Of course we have to fight corruption, yes; empower women, yes. But it takes not only one year, not only ten; it takes a lifetime. I am a supporter of the UN mission – I have devoted my life to that. But to be in a country far from home and to be in charge of changing, not just the theoretical law, which is very difficult, but also the views of the people. This is the challenge.

I was in Rwanda during the genocide [...] Rwanda was a popular genocide. Have you been to Srebrenica? To Cambodia? I was there in 1975. So this is not forever: people change – yes, for the good, but sometimes for the bad.

I want to end with a thought for the people in Syria now, because we said – including my government – that we were sure to intervene and to stop the massacre, and we did not. Now how many are dead? We are as inert as we were facing Rwanda or the Second World War.

So, human rights is my religion, and the rule of law my bible, but we have a long way to go. ☒



To view Bernard Kouchner's full speech and an in-depth interview with him go to tinyurl.com/Dublinfilms



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