Educating Tomorrow's Transnational Lawyers: Challenges Facing Africa

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I. INTRODUCTION

International law has grown from a field of study, which deals with legal relations between states as it's subject to a field of legal practice that is not necessarily confined to construing treaties between those states but also covers transactions across national boundaries that may not be treaty-based. Somehow states are getting closer to one another in more ways than one, necessitated by the global village syndrome that is spurred on by globalization. I use "globalization" in its ordinary sense that depicts the seeming smallness of the world as a result of the increasing interdependence of states and societies. We are living at a time when nation states emphasize the benefits of integrating economies and opening markets to woo foreign investments.

A number of the world's regions have adopted mechanisms that enjoin member countries to ensure the mobility of skilled labor as one of the ways of attaining closer integration and achieving greater growth.[1] Similarly, universality of human rights obligations and accountability is fast gaining ground. These phenomena are not new to Africa. African experience has seen the establishment of a number of regional blocks[2] whose objectives *inter alia*, include promoting investments, accelerating growth and bettering the lives of the general citizenry. The recent replacement of the Organization of African Unity (OAU) with the African Union (AU)[3] emphasizes more integration at the continental level than political association given the organs of the new AU, which

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[1] The European Union and the North American Trade Agreement (NAFTA) are examples.

[2] These include the Economic Community of West African States (ECOWAS), the East African Economic Community (EAC), the Southern African Development Community (SADC), as examples.

[3] *See* the Constitutive Act of the African Union, adopted at the Thirty Sixth Ordinary Session of the Assembly of Heads of State and Government of the OAU, 11 July 2000 at Lome, Togo; Decisions on the Establishment of the African Union and the Pan African Parliament, OAU Doc. AHG/Dec. 143 (XXXVI). *See* also The Durban Declaration in Tribute to the Organization of African Unity and on the Launching of the African Union, Durban, South Africa, 10-12 July 2002. AU. Doc. ASS/AU/Decl. 2 (1). The summit in Durban was the first ordinary meeting of the Assembly of the AU, which replaced the Assembly of Heads of State and Government under the Charter of the OAU.

include a Pan African Parliament,[4] a Court of Justice, a Central Bank, among others. The adoption of the New Partnership for Africa's Development (NEPAD)[5] as the development program of the AU underscores the desire to have a unified standard of socio-economic development in the continent. In no distant time, the African Court on Human and Peoples' Rights will be established, as the Protocol establishing it has recently entered into force.[6]

The above developments mean that Africa stands at a point in history where the necessary transnational and international legal skills will become increasingly relevant. The question, however, is whether the continent is equipped to meet the challenges that will arise from the high level of regional integration envisaged above. The answer to this question does not seem to be in the affirmative. There is over-jurisdictional emphasis without flexible mechanism for easier integration of legal services delivery, there is also lack of comparative legal education in the judicial/legal systems and traditions of the continent, and lack of emphasis on and expertise in international or transnational law as a required field of study in many universities.

II. JURISDICTIONAL OVER-EMPHASIS

The term jurisdiction in legal practice is used here to refer to a legal system of a particular country. Transnational legal practice implicates a situation where lawyers trained in a particular jurisdiction practice in the courts and tribunals of other countries or foreign jurisdictions, or carry on some form of legal services transaction other than appearing in the courts or tribunals of such countries. Like in many parts of the world, Africa has multiple legal systems or legal traditions: Common law, Civil law, Islamic law, Roman-Dutch law, Customary law, or a combination of any two or three of these

[4] The first session and opening of the Pan African Parliament will hold on 18 March 2004 at the headquarters of the African Union, Addis Ababa, Ethiopia. See Inauguration of the African Union, posted on the Internet at www.africa-union.org/home/Welcome.htm (last visited on March 10, 2004).

[5] Declaration on the New Common Initiative (MAP and OMEGA, hereafter, the Common Initiative Declaration), AHG/Decl. 1(XXXVII), ¶ 4, adopted at the 37th Session of the Assembly of Heads of State and Government of the OAU from 9-11 July 2001 in Lusaka, Zambia officially adopting the initiative that gave birth to NEPAD. NEPAD was adopted as the initiative's name at the meeting of the Heads of States and Government Implementation Committee (HSGIC) in Abuja, Nigeria on 23 October 2001.

[6] The Protocol on the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples, OAU.DOC.CAB/LEG/66.5 (1998). The Protocol entered into force on 25 January 2004 after the 15 instrument of ratification was deposited as required under Art. 34 of the Protocol.

systems. What determines the jurisdiction that is associated with particular African states is their colonial affiliation, such that British colonized states adopt the Common law, while French colonized states have the Civil law tradition. Islamic law forms the foundation of legal systems of states that are predominantly Moslems. States like South Africa, Namibia, and other apartheid-impacted states have the Roman-Dutch law tradition and some Common law influence. In virtually all Africa states, customary law is practiced.

The result is that states become very protective of their jurisdictional character; they adopt stringent rules that bar practitioners from other countries from engaging in practice no matter their qualifications. Such lawyers are regarded as having been trained in foreign law. Foreign law or not, it also turns out that entities in these sates are involved in different forms of transnational legal transactions that may not likely be tied to a particular local law.

Justifications for jurisdictional emphasis include the need to properly regulate entry into the profession in terms of adequate training in local law; the fact that clients prefer services from lawyers familiar with their methods of doing business and their specific business requirements, etc. The point is not to take away regulation of local practice of law, but that mechanisms should be set in place to ease transitional practice in view of the interdependence of countries. Increasing integration would require less jurisdictional emphasis not just at sub-regional levels,[7] but continent wide. Regulation at the continental level may be necessary to ensure the quality and the integrity of the profession, which is a common desire of all legal traditions.

III. LACK OF COMPARATIVE LEGAL EDUCATION.

Like in many parts of the world, entry into legal practice in a number of jurisdictions is granted to citizens who have at least a Bachelor of Laws (LL.B) or a first professional law degree and who have passed the Bar examination upon some postgraduate practical

[7] The recent re-launch of the East African Community would enable lawyers from the three member countries to engage in transnational legal practice. Kenya, Uganda and Tanzania have established the East African Law Society, which has successfully petitioned their respective governments to allow cross border legal practice.

legal training and serving pupilage or articles within law firms operated by practitioners of some considerable experience. Here the emphasis is solely on domestic practice and as a result, the curriculum identifies only such core courses that would enable students to achieve the requirements for admission to the Bar or for admission as a member of the law society (as attorneys or solicitors) where the profession is not fused. Despite that the continent has multifarious legal traditions in an increasing integrating atmosphere at regional and sub-regional levels, there is no comparative law curriculum on the region in any curriculum of the Schools or Faculties of Law in African universities. Comparative law involves comparing "domestic substantive and procedural laws of different legal systems"[8] with a goal of obtaining "better knowledge of legal rules and institutions."[9] Expertise in the legal traditions of Africa, no matter how minimal, is necessary not only in this new wave of transnational transactions, but also for effective functioning in regional judicial or quasi-judicial service. Sensitivity to the various legal cultures and traditions of the continent is emphasized in the election of members to the African Commission on Human and Peoples'[10] Rights and one expects that the same will be the case when the African Court of Justice and the African Court on Human and Peoples' Rights are constituted.

The case that Sanchez[11] makes regarding the need for teaching comparative and foreign law of United States' (US) trading partners in US law schools is very apt for Africa in the new dispensation of the AU and NEPAD where inter-African trading and political relationship will be much more emphasized. Thus, the over-jurisdictional emphasis that we discussed above needs to be loosened not just regarding legal practice, but also regarding legal education.

IV. INADEQUATE TRAINING AND CAPACITY IN INTERNATIONAL LAW.

[8] *Gloria M. Sanchez, A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. Trading Partners*, 34 SAN DIEGO L. REV. 635 at 674-675 (1997).
[9] *Id*., at 675.
[10] See VINCENT O. NMEHIELLE, THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICE, AND INSTITUTIONS 174 (Martinus Nijhoff, 2001).
[11] *Sanchez, supra*, note 8 at, 675-676.

Akin to the lack of adequate comparative law education in Africa is the issue of inadequate training in and emphasis on international law and its specific aspects in law schools or law faculties across the continent. Very few universities offer international law courses and where they are offered, they are at best electives, meaning that they attract very few students. Again, legal curricula in African universities and professional training institutions, as in other parts of the world, are designed to suit the demands of national practice of which international law is assumed not to be part of. Similarly, there is lack of academic international law expertise in the continent. Those interested in pursuing international law careers are left with the option of seeking specialist training overseas in the Western Hemisphere. Given the economic predicaments of many African states, it becomes almost impossible for a great number of students to study outside their home countries in the quest for expertise in international law without state or other assistance. State assistance for overseas international law study is not popular and other assistance comes in the form of scholarships and fellowships from donor organizations and foundations in the West. While donor assistance for fellowships and scholarships are important, they are limited in the legal field and are available to very few students. Those who are lucky enough to win overseas fellowships and scholarships for international law study find that their study is most times placed outside the context of Africa. Africa hardly features in most of the overseas international law programs, or it features only peripherally. The result is that there is hardly any African-centered international law curriculum or one that takes Africa into consideration in terms of perspectives even when those who studied overseas come back to their home countries.

In the same vein, various African states do not appreciate the place of international law in their legal systems due to the lack of training and expertise in international law. Thus, lawyers in several African countries are not well equipped to pursue careers in transnational legal practice, or to even use international law to aid their domestic practice. At the risk of singling out a particular country, let me cite the case of Malawi, among many others African countries whose legal system does not seem to appreciate the application of international law and foreign case law.[12] The result of an interview conducted on practicing lawyers and judges to determine the reasons for the absence of international human rights law in the decisions handed down by courts in Malawi serves

[12] See *Thomas T. Hansen, Implementation of International Human Rights Standards through National courts in Malawi*, 46 JOURNAL OF AFRICAN LAW, 31-42 (2002).

as the basis of this assertion and illustration. Many lawyers confessed that their own knowledge of international law and human rights was insufficient. Judges responded that they rarely have applied or referred to international human rights law or case law, even though the provisions of Section 71 (2)(c) of the country's Constitution enjoins them to do so.[13] The judges emphasized that part of the reason for not applying or referring to international human rights law were that few Malawian lawyers had international human rights law knowledge and that they rarely made their submissions using international human rights materials.[14] This situation is not limited to Malawi; the same could be said of very many African countries.

Transnational legal practice in Africa requires a new emphasis on transnational legal curricula that accommodate comparative law as well as various aspects of international law within an African context. While a good understanding of the structure of the primary law of a jurisdiction is an absolute necessity, legal practice in the twenty-first Century requires more. Thus, a lawyer's failure to properly understand the sense of different legal concepts or adapt to different modes of practice in various parts of the world can lead, for example, to the collapse of a business negotiation, contracts to be drafted incorrectly, transactions to go awry, or can endanger the long term viability of a valuable foreign investment for that matter.

The current integration terrain in Africa requires that future law students and established lawyers who are novices in transnational law should be prepared for the tasks of transnational legal practice and as such, there needs to be a shift in emphasis. Basic courses in international business transactions, international trade, public international law, human rights and comparative law, as well as advanced seminars in such areas will play significant roles.

V. CONCLUSION.

Africa is no longer at the fringes of international affairs, having produced two Secretaries-Generals of the United Nations. Again, globalization continues to have its

[13] *Id.*
[14] *Id.*

serious impact on the continent, which is seen as an emerging market and a possible source for the supply of cheap labor. Similarly, the drive for continental integration is reaching a climax. It becomes imperative that legal education in the continent must keep pace with these developments. Law schools and faculties in the continent must begin to see the need to introduce the requisite transnational and comparative law subjects and make them core courses. The question of resources must be addressed to promote African sensitivity to the study of international law. In this regard, a partnership must be forged between African law schools and law schools and legal associations in the North for material support of the new transnational legal initiative in the study of law. There should be a conscious effort to capacitate Africa to achieve this because it will facilitate transactions between the two parts of the world. This could be done in various ways: helping to supply transnational law materials to African universities, development of Africa-centered transnational curricula, efforts to site international law abroad programs in Africa rather than in Europe and other places allied to mostly American law schools, concrete partnerships and common programs with African universities, among others.

Similarly, African law schools must begin to find their place in continuing legal education that will emphasize transnational practice. American and European firms that have already established themselves in transnational practice even in Africa must realize that they need to engage with Africa for them to be successful in the new African dispensation. No continent must be left behind in the desire to redesign legal practice across the globe to take into account the transnational nature of legal practice in the Twenty-first Century.