

# TRAINING A COUNTERVAILING ELITE: THE NECESSITY OF AN EFFECTIVE LAWYERING SKILLS PEDAGOGY FOR A SUSTAINABLE RULE OF LAW REVIVAL IN EAST AFRICA

KIRSTEN A. DAUPHINAIS\*

## I. INTRODUCTION

[T]he lawyer in East Africa has to be much more than a competent legal technician. With the coming of independence, the manifold problems that beset developing countries have to be faced, and in doing this great changes will have to be made in the framework of society. Lawyers have a vital part to play in these developments, for upon them will fall a major share of the work of putting into practice the principles and ideas of their colleagues in the fields of politics, economics and science, and ensuring that the resultant system works fairly and efficiently. Legal education must take account of these facts, and see that students are made aware of and prepared for their future role.

Legal Education for East African lawyers must therefore entail more than the accumulation of knowledge about the rules of law-to know much law is not necessarily to be a good lawyer, although it is the foundation upon which most legal education must rest. The good lawyer is the one who knows something of the society in which the law operates and the processes by which the law may change and be changed by that society. Thus we teach the law as it exists in East Africa today, but we do not stop there; we use this law as a firm base upon which future developments may be considered. In this way we hope to be able to produce lawyers who will have thoroughly mastered the techniques of the law; how to search out all the relevant authorities on a particular point and marshal them into coherent form; how to read a case in order to

---

\*Associate Professor of Law, Director of Lawyering Skills, and Alphon Research Fellow, University of North Dakota School of Law. I would like to thank what is now an army of research assistants who have assisted with gathering sources for this article: the generals, Paul Tuchscherer and Peter Zuger, and the foot soldiers, David Welling, Joseph Mandala, Kelly Olson, Brittany Bornemann, Rachel Sinness, Kristen Hanson, Catherine Palsgraaf, Johannes Palsgraaf, Shannon Johnson, Laura Reynolds, and Charles Jacobson. I dedicate this article to the memory of Anne and Alex.

understand it fully; how to analyse and interpret a statute; and how to put across one's point of view in speech and writing. But over and above all this, they will have studied the law against the social and economic background of the East African jurisdictions, and will be in a good position to offer useful contributions to discussion on the problems of the law that ought to be in East Africa.<sup>1</sup>

In 1970, one East African law school laid out a bold and ambitious agenda for legal education in East Africa, one equal to the enormity of the demands of the day. The question thirty-nine years later is: to what extent has that agenda been met, that promise been fulfilled? The following article attempts to answer and offers solutions to the challenges that remain arising out of the best practices of the pedagogy of lawyering skills and the scholarship of teaching and learning as it applies to legal education. The focus of this article is on the Anglophone nations of East Africa, Kenya, Uganda, Tanzania, Zambia, and Zimbabwe, although reference will be made to other African nations, in particular Ethiopia, Nigeria, and South Africa, where experiences are illustrative for this article's purposes. This is due to some commonalities among the legal cultures of these countries, as well as to the fact that these nations sent delegates to the March 2007 Conference on Legal Writing Pedagogy for East Africa, an event at which this author presented and gathered qualitative data from East African law instructors, which deeply inspired and informed this article.

This article is meant to be of interest to African legal educators, Western law professors interested in teaching in Africa, and any student or critic of the law and development movement or indeed of American and international legal education.

Part II of this article reviews the history of legal education in East Africa. Part III discusses the law and development movement in Africa and the role of legal education in it. Part IV lays out the major critiques leveled at the law and development movement in the 1970s. Part V discusses the resurrection of the movement in the early 1990s and explores the role that an effective lawyering skills pedagogy can play in that revival. Part VI reviews the status of this pedagogy in East Africa and the challenges its law schools encounter in this regard. Part VII draws on the scholarship of teaching and learning to posit possible solutions for the unique problems facing the implementation of lawyering skills in the East African law school classroom. Finally, Part VIII looks forward to the blossoming of a lawyer-

---

1. TUDOR JACKSON, GUIDE TO THE LEGAL PROFESSION IN EAST AFRICA 18-19 (1970) (quoting The University College, Dar es Salaam, *A Guide for Schools* 16-17 (1970)).

ing skills pedagogy in this region of the world and opines about its impact on the welfare of the region.

## II. HISTORY OF LEGAL EDUCATION IN EAST AFRICA

Legal education in Africa is not even fifty years old.<sup>2</sup> “Legal education through domestic institutions was almost universally unavailable in English-speaking African countries until independence of the various countries from their respective colonial rulers.”<sup>3</sup>

In East Africa, explicit racial prohibitions were unnecessary to ensure that there were no African lawyers in Kenya at independence and only two in Tanzania, because the requirement of postsecondary (often university) training, which frequently was available only in the metropole (the former colonial power), denied access to the profession to all but the haute bourgeoisie.<sup>4</sup>

The British colonial authorities had a deep-seated fear of lawyers. The Indian nationalist movement had been led by lawyers, and the British, anxious to forestall a similar challenge in Africa, discouraged the training of African lawyers. When institutions of higher education came to be established in Africa after the Second World War, law was conspicuously absent from the subjects offered. The primary method of entry into the legal profession was through qualification in England as a solicitor or barrister, but the colonial authorities refused to provide scholarships for law. In East African countries, which were based to a significant extent on the ‘plantation economy’ model (with the immigrants favored in major sectors of the economy) this meant that few Africans trained as lawyers.<sup>5</sup>

Qualification was an onerous burden for black Africans aspiring to the bar, invariably entailing a long journey to London, graduation from a British university, and a stint at the Inns of Court.<sup>6</sup> Consequently, in 1960, there

---

2. Muna Ndulo, *Legal Education in Africa in the Era of Globalization and Structural Adjustment*, 20 PENN ST. INT’L L. REV. 487, 488 (2001-2002) [hereinafter Ndulo *Legal Education*].

3. Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT’L L. 99, 127 (2004-2005).

4. Richard L. Abel, *The Underdevelopment of Legal Professions: A Review Article on Third World Lawyers*, 1982 AM. B. FOUND. RES. J. 871, 873 (1982).

5. Yash Ghai, *Law, Development and African Scholarship*, 50 MOD. L. REV. 750, 751 (1987); Ndulo *Legal Education*, *supra* note 2, at 489. The perceived greater need for African engineers, doctors, and agriculturalists has also been cited, although a head count yields few of these professionals actually graduated at that time either. *Id.*

6. Ghai, *supra* note 5, at 752.

was only one black African lawyer in then Tanganyika—modern-day Tanzania, only ten in Kenya, and twenty in Uganda.<sup>7</sup> The profession as it existed at the time of independence was dominated by settlers from Britain or India.<sup>8</sup>

With independence, there was an urgent need for qualified black lawyers:

In the colonial enterprise, lawyers were assigned a relatively minor role. The organization of the legal system during the colonial period kept the judiciary, as well as the Bar, away from regular official contact with the African population except in the case of serious criminal offenses. Although customary courts served as the exclusive venue for resolution of legal disputes between native Africans, lawyers had no role in these courts. At independence; [sic] the dual court system was reformed, and a single judiciary hierarchy was introduced. All people in an African country were made subject to the same jurisdiction of the same courts.<sup>9</sup>

Moreover, there was a major shift in the legal culture that did exist, limited as it was. For instance, African lawyers trained in England had been initiated into the British bifurcated system of barristers and solicitors, a distinction wholly inapposite in African legal practice which adopted a fused profession.<sup>10</sup>

Perhaps the first great signpost of progress in African legal systems was the 1960 establishment of a committee under Lord Denning to review legal education for Africans within the United Kingdom.<sup>11</sup> Progressively for its age and in direct contradiction to the long-standing and hostile colonial policy, the Denning Committee noted:

[T]he great need in most of the territories is to train up Africans to take their proper place in the administration of justice. On the transfer of power the territories will not only need legislators and administrators. They will also need judges and lawyers. And those should, so far as possible, be fairly representative of the community as a whole.<sup>12</sup>

---

7. *Id.*

8. L.C.B. GOWER, *INDEPENDENT AFRICA: THE CHALLENGE TO THE LEGAL PROFESSION* 111 (1967).

9. Ndulo *Legal Education*, *supra* note 2, at 489-90.

10. Ghai, *supra* note 5, at 752; GOWER, *supra* note 8, at 104.

11. Ghai, *supra* note 5, at 752.

12. *Id.*

The Denning Committee recommended that African nations should not admit attorneys to practice solely on the strength of British training, but should require training on local law and further recommended the establishment of African law faculties.<sup>13</sup> A.N. Allott, a leading British law professor of the pre-independence era, agreed that “the very future of the law in Africa depends on a proper system of legal education being established.”<sup>14</sup> Thus, law schools, commonly referred to in the British tradition as law faculties, rapidly sprung up: in Dar-es-Salaam, Tanzania, in 1961, in Malawi in 1962, in Zambia in 1967, and in Uganda in 1968.<sup>15</sup> Today almost all Commonwealth African nations have law schools.<sup>16</sup>

Instruction at the law faculties was and still is supplemented by pre-bar admission training at a professional law school, such as the Kenya School of Law.<sup>17</sup> Usually, there is a Council of Legal Education, led by the Chief Justice of the country and with at least one member from the institute or college, that supervises this course of instruction.<sup>18</sup> These institutes were intended to be practical in their orientation with a decreased emphasis on formal lectures.<sup>19</sup> The institutes also required a pre-admission externship, also known as articling or pupillage, at a law chambers.<sup>20</sup>

Though principally funded by their own governments then and now, African law schools were endowed with large resources from public and private sources in the United States, including the United States Agency for International Development and the Ford Foundation, which particularly concerned itself with the training and support of African faculty,<sup>21</sup> as well as the SAILER<sup>22</sup> project of the Institute of International Education,<sup>23</sup> the American Bar Association, and projects spearheaded by numerous leading American law schools, such as Harvard and Yale.<sup>24</sup>

---

13. Muna Ndulo, *Legal Education, Internationalisation and African Law Schools*, 2 J. COMMONWEALTH L. & LEG. EDUC. 23, 32 (2004) [hereinafter Ndulo *Internationalisation*].

14. THE FUTURE OF LAW IN AFRICA 51 (A.N. Allott ed., 1960).

15. Ghai, *supra* note 5, at 755.

16. Ndulo *Internationalisation*, *supra* note 13, at 32.

17. GOWER, *supra* note 8, at 126; *see also* Ndulo *Legal Education*, *supra* note 2, at 493-94.

18. Ndulo *Legal Education*, *supra* note 2, at 493-94.

19. *Id.*

20. GOWER, *supra* note 8, at 127. It should be noted that in Kenya a lawyer can also be admitted to the bar after a seven year articulated clerkship, followed by attendance at the Kenya School of Law, and passage of the bar examination. J.B. Ojwang & D.R. Salter, *The Legal Profession in Kenya*, 34 J. AFR. L. 9, 17 (1990) [hereinafter Ojwang & Salter *Legal Profession*].

21. Ghai, *supra* note 5, at 755.

22. Staffing of African Institutes of Legal Education and Research.

23. GOWER, *supra* note 8, at 141.

24. JAMES GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 8 (1980).

Legal education at these newly created African law faculties would be “progressive” in comparison to that at their British counterparts. Recognizing the “useless[ness]”<sup>25</sup> of “the traditionalist conception of legal education as an osmotic transmission of tacit knowledge,”<sup>26</sup> law curricula would include some focus on social sciences.<sup>27</sup> This was a noteworthy development, as it should be recalled that in Africa, law is not a graduate degree—it is an LL.B. with no preceding liberal arts education to build upon:

[F]or most of our students law is the first and only degree. We do not have the luxury of assuming that we are adding a training in law ‘on top of’ an existing variety of specialised training in socially needed fields such as economics, history and political science. Until such time as law becomes post graduate education in Africa—if that choice is ever made—we must concentrate more and more on adding other disciplines or subjects to the content of the curriculum for our lawyer/universalists.<sup>28</sup>

For the most part, however, the education, which centered on English pedagogical methods,<sup>29</sup> is ineffective in many respects for the needs of African lawyers. As one scholar noted, “[t]he heavy English reliance on lectures and texts tends to be boring, and to produce sponge-like students who uncritically absorb generalities.”<sup>30</sup> There was also some use of the small group tutorial model,<sup>31</sup> described by one commentator as “[t]he only chance that a law student has to sharpen his skills.”<sup>32</sup> At least some schools have now abandoned the tutorial.<sup>33</sup> Even forty years after independence, the English influence remains:

The basic structure of legal education in most former British colonies is English. The teaching methods are weighted heavily to-

25. John A. Harrington & Ambreena Manji, *‘Mind with Mind and Spirit with Spirit’: Lord Denning and African Legal Education*, 30 J.L. & SOC’Y 376, 396 (2003).

26. *Id.*

27. *Id.* For example, in Zambia, the students spend the first year of their legal program taking subjects of their choice in the arts and social sciences. Ndulo *Legal Education*, *supra* note 2, at 491. However, Professor Ndulo also argues that “more scholarly and reflective subjects were excluded from the curriculum” at most African law schools. *Id.* at 488.

28. Jack A. Hiller, *Reconstructing Law Teaching Programmes in Developing African Countries*, 11 E. AFR. L.J. 69, 72 (1975).

29. Ndulo *Legal Education*, *supra* note 2, at 488.

30. Quintin Johnstone, *American Participation in East African Legal Education*, 16 J. LEGAL EDUC. 312, 314 (1963-1964).

31. T.O. Ojienda & M. Oduor, *Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya*, 2 INT’L J. CLINICAL LEGAL EDUC. 49, 50 (2002).

32. PAUL MWANGI, *THE BLACK BAR* 93 (2001).

33. Remarks of Dean Okech-Owiti of the University of Nairobi Faculty of Law to a delegation of American professors from the Conference on Legal Writing Pedagogy for East Africa (Mar. 14, 2007) (on file with author) [hereinafter Okech-Owiti Remarks].

ward the English approach, with, however, more emphasis on formalism than in England. Students are taught to memorize large numbers of rules organized into categorical systems (requisites for contract[s] and rules about breach, for example). They learn issue-spotting and to identify the ways in which the rules are ambiguous, conflicting, or inadequate and incomplete when applied to particular factual situations. The students do not usually learn case analysis, as the basic tools for instruction are textbooks rather than casebooks or law reports; instead, students learn general broad holdings of cases. They do not learn policy arguments. Most of the rules come directly from English textbooks; it is easier to learn British rules than local rules in the African context because, despite over forty years of independence, the difficulties of working with local materials are formidable.<sup>34</sup>

There would be little focus in African curricula on any kind of skills training.<sup>35</sup> While asserting that legal education must remain “principally theoretical,”<sup>36</sup> Professor Hiller noted the importance of introducing such skills at the law faculties, finding that “there is nothing wrong, and quite a lot right, in starting out with theory (informed theory) and testing it with practice.”<sup>37</sup>

Many of these skills are taught in post-LL.B. schooling, pupillage or clerkships in Africa as elsewhere. This is too late in the educational process to introduce them. The teaching of skills shows the relevance of theory and keeps it in bounds. Legal education must be both practical and theoretical; one feeds the other, therefore such training should be part of the LL.B. curriculum.<sup>38</sup>

The state of African legal practice at the time of independence highlighted the difficulties with the lack of emphasis on skills:

If things were bad in the field of litigation they were far worse in non-litigious business in which most African lawyers were not only untrained but uninterested. Much legal drafting was incompetent and standards of conveyancing were abysmal. In most cases there was no attempt to follow the traditional course of agreeing a written contract, adducing and investigating title, agreeing the terms of a conveyance, and finally completion. The lawyer of the proposed vendor simply handed over to the would-be purchaser

---

34. Ndulo *Legal Education*, *supra* note 2, at 492.

35. Fairly few American law schools focused on skills training at the time.

36. Hiller, *supra* note 28, at 75.

37. *Id.*

38. *Id.* at 74.

any deeds or documents the vendor had, and the purchaser's lawyer did the best he could. There was no control of professional conduct except a somewhat nebulous supervision exercisable by the courts. Few lawyers kept any proper books or attempted to separate their clients' money from their own. Some ran their practices on money obtained from or on behalf of their clients and hoped to be able to stave off the claims of one client until they had been put in funds by another.<sup>39</sup>

### III. LAW AND DEVELOPMENT MOVEMENT AND LEGAL EDUCATION'S ROLE IN IT

Enter the 1960s, the "development decade,"<sup>40</sup> and the Americans to the tune of approximately two American law professors to each African law faculty.<sup>41</sup> Coinciding with Africa's independence movement, many scholars would argue was the beginning of the law and development initiative.<sup>42</sup> Law and development's efforts were focused on reforming aspects of the legal systems of countries in the developing world, such as the methods of legal education, admission criteria for the profession, or the delivery of legal assistance for the impoverished.<sup>43</sup>

The central premise of the Law and Development movement in the United States in the 1960s was that strengthening of the legal system and the legal profession in developing countries would lead to equitable social change there. Essential to this instrumental vision of law were changes in legal education (at the time, to increase the reading of cases and use of Socratic method) and promotion of the model of lawyers as social engineers.<sup>44</sup>

"[T]he theory of law as 'social engineering' was a familiar one to the American legal profession long before the emergence of a specialty in law and development."<sup>45</sup> The notion that law promotes development was in evidence from the inception of Africa's independence era:

---

39. GOWER, *supra* note 8, at 114-15.

40. GARDNER, *supra* note 24, at 3.

41. Ndulo *Internationalisation*, *supra* note 13, at 34.

42. Peggy Maisel, *International Cross-Cultural Collaboration in Clinical Education: The Role of U.S. Clinicians in Developing Countries 7* (draft paper delivered at 6th International Clinical Conference, October 10, 2005) [hereinafter Maisel Working Paper].

43. *Id.* at 8.

44. JANE E. SCHUKOSKE, *Meaningful Exchange: Collaboration among clinicians and law teachers in India and the United States*, in EDUCATING FOR JUSTICE AROUND THE WORLD 233, 235 (Louise G. Trubek & Jeremy Cooper eds.) (1999).

45. Elliot M. Burg, *Law and Development: A Review of the Literature & a Critique of 'Scholars in Self-Estrangement'* 25 AM. J. COMP. L. 492, 505 (1977).



[T]he medical practitioners, engineers, and the like will not be able to perform their even more vital tasks unless law and order are preserved in these countries; and they will not be preserved without an adequate number of first-rate lawyers. Indeed, I go further and contend that without strong legal professions these countries have little hope of solving their pressing problems or, indeed, of long-term survival as true democracies.<sup>46</sup>

Professor Burg adds:

Are there certain qualities which inhere in a legal system which serve to foster development? . . . [S]everal may be identified which appear throughout the law and development literature. These include: (1) stability, (2) predictability, (3) fairness, (4) the educating function, and (5) most pragmatically, what have been hailed as the special development abilities of the lawyer.<sup>47</sup>

He continues that “stability is a prerequisite to investment by private capital and public international agencies;”<sup>48</sup> Professor Abel opines that “[l]awyers accompany, and may contribute to, the rise of domestic commerce and the extractive industries.”<sup>49</sup>

For an effective market-based economy in particular, there must be legal systems and processes that protect property rights and economic opportunities on behalf of individuals who lack traditional political and economic power. A key principle is to provide equality and predictability under the law. While a more traditionally organized economy may depend mainly on family connections, political parties, or the state, a more open and liberal economy relies on the authority of the law. . . . The point is that legal systems provide background rules and processes that give new entrants the means to build legitimate business relationships and take economic risks. . . . Weak states also require legal systems to protect the states and individuals from strong corporations.<sup>50</sup>

Burg also states that the law plays a function in “harmonizing social and cultural differences.”<sup>51</sup> Lawyers, in particular, would be needed to effect Africa’s contemplated legal system of pluralism, in which received British common law, customary law, and, in some cases, Shari’a, or Islamic

---

46. GOWER, *supra* note 8, at 104.

47. Burg, *supra* note 45, at 507.

48. *Id.*

49. Abel, *supra* note 4, at 888-89.

50. THE WORLD BANK, *Legal and Judicial Reform: Strategic Directions* 14-15 (2003).

51. Burg, *supra* note 45, at 508.

law, would coexist in the administration of justice. Sage lawyers would be needed to ensure that these pluralistic forces did not ultimately prove to be divisive:

A problem facing many developing countries is societal disintegration. The centrifugal forces of tribalism and religious communalism retard nation building. Plural legal systems mirror the internal divisions within a country. In contemporary Africa, for example, a problem of overriding concern is what to do with customary law. It has already been seen that laws oriented towards a primitive economy are inadequate for and often detrimental to development. Moreover, the mere fact of multiplicity of legal systems constitutes a barrier to national unity.<sup>52</sup>

Thus, lawyers would be faced with the daunting task of creating a legal system respectful of cultural diversity, but able to support solidly the goal of nation building.

In this regard, lawyers could also be counted on to serve as a meritocratic bulwark against the powers of militarism and totalitarianism, a “countervailing elite.”<sup>53</sup> L. Michael Hager, a USAID officer who had recently served in Africa, hearkened back to the seminal 18th century writings of the French observer Alexis de Tocqueville when he opined:

Observing that ‘lawyers belong to the people by birth and interest, to the aristocracy by habit and taste’, [sic] Tocqueville characterized the American legal profession as the ‘connecting link of the two great classes of society’. [sic] The statement may describe an important role for lawyers in the developing countries today. Much of the resistance to development comes from the political elite whose material interests are threatened by change. The political elite tends to become a closed society, inhibiting opposition parties. Both the participatory element of political development and the social mobility thus reach a standstill.

Here the legal profession, to the extent it is recruited from outside the elite group, can provide the vital function of a countervailing force.<sup>54</sup>

The fairness promoted by the legal system is also of crucial importance, as “unfairness . . . can distort or destroy the market mechanism.”<sup>55</sup>

---

52. L. Michael Hager, *The Role of Lawyers in Developing Countries*, 58 A.B.A. J. 33, 36 (1972).

53. *Id.* at 37.

54. *Id.*

55. Burg, *supra* note 45, at 508.

Furthermore, “legality—a concept which embraces such aspects of fairness as due process, equality of treatment, and enunciated standards of government behavior—is ‘a potential instrument of rapid social change.’”<sup>56</sup> In addition, from the beginning, the movement recognized the key role played by lawyers in the promotion of civil and human rights. Lawyers often defend individual liberties and protect individuals from arbitrary government intrusion, notably in the criminal and administrative law realm.<sup>57</sup>

Clearly the first and most important role of the legal system in development is the safeguarding of constitutional rights. For their existence is likely to be threatened, and their abrogation, when it occurs, is a setback to political development, as well as to the rule of law. Confidence in government, like respect for law, is earned with difficulty and lost with ease.<sup>58</sup>

The creation and defense of a well-trained and independent judiciary that is incorruptible and able to be relied upon by international investors to adjudicate disputes fairly is integral to this effort, as is a concomitant system of legal education in Africa.<sup>59</sup>

The educative function of law was viewed to be important, in that it could foster “new behavioral norms,” one of which could be a societal interest in development.<sup>60</sup> “The legal profession must, in a coherent fashion, engage in civic education programs designed to encourage citizens to change their attitudes toward the legal order.”<sup>61</sup>

Lawyers were also needed for the dissemination of the most fundamental information to the citizenry, “creat[ing] a consciousness of legal rights”<sup>62</sup>:

[T]he dual nature of the legal system which exists in most African countries has largely resulted in people not being aware of their rights under the mostly received State Law as compared to knowledge of customary or religious law and the problem of lack of

---

56. *Id.* (quoting MODIBO OCRAN, TOWARDS A JURISPRUDENCE OF AFRICAN DEVELOPMENT 284 (1971)).

57. Wolfgang G. Friedmann, *The Role of Law and the Function of the Lawyer in the Developing Countries*, 17 VAND. L. REV. 181, 185 (1963-1964).

58. Hager, *supra* note 52, at 36.

59. *Id.* at 37.

60. Burg, *supra* note 45, at 509.

61. Okechukwu Oko, *Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa*, 33 VAND. J. TRANSNAT'L L. 573, 613 (2000) [hereinafter Oko *Consolidating*].

62. *Id.*

awareness has been exacerbated by limited resources for legal services.<sup>63</sup>

Finally, Professor Burg asserts that lawyers have a “unique ability to contribute to development”<sup>64</sup>:

[T]he lawyer is best suited to possess a general knowledge of the legal system in its substantive, remedial, and institutional aspects. He can design contracts and statutes so as to achieve parties’ intentions, he can communicate well with other lawyers and with judges, and he values fairness and regularity.<sup>65</sup>

The lawyer must be well-equipped to perform effectively his or her role as “an expert in the institutions and processes through which society functions.”<sup>66</sup> While often taken as read in American legal culture, Professor Hiller reflects on the uniqueness of such a role for lawyers in African society:

One thing at which lawyers can be especially good is creating, inventing, establishing, and developing new ideas, techniques, relationships, and institutions. This talent has been neither valued nor utilised in the British system, most affairs being thought to be too important to be put in the hands of lawyers—an assumption which was correct, given the British lawyers’ own narrow view of their role. However, this is exactly the sort of skill needed in developing countries and we should gear our legal education to develop it.<sup>67</sup>

The lawyer would assume leadership roles in business, government, and politics<sup>68</sup> and participate both in the macro labor of envisioning policy:

An ever increasing—though in the analysis of the functions of law and the lawyer, much neglected—part of the work of the lawyer is neither litigation nor the resolution of disputes. It lies in the shaping and formulation of policies, in the exercise of legal powers, constructively establishing or altering the relations between private legal parties *inter se*, between public authorities and private par-

---

63. Philip F. Iya, *Fighting Africa’s Poverty and Ignorance through Clinical Legal Education: Shared Experiences with New Initiatives for the 21st Century*, 1 INT’L J. CLINICAL LEGAL EDUC. 13, 28 (2000).

64. Burg, *supra* note 45, at 509.

65. *Id.* If the foregoing are the reasons why lawyers might be essential to the development process, an effective lawyering skills pedagogy for law schools in the developing world, including East Africa, emerges as a necessity.

66. LOWENSTEIN, LAWYERS, LEGAL EDUCATION, AND DEVELOPMENT 66 (1970).

67. Hiller, *supra* note 28, at 71 n.8.

68. Hager, *supra* note 52, at 37.

ties, between governments and foreign investors, and the like. In the public international sphere this task consists increasingly-and most notably in the case of developing countries-in the formulation of economic policies expressed in accession to multilateral trade agreements (such as GATT) or the conclusion of bilateral treaties.<sup>69</sup>

and in the micro labor of reducing policy to paper:

As a parliamentary draftsman or counsel, the lawyer is essentially the technician. As a member of a law revision commission, or more fundamentally, as a formulator of constitutional principles, the lawyer, usually in company with non-lawyers [sic] may play a major role in the shaping and articulating of the basic political and social foundations of the legal system.<sup>70</sup>

Professor Friedmann also recognizes an even more expanded role of the lawyer:

It is he who must draft the necessary legislation or the complex international agreements; it is he who will usually be the principal, or one of the principal, representatives of his country in international trade negotiations. It is he who must draft the applications for loans from national or international credit agencies, such as the World Bank or the United States Agency for International Development, or formulate the modalities and conditions of joint business ventures, between his own government or a private enterprise in his own country on the one side, and a private enterprise or a foreign consortium, a foreign government, or a public international agency on the other side. It would be as artificial as it would be wasteful of the still desperately scarce trained manpower resources of developing countries to believe that the lawyer should or could confine himself to the strictly legal issues. . . .<sup>71</sup>

Many of the earliest leaders of independent Africa concurred in the vital role to be played by lawyers.<sup>72</sup> President Kenneth Kaunda of Zambia, for example, stated:

I think the lawyer, through his training and experience, is perhaps better fitted than anyone else to work out solutions to the social

---

69. Friedmann, *supra* note 57, at 188.

70. *Id.* at 183.

71. *Id.* at 189. Indeed, in the context of international development, the lawyer must defend the interests of his or her own nation. "Law may harmonize the often divergent interest between a developing country and outsiders." Hager, *supra* note 52, at 36.

72. Ghai, *supra* note 5, at 754.

and economic problems of society. . . . [I]n a young developing country the failure of the lawyer to play a full part in national and local affairs is more than just a pity; in a society where so few have received any education at all, far less professional qualifications, it becomes the duty of all those who are more fortunate to use their knowledge and skills not just for the benefit of their client, but for the advancement of the whole society.<sup>73</sup>

Thus, expectations were high for those earliest post-colonial African lawyers:

The contemporary lawyer in all states, but most emphatically so in the developing nations, must become an active and responsible participant in the shaping and formulation of development plans. He must guide and counsel but also warn where necessary. He must acknowledge the drastically increased role of public law in developing societies, which usually have inadequate resources, a totally inadequate quality and quantity of responsible private venture capital, gross educational deficiencies, and a minimum of technical skills and administrative experience.<sup>74</sup>

Professor Gower elaborated on the needs of the newly independent African states:

They need commercial, corporation, and property lawyers if they are to achieve an economic take-off. They need bilingual international, comparative, and constitutional lawyers if they are to survive as states and to enter into the larger unions which Pan-African sentiments and economic development demand. . . . They need courageous lawyers with the highest ethical standards if the atrophy of the rule of law and of personal and academic freedom and the corrosive growth of corruption, Nepotism [sic], and elitism are to be arrested, and if the military and police power is to be kept within bounds.<sup>75</sup>

John Harrington and Ambreena Manji summarize the elevated role of lawyers in African development:

[T]he lawyer's task was not simply the negative one of defending individual liberties and the rule of law. Rather, since there was a historic correlation between law and social progress, lawyers should be employed positively as instruments of social and eco-

---

73. Kenneth Kaunda, Address to the Law Society of Zambia (Apr. 24, 1962).

74. Friedmann, *supra* note 57, at 186.

75. GOWER, *supra* note 8, at 102-03.

conomic development. Their typical tasks would include drafting legislation, writing contracts for nationalized industries, and conducting negotiations with developed country institutions on behalf of state marketing boards. . . . [L]awyers would build the nation.<sup>76</sup>

Lawyers were to be “*lux in tenebris*, light in our darkness . . . [standing] between justice, ‘lady and queen of all moral virtues’, [sic] and ‘barbarism’.[sic]”<sup>77</sup> And the lawyer would be a universalist, a twentieth-century Renaissance man.<sup>78</sup>

In light of these heightened expectations, the expectations of the legal education that would produce these practitioners were likewise daunting. “Legal education was a particular focus [of the law and development movement] because of a belief that ‘reformed’ legal education would strengthen the legal profession that would in turn help in economic and social development.”<sup>79</sup> Professor Friedmann explained, “[a]ll [of] this requires a type of lawyer, on both the public and the private level, who has a different approach and a different background of knowledge from his predecessors.”<sup>80</sup> Professor Hiller found a requirement for “a broader, more flexible and imaginative education than has previously been provided”<sup>81</sup>:

When institutions for legal education came to be established, the dominant view of the role of the lawyer held by those advising on the matter was that of social engineer rather than technician, which implied a broader rather than a professionally oriented approach to legal education, an emphasis on legal policies rather than doctrines. The tasks of nation building and economic development that seemed attendant on independence were seen as a challenge to lawyers-to create new institutions, fashion an integrated legal system, establish schemes of rural credit, service foreign investments, manage diplomacy, etc. The arrival of legal education at the end of colonialism meant that other models than the English were able to influence its assumptions and forms. The most influential of them was that of the United States, which by this time was looking

---

76. Harrington & Manji, *supra* note 25, at 396.

77. *Id.* at 397 (quoting P. GOODRICH, LANGUAGES OF LAW. FROM LOGICS OF MEMORY TO NOMADIC MASKS 90 (1990)).

78. Hiller, *supra* note 28, at 72. The term “Renaissance man” deserves a pause for comment here because in 1960s Africa (as in 1960s America and largely for decades to come) “man” is exactly who we are talking about when reflecting on the African lawyer. The delay in tapping one half of its potential brainpower to attack the formidable problems we have been discussing would be a worthy subject for another article.

79. Maisel Working Paper, *supra* note 42, at 8.

80. Friedmann, *supra* note 57, at 189-90.

81. Hiller, *supra* note 28, at 71.

to expand its role in the developing countries. American academics brought with them not only a broad view of the role of the lawyer, but also a broad view of the scope and methods of legal education to go with it.<sup>82</sup>

As an initial response, with the advent of the American involvement in the law and development, came the introduction of the problem or Socratic method of teaching, then conceived as a reform of the British *ex cathedra* manner of teaching.<sup>83</sup>

American legal development scholars engaged in extensive critique of the law schools of the developing world and suggested changes to curricula.<sup>84</sup> Whether the law schools of East Africa, powered by dedicated and inspired African scholars and aided by Western advisors and funds, could implement this ambitious agenda remained to be seen.

#### IV. BACKLASH TO THE LAW AND DEVELOPMENT MOVEMENT

Perhaps it is not shocking that by the 1970s many commentators found that lawyers functioning within East African legal systems were not able to achieve all the social engineering outcomes for which the law and development theorists had hoped. First, perhaps not surprisingly, African law schools from the beginning faced grave challenges in delivering the legal education necessary to educate the nation building lawyer. At least one commentator argued that the system of African legal education was flawed in its very design:

[The] old developmental dynamics also impacted the legal education system that was imposed in colonial Africa. It is generally recognized that the legal system left in place when African countries gained independence was an alien system of rules dissociated from the local needs, and the populace was ill prepared to contend with the challenging task of development within the context of this alien system. As a consequence, the system of legal education duplicated foreign models ill-suited to the indigenous environment. Therefore, the professional legal community was committed to the values of a received legal culture different from their own.

Consequently, there must be serious questions concerning the system of legal education left in place or developed following colonial rule. The curriculum design and objectives, including peda-

---

82. Ghai, *supra* note 5, at 753-54.

83. Harrington & Manji, *supra* note 25, at 396.

84. Maisel Working Paper, *supra* note 42, at 8-9.



gogy left with developing nations following independence, are almost a mirror image of the British common law or European civil law systems developed in an entirely different socioeconomic cultural context. Notwithstanding, post-colonial African nations have not consciously and systematically undertaken a redesign of their legal education systems to more appropriately meet the needs of their societies. The current systems, as left by the colonial rulers, or as they have evolved over the years, have outlived their utility, whatever marginal utility they had.

The law courses of early curricular design did not reflect the needs of society, and the training of lawyers was based on doctrinaire teaching geared to an adversary setting catering to litigation for the fortunate few at the cost of social injustice to the deprived many. As a result, the *status quo* was maintained and the majority of the people continued to suffer the indignities which are the legacy of colonial rule. Another aspect of the legal education system contributing to the dilemma in which developing nations currently find themselves, is that university law schools are not an indigenous institution. Therefore, the legal system is a received culture, socially irrelevant to the culture, environment and spiritual mores of the society. Moreover, many of the early lawyers, as descendants of the political elite, who obtained their legal training outside of their native countries in western Europe, [sic] and North America [sic] have exacerbated rather than mitigated the inadequacies of the system of legal education. Furthermore, legal education has received a relative low priority in the hierarchy of priorities concerning the allocation of financial resources. Thus, the allocation of resources to the “law” must be reevaluated, and accorded the salience required to bring about comprehensive reform. Inasmuch as law is a sociological phenomenon constrained by the indigenous contemporary social context, a discussion of legal education in post colonial, contemporary Africa must take into account a new developmental dynamic and include the relationship of legal education to the developmental needs of the country. . . . The legal tools and strategies needed to address the social ills of poverty, unemployment and economic under-development must be geared to address the unique ethos in a given society.

Legal education and the law must be an integral component of any amalgam or instrumentality of change and development in order to mitigate the circumstances of economic underdevelopment,

poverty and unemployment, and all other social phenomena inimical to the public interest.<sup>85</sup>

In short, one scholar characterized this institutional flaw: “[t]he system of legal education replicated foreign models ill suited to the indigenous milieu and the professional legal community was committed to the values of received legal culture.”<sup>86</sup> Muna Ndulo, Professor of Law and Director of the Institute for African Development at Cornell University School of Law, states:

The heavy ‘rule focus’ of African legal education is troubling. As Whitehead warned, ‘[w]hatever be the detail with which you cram your student, the chance of his or her meeting in life exactly that detail is almost infinitesimal and if he or she does meet it, he or she will probably have forgotten what you have taught him or her about it.’<sup>87</sup>

Even if the underpinning concepts of legal education in the region were perfect, African law schools faced enormous logistical challenges:

The new law faculties faced formidable problems. Their own conception of the training of a lawyer established an ambitious agenda. Even if they had conceived of their task more narrowly, there were no local textbooks nor were local legislation and judicial decisions easily accessible. There were virtually no local persons suitably qualified to teach. There was no tradition of legal scholarship and criticism of local legislations or decisions.<sup>88</sup>

There was a notable lack of textbooks and teaching materials and those which were available tended to be English.<sup>89</sup> These proved to be inadequate for instruction at African law faculties. While the received British common law was one of the sources for incipient African legal systems, it was by no means the only influence, and naturally the British materials took no cognizance of other sources of African law, including customary law, viewed by Professor Jessup to be a “requirement” for African legal education.<sup>90</sup> The teaching materials also could not account for how British law

---

85. Grady Jessup, *Symbiotic Relations: Clinical Methodology - Fostering New Paradigms in African Legal Education*, 8 CLINICAL L. REV. 377, 386-89 (2001-2002).

86. SHIV DAYAL, *Dynamics of Development: Legal Education and Developing Countries*, in LAW IN ZAMBIA 91, 93 (Muna Ndulo ed., 1984) (internal quotations omitted) [hereinafter Dayal *Dynamics*].

87. Ndulo *Legal Education*, *supra* note 2, at 493 (quoting F.E. WHITEHEAD, *THE AIM OF EDUCATION AND OTHER ESSAYS* 4 (1959)).

88. Ghai, *supra* note 5, at 754.

89. *Id.* at 755.

90. Jessup, *supra* note 85, at 390.

would operate in the unique African context.<sup>91</sup> Both African and consulting Western law professors worked rapidly to try to create appropriate case materials, but it was difficult to keep up with the needs of a brand new legal system.<sup>92</sup> Professor Grady Jessup commented:

The success of any reform initiative will depend upon the implementation of culturally and historically relevant teaching methodologies. The teaching materials must be viewed in a new construct, and not simply accepting the transplanted text books and case books from Europe and America, reflecting a different legal culture and different conditions in society. A daunting task of the legal educators in developing countries of Africa is to create new teaching materials, including text books, case books, and training materials that arise out of the social milieu of their society and national context. The materials should provide a historical perspective, a sense of contemporary necessities for social development and national priorities in support of legislation, constitutional provisions, rules promulgated and the goal to be achieved.<sup>93</sup>

Lack of financial resources to accomplish these lofty goals became a problem.<sup>94</sup>

Ten to fifteen years after independence, in many respects, the situation at the law faculties was discouraging. Commenting in 1987, Professor Ghai of the Dar-es-Salaam law faculty stated:

Twenty-five years ago a university lectureship was both well remunerated and prestigious. Library facilities were adequate, teaching loads were reasonable, and there was financial and administration support for research, publications, and conferences. Today a university post is not particularly highly regarded. A ca-

---

91. Ghai, *supra* note 5, at 755. Indeed, as late as 2002, Professor Ndulo called for: “the examination of local conditions [which] will enable lawyers to move away, as Gower observed, from the belief that, ‘English law is the embodiment of everything that is excellent even when applied to totally different social and economic conditions.’” Ndulo *Legal Education*, *supra* note 2, at 501 (citing GOWER, *Foreword* to ROBERT B. SEIDMAN, *SOURCE BOOK OF THE CRIMINAL LAW OF AFRICA* vi (1966)).

Lawyers, in the British experience, have a narrow and structured role in their society which is comparatively stable. The context of change found in Africa calls for a more involved lawyer, a lawyer who actively participates in change, regulating the change, and soothing its impact by conceiving of and bringing about modified, equilibrated institutions.

J.B. Ojwang & D.R. Salter, *Legal Education in Kenya*, 33 J. AFR. L. 78, 89-90 (1989) [hereinafter Ojwang & Salter *Legal Education*].

92. Ghai, *supra* note 5, at 758.

93. Jessup, *supra* note 85, at 389-90.

94. *Id.* at 390.

reer in politics, civil service or the private sector is much better rewarded, and offers greater possibilities to influence policy. Given the ravages of inflation, a university salary is no longer sufficient for a decent living. Most law teachers are consequently forced into consultancies or commissioned research, especially where the payment is in foreign exchange. Some countries or universities have tried to ban or regulate outside work, but this, if effective, drives the best people out of teaching. The scarcities of food and other basic necessities, and the consequent need to wait long hours in queues, are deeply disruptive to research.

The shrinking of resources and shortages of foreign exchange have taken a terrible toll on libraries. . . . Dar-es-Salaam, although an outstanding law faculty, has been able to order few new law books or journals for years; the situation at Makerere in Uganda . . . has been scarcely better. There is also an acute shortage of paper, so that even local materials cannot be mimeographed for distribution to students. Texts or case books which were prepared in the 1960s and 1970s are out of print; students compete for a tattered copy in the library. Students rely heavily on notes taken during lectures.<sup>95</sup>

In short, “a lack of financial resources exacerbated or impeded staff development, equipment acquisition, physical plant renovations and efforts to reduce student-faculty ratios.”<sup>96</sup>

The means of Western participation in the law and development movement was being scrutinized as well. As early as 1967, commentators questioned the utility of “cook’s tours” where American law professors spent short stints in residence at African law faculties,<sup>97</sup> “arriv[ing] in foreign territory unencumbered by any significant understanding of the local language, law, polity, economy, or culture.”<sup>98</sup> American experts teaching abroad approached legal education and the administration of justice as they did in the United States, that is, without integrating African practices and influences.<sup>99</sup> This was problematic on several levels. First, a “received” legal pedagogy which inadequately considered prevailing local conditions was not likely to be effective, nor was it likely to be accepted or endure af-

---

95. Ghai, *supra* note 5, at 774-75.

96. Jessup, *supra* note 85, at 392 n.67.

97. GOWER, *supra* note 8, at 138.

98. GARDNER, *supra* note 24, at 8-9.

99. Peggy Maisel, *The Role of U.S. Law Faculty in Developing Countries: Striving for Effective Cross-Cultural Collaboration*, 14 CLINICAL L. REV. 465, 465 (2007-2008) [hereinafter *Maisel Collaboration*].

ter consultants departed.<sup>100</sup> Second, critiques of African legal institutions based solely on their differences from their American counterparts were unsound.<sup>101</sup> Finally, some critics of the movement argued that the underlying purpose of the law and development movement was not only to improve life in developing world nations, but “to strengthen American cultural and legal influence,” inappropriately in the critics’ view.<sup>102</sup>

The law and development critics took issue not only with legal education in the developing world, but with the prevailing notions of the role of law in society in general. Law and development views were criticized as naïve, “lack[ing] . . . [in] theoretical sophistication.”<sup>103</sup> “American legal assistance was characterized in part by a rather awkward mixture of goodwill, optimism, self-interest, arrogance, ethnocentricity, and simple lack of understanding. . . . [T]he law and development movement was . . . flawed and rather inept . . . ,”<sup>104</sup> displaying a “missionary spirit.”<sup>105</sup>

Moreover, Professor Gardner argues that American legal models as they operated in America itself were “flawed, vulnerable to executive ordering and authoritarian abuse,”<sup>106</sup> rendering it easy to view this group of law and development critics as forerunners of the American Critical Legal Studies movement.<sup>107</sup> Law and development theory was cast as legal liberalism, a simplistic assumption that a model featuring lawyers as creators of brand new societies, arguably such as those that drove the development of government in eighteenth and nineteenth century America, could be transplanted wholesale into newly independent African states and work in the same way.<sup>108</sup> Also critiqued was the notion that new African independence

---

100. *Id.* at 473-74.

101. *Id.* at 473. At the Nairobi Conference, Professor Adam Todd of the University of Baltimore queried whether teaching the nuts and bolts of effective communication and advocacy for the common law adversarial model flies in the face of the communitarian values of customary law in East Africa. Adam Todd, Remarks at the Conference for Legal Writing Pedagogy for East Africa (March 15, 2007) [hereinafter Todd Remarks].

102. Maisel *Collaboration*, *supra* note 99, at 473 (quoting GARDNER, *supra* note 24, at 283). Of course, one might argue that it is hardly a shocking notion that American governmental and non-profit entities would expend resources to promote American interests abroad.

103. Ghai, *supra* note 5, at 766.

104. GARDNER, *supra* note 24, at 4-5.

105. *Id.* at 13.

106. *Id.* at 6.

107. Ghai, *supra* note 5, at 769; *see also* Brian Z. Tamanaha, *Book Review: Law and Development*, 89 AM. J. INT’L L. 470, 474 (1995) (Richard Bilder ed.) (stating that Marc Trubek, a leading light of the law and development critique movement, went on to be a central figure in Critical Legal Studies).

108. Ghai, *supra* note 5, at 766.

constitutions could be developed and implemented just as the American one had been.<sup>109</sup>

Law and development began with the Malthusian assumption that “[s]ecurity of property, without a certain degree of which, there can be no encouragement to individual industry, depends mainly upon the political constitution of a country, the excellence of its laws and the manner in which they are administered.”<sup>110</sup>

However, as early as 1963, scholars like Professor Allott expressed skepticism at the notion that the rule of law was necessary to attract foreign investment in the developing world:<sup>111</sup>

I would suggest that such investors or lenders are not particularly interested in the state of the law in the countries to which they lend; what they will look for is efficient government capable of making proper use of the money lent or invested, and some assurance (though this is sometimes weakened for political reasons to vanishing point) that the loan will be serviced and the money will eventually be repaid.<sup>112</sup>

While law and development scholars would argue that it is precisely the promotion of the rule of law that would provide the best surety for such repayment, by the 1970s, a growing cadre of American critics, embittered by political events in their own nation, began to call these most basic premises of law and development into doubt:

In some countries law may be seen, at least by political leaders and some elites, as an inhibiting factor in the effort to bring profound changes in the social structure and the outlook of people. The use of laws and legal processes may (it is argued) produce rigidity in administration, entrench vested interests, frustrate popular participation and the development of political processes (e.g., party institutions) to effect essential changes, make impossible many social experiments and flexible approaches to very difficult problems. Law may unwisely restrict persons in government who may need to exercise wide discretion to carry out stated policies. . . . [A]

---

109. *Id.* at 774.

110. THOMAS MALTHUS, *PRINCIPLES OF POLITICAL ECONOMY* 309-10 (2nd ed., Augustus M. Kelley 1964) (1836).

111. Burg, *supra* note 45, at 520.

112. A.N. ALLOTT, *Legal Development and Economic Growth in Africa*, in *CHANGING LAWS IN DEVELOPING COUNTRIES* 194, 205 (J.N.D. Anderson ed., 1963).

major cause of problems of access to justice or delays in obtaining it was the over-legalization of institution [sic] and processes.<sup>113</sup>

“The critics argued that the cause of poverty in developing countries was their incorporation into the international capitalist economy and the new international division of labour”<sup>114</sup> and lawyers were viewed as an integral part of that regime. “Invoking the alleged dependency of capitalism on legal certainty, they devote extraordinary energies to restating, systematizing, and codifying the law—an activity that serves largely to enhance their own self-importance.”<sup>115</sup> They were “preoccup[ied] with litigation and legal protection of the political status quo”<sup>116</sup> and they “clearly benefit[ed] from and validate[d] the system of social stratification.”<sup>117</sup> “Lawyers, like other members of the middle classes, may also often be disposed to favor agendas of social change that emphasize peaceful and ordered social life rather than the chaos of revolutionary transformation.”<sup>118</sup> Professor Abel continued, “Private lawyers become mere reactive obstructionists who invoke legalism to thwart government action but are largely irrelevant to the task of mobilizing state power actively.”<sup>119</sup> At a minimum, “laws and regulations [might] substitute for progress when little else exists,”<sup>120</sup> perhaps creating a dangerous sense of complacency. “[L]aw ‘on the books’ has an inertia which is difficult to overcome.”<sup>121</sup> Moreover, law “on the books” is particularly destructive when it is a cover for realpolitik or corruption and when the laws do not mean what they say or have different meanings for different citizens, depending on their place in society and proximity to power.<sup>122</sup> “[T]he lawyer tends to be looked upon as a kind of manipulator or fixer who, in many ways, fails to represent society’s basic values and attitudes.”<sup>123</sup>

Indeed, Professor James Gardner opined that the flawed attempt to transfer American legal models to the developing world led to those models

113. COMM. ON LEGAL EDUC. IN THE DEVELOPING COUNTRIES, *LEGAL EDUCATION IN A CHANGING WORLD* 44 (1975).

114. Ghai, *supra* note 5, at 770.

115. Abel, *supra* note 4, at 889.

116. Hager, *supra* note 52, at 33.

117. Abel, *supra* note 4, at 889.

118. STEPHEN ELLMANN, *Cause Lawyering in the Third World*, in *CAUSE LAWYERING* 349, 362 n.118 (Austin Sarat & Stuart Scheingold eds., 1998).

119. Abel, *supra* note 4, at 886.

120. Stuart R. Cohn, *Teaching in a Developing Country: Mistakes Made and Lessons Learned in Uganda*, 48 *J. LEGAL EDUC.* 101, 104 (1998).

121. Hager, *supra* note 52, at 34.

122. *See id.* at 35 (discussing “the gap between theory and practice”).

123. Arthur Von Mehren, *Law and Legal Education in India: Some Observations*, 78 *HARV. L. REV.* 1180, 1184 (1964-1965).

becoming “the handmaidens of a dictatorship or authoritarian state.”<sup>124</sup> “[T]he ruling dictators adopt an instrumentalist and distorted philosophy on law. They view law as an instrument that the state employs to preserve its authority.”<sup>125</sup> Even if not rising to this level, American and African lawyers were often not on the same page. At a minimum, “American legal assistance goals were not widely shared by . . . Third World lawyers.”<sup>126</sup>

A lawyer with an improved and modernized education might simply then become a mechanism for increasing social inequality.<sup>127</sup> These newly trained lawyers would certainly be more expensive to hire.<sup>128</sup> As Professor Dayal states, “Justice, like a five-star hotel, is open to everyone but one must have the means to approach it.”<sup>129</sup> Other scholars also explained this issue of access:

The [Law and Development Movement] ignored such questions as whether an expanded and modernized legal profession might not increase social inequality and reduce participation in decisionmaking. In societies where legal services are allocated by price, improved education could raise the costs of legal services and thus strengthen the ‘haves’ vis-à-vis the ‘have-nots.’ Moreover, increasing professionalization of legal services could lead to greater formalization of legal decisionmaking, thus making it more, rather than less, difficult for the have-nots effectively to express their views.<sup>130</sup>

“The high costs of legal services, long and complex court processes, and inordinate delays in court, tend to reinforce the belief that access to and enjoyment of legal rights depends on status.”<sup>131</sup>

Perhaps the most destructive aspect of this is that “[t]he law is remote from the popular culture and hence meaningless to a majority of the populace.”<sup>132</sup> Professor Ndulo states as late as 1998 that “[i]n a typical African state, a large percentage of the people remain outside the formal structures

---

124. Maisel *Collaboration*, *supra* note 99, at 474 (quoting GARDNER, *supra* note 24, at 280-81).

125. Oko *Consolidating*, *supra* note 61, at 589.

126. GARDNER, *supra* note 24, at 10.

127. Maisel Working Paper, *supra* note 42, at 9.

128. *Id.*

129. Dayal *Dynamics*, *supra* note 86, at 100.

130. David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1076 (1974).

131. Oko *Consolidating*, *supra* note 61, at 611.

132. Hager, *supra* note 52, at 33.



of the state and rely on self help for their survival.”<sup>133</sup> This might lead people to seek extralegal and even violent means to effect change or to make their voices heard.<sup>134</sup> “Conflicts in Africa have typically been rooted in struggles for political power, ethnic privilege, national prestige, and scarce resources”<sup>135</sup> and “[g]iven the multi-ethnic character of most African states, political conflict leads to a violent politicization of ethnicity.”<sup>136</sup>

[S]ince 1970, more than 30 wars have been fought in Africa, the vast majority of them intra-State in origin. In 1996 alone, 14 of the 53 countries of Africa were afflicted by armed conflicts, accounting for more than half of all war-related deaths worldwide and resulting in more than 8 million refugees, returnees and displaced persons. The consequences of those conflicts have seriously undermined Africa’s efforts to ensure long-term stability, prosperity and peace for its peoples.<sup>137</sup>

Even where the movement was ostensibly in greater touch with the African people through the increased emphasis on customary law, problems arose. Some scholars argue that customary law has hindered development.<sup>138</sup> Many commentators found that customary law can be contrary to commonly accepted international mores of human rights, particularly as involves the rights of women and children:

Women’s issues pose a dilemma for law-and-development scholars who wish to protect indigenous cultures from transplanted state law regimes because, for women in many developing countries, as one writer succinctly put it, ‘folk law is the culprit.’ Many tradi-

133. Muna Ndulo, *The Democratic State in Africa: The Challenges for Institution Building*, 16 NAT’L BLACK L.J. 70, 83 (2000) [hereinafter Ndulo *The Democratic State*].

134. See Muna Ndulo, *The Democratization Process and Structural Adjustment in Africa*, 10 IND. J. GLOBAL LEGAL STUD. 315, 325 (2003) [hereinafter Ndulo *The Democratization Process*] (“It stands to reason that recruitment to the cause of the insurgency will be nearly impossible when people are happy and believe the warfare is not the only way to draw attention to their grievance or to create change.”).

135. *Id.* at 316.

136. *Id.* at 320.

137. *Id.* at 315-16 (citing *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the Secretary-General*, available at <http://www.un.org/ecosocdev/geninfo/afrec/sgreport/report.htm>).

138. Burg, *supra* note 45, at 502. It should be noted that some African women’s organizations have called for the elimination of customary law, as they feel it is biased toward men. Kenya, JURIST 2, available at <http://jurist.law.pitt.edu/world/kenya.htm> (last visited August 12, 2009); see also Ndulo *The Democratization Process*, *supra* note 134, at 351 n.209 (“[c]ustomary law is the source for much of this discrimination”).

tional cultures, like Western cultures, favor men at the expense of women, sometimes to an unpalatable extreme.<sup>139</sup>

Certainly, it was difficult to view the law and development movement as successful when, in the West, one need only turn on the television or in Africa, look about, to see rampant famine, disease, violence, and appalling loss of life.<sup>140</sup> Professor Mutua states, “[t]here is little doubt today that Africa’s survival is seriously threatened by corrupt and inept political elites, unbridled militaries, ethnic rivalries and economic misery.”<sup>141</sup> The hope that African lawyers could serve in a “countervailing elite”<sup>142</sup> role, to stand as a rampart against global and local forces of militarism and dictatorship, had not come to pass. “Military intervention, commonly known as *coups d’etat*, is perhaps ‘the most visible and recurrent characteristic of the [post-colonial] African experience.’ Few democratically elected presidents in Africa complete their terms without a military coup.”<sup>143</sup> There was “no countervailing force to blunt the excesses of warlords, or the state itself.”<sup>144</sup> Africa has been unable to overcome the legacy of its past:<sup>145</sup>

As democratization efforts that engulfed Africa immediately after colonial rule quickly atrophied, authoritarian rule supplemented them, mostly in the form of military regimes and one-party states. Even in countries with elected civilian administrations, democracy serves as a gloss that veils abuses by tyrants and despots masquerading as democrats. Some commentators blame the failure of democracy on the unchecked predatory instincts of a politicized military. Others insist that the selfish impulses of political elite who seek the power of democracy but reject its concomitant obligations, coupled with the absence of meaningful democratic traditions, are what frustrate democratization efforts in Africa.<sup>146</sup>

---

139. Tamanaha, *supra* note 107, at 482 (citing K.O. Adinkrah, *Folk Law Is the Culprit: Women’s ‘Non-Rights’ in Swaziland*, 30-31 J. LEGAL PLURALISM 223 (1990-91)). One example of this is the practice of female genital mutilation, to which two million primarily African women, girls, and infants are subjected each year. Patricia A. Broussard, *Female Genital Mutilation: Exploring Strategies for Ending the Ritualized Torture; Shaming, Blaming, and Utilizing the Convention against Torture*, 15 DUKE J. GENDER L. & POL’Y 19, 23 (2008).

140. See Ghai, *supra* note 5, at 774 (discussing famine and the lack of political freedom in Africa).

141. Makau wa Mutua, *Conflicting Conceptions of Human Rights: Rethinking the Post-Colonial State*, 89 AM. SOC’Y INT’L L. PROC. 484, 487 (1995).

142. Hager, *supra* note 52, at 37.

143. Oko *Consolidating*, *supra* note 61, at 585 (quoting SAMUEL DECALO, *COUPS AND ARMY RULE IN AFRICA: MOTIVATIONS AND CONSTRAINTS* 1 (2d ed. 1990)).

144. Ndulo *The Democratization Process*, *supra* note 134, at 321.

145. *Id.* at 329.

146. Oko *Consolidating*, *supra* note 61, at 575-76.

Critics also expressed a sentiment, so often heard in the United States, that there are too many lawyers. And while Africa certainly then and now does not have the vast numbers of lawyers that populate America, several commentators opined that too many of the best and brightest of Africa were being siphoned off into law when their talents would have been better turned to medicine, economics, or engineering.<sup>147</sup>

Perhaps the most dramatic example of backlash against law and development was the rise of the radical view of law and social change that developed at the law faculty at Dar-es-Salaam.<sup>148</sup> Finding its roots in Marxism, this view, abandoning the notion that law was benign and positive, deemed it instead to be an oppressive impediment to progress and equality, a by-product of exploitative societal economic forces.<sup>149</sup> This became the dominant political school of thought in Tanzania for decades to follow.<sup>150</sup>

In 1980, Professor Gardner reviewed the law and development movement with a damning indictment:

In the final analysis, a history of the law and development movement is rather sad. It is a history of an energetic but flawed attempt to provide American legal assistance and to transfer American legal models, which were themselves flawed. It is a history of poorly understood interactions between these legal models, with their strengths and limitations, and complex patterns of authoritarian, socialist or democratic change in the Third World.<sup>151</sup>

Around this time, Western assistance in the developing world tapered off dramatically, devastating to African law schools “dependent on donor finance.”<sup>152</sup> This coincided with:

the catastrophic decline in overall levels of funding of the social sectors in real terms. This problem has been exacerbated by the austerity measures demanded by the World Bank and IMF. The protection of relative social expenditure must be viewed in relation to the massive absolute reduction in public spending simultaneously insisted upon by the same institutions. Stabilisation meas-

---

147. Hager, *supra* note 52, at 35.

148. Ghai, *supra* note 5, at 770.

149. *Id.* at 771. Professor Ndulo argued that it was the perception that lawyers’ orientation was favorable to the wealthy class that invited the Marxist critique in Africa. Muna Ndulo, *Understanding Reform with Special Reference to Africa: Perspectives on Reform*, at 10 (Jan. 24-30, 2004) (Paper presented at the Fifth Annual Global Development Conference Understanding Reform in Delhi, India) [hereinafter Ndulo *Understanding*].

150. Ghai, *supra* note 5, at 770.

151. GARDNER, *supra* note 24, at 280-81.

152. Ndulo *Internationalisation*, *supra* note 13, at 38.

ures often require governments to include strict cash budgeting, and places limits on the amount of money the government borrows for public expenditure requirements. Reduced educational expenditures result in reduced support for law schools throughout Africa.<sup>153</sup>

Many scholars deemed the law and development movement to be at an end.<sup>154</sup>

However, Professor Gardner also noted, “American legal instrumentalist ‘know-how’ carried abroad returned with a refreshing acknowledgment of how little was really known.”<sup>155</sup> Perhaps, as in a well-crafted Socratic dialogue, the student of law and development, having all preconceptions shattered, was now ready to start anew, humbled and open-minded.

## V. THE RESURRECTION OF LAW AND DEVELOPMENT AND HOW LAWYERING SKILLS CAN CONTRIBUTE

“[M]uch time has passed since the demise of the Law and Development movement, and the time has come to reassess the viability of new methods and the active exchange of views between . . . legal educators. New developments in the advocacy and use of active teaching make this reassessment possible.”<sup>156</sup> The 1990s and the first decade of the 21st century have seen what many commentators have characterized as a renaissance of the law and development movement and a resurgence of American and international institutions willing to fund the involvement of Western lawyers in African development activity and legal education.<sup>157</sup>

One significant event in this renaissance was the inauguration of the ABA Africa Law Initiative Sister Law Program which commenced with a meeting in 1994,<sup>158</sup> sent eight U.S. clinicians to Ethiopia, Kenya, Tanzania, and Uganda in 1996,<sup>159</sup> and followed up by sponsoring additional conferences.<sup>160</sup> Additional efforts are mostly funded by the United States Agency

---

153. *Id.*

154. Maisel Working Paper, *supra* note 42, at 10.

155. GARDNER, *supra* note 24, at 281.

156. Richard J. Wilson, *The New Legal Education in North and South America*, 25 STAN. J. INT'L L. 375, 423 (1988-1989).

157. *See, e.g.*, McKen Carrington, *Legal Education in Malawi*, 23 T. MARSHALL L. REV. 55, 55 (1997-1998) (describing programs funding Western professors in Africa); *see also* Michael Wolf, *Universities Vital to Democracy in Africa*, CHRON. OF HIGHER EDUC., Oct. 10, 1997, at B13, available at <http://chronicle.com/che-data/articles.dir/art-44/issue-07.dir/0760>; Maisel Working Paper, *supra* note 42, at 11 (discussing funding programs for Western professors in Africa).

158. Jessup, *supra* note 85, at 390.

159. Maisel Working Paper, *supra* note 42, at 17 n.46.

160. *Id.*

for International Development (USAID), the United States Information Agency (USIA), the Fulbright Program, the Ford Foundation, and individual U.S. law schools and professors.<sup>161</sup> Indeed, East African law faculty administrators are welcoming and inviting Western professors to their law schools, provided the experts can be funded by external sources.<sup>162</sup>

Now recognizing that much of the heart of the critique proffered by Trubek and Galanter and their colleagues was spurred by the hypocrisy of American political events of the time, such as the war in Vietnam and Watergate,<sup>163</sup> the role of law and lawyers in East African and other developing nations is coming to be viewed with a greater sense of equanimity. Law is increasingly seen as a “value-neutral tool”<sup>164</sup> and “[l]awyers may shield the *status quo* or labor in the forefront of social change. They may concern themselves only with private gain or become active in the development process.”<sup>165</sup> Just as the law and development movement was criticized in the 1970s as ethnocentric, naïve legal liberalism, or legal imperialism, similar questions are being asked about the extremes of cultural relativism and sole reliance on “African solutions to African problems.”<sup>166</sup> Professor Ndulo posited the following in 1998:

Many post-independence dictatorships (and indeed the African one party system of governance in Zambia, Kenya, Tanzania and elsewhere in Africa) were justified on the grounds that they were a variant of democracy best suited to the peculiar African circumstances, and, at the same time, a natural facilitator for economic growth and national unity.<sup>167</sup>

In 2003, he continued that “[t]oday it is quite evident that these justifications had little to do with ‘African concepts of governance’ and more with the consolidation of political power through the elimination of all political opposition.”<sup>168</sup>

Professor Ndulo suggests an alternative:

---

161. *See id.* at 21-26.

162. Okech-Owiti Remarks, *supra* note 33. Dean Okech-Owiti was particularly enthusiastic about having such visitors at his school in its present circumstances of a long-standing hiring freeze. *Id.*

163. Trubek & Galanter, *supra* note 130, at 1092.

164. Robert Seidman, *Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa*, in *AFRICA AND LAW* 3, 3 (1968).

165. Hager, *supra* note 52, at 37.

166. Ndulo *The Democratization Process*, *supra* note 134, at 342.

167. Ndulo *The Democratic State*, *supra* note 133, at 80.

168. Ndulo *The Democratization Process*, *supra* note 134, at 342.

Too many Africans are trapped in conditions of grinding poverty, face daily violence and abuse, suffer under corrupt and oppressive regimes, and are condemned to live their lives in squatter settlements or rural slums with inadequate sanitation, schooling, and health facilities. All of these factors contribute to conflict, poverty, instability, and misery. Underlying the prevalence of conflict in Africa is a crisis of governance and poverty leading to a scramble for resources. Good governance would make a major contribution to the reduction of conflict and poverty. It would do this by creating an environment conducive to sustainable development, thereby reducing poverty—the root cause of many African conflicts. . . . Human rights and sustainable development are interdependent and mutually reinforcing. In conditions of prosperity, conflicts are less likely to arise and more likely to be resolved quickly and peacefully if they do arise.<sup>169</sup>

He further champions the importance of democratic institutions of government, institutions in which well-trained lawyers could play an integral role:

A 1993 study of 233 internal conflicts around the world concluded that democracies had a far better record of peacefully managing such conflicts than alternative systems. The empirical fact that democracies are far less likely to go to war with each other than other regimes further substantiates the relationship between poverty and conflict, and their impact on the democratization process. Authoritarian or totalitarian systems simply do not have the institutions by which conflicts in society can be peacefully expressed and resolved. Dictatorships generally try to deal with conflicts by ignoring or denying them, or by suppressing them using state coercive apparatus. While such methods may indeed control conflicts (albeit usually at a severe cost), they generally cannot resolve them. . . . In contrast, . . . democracy operates as a conflict management system.<sup>170</sup>

Professor Ndulo concludes that “[t]he future of democracy in Africa depends on the development of political systems that give people a sense of

---

169. *Id.* at 316-17.

170. *Id.* at 323-24 (citing DEMOCRACY AND DEEP-ROOTED CONFLICT: OPTIONS FOR NEGOTIATORS 22-23 (Peter Harris & Ben Reilly eds., 1998)); see also ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, 2 DAC ORIENTATIONS ON PARTICIPATORY DEVELOPMENT AND GOOD GOVERNANCE 12-13 (1994); U.N. DEVELOPMENT PROGRAM, THE SHRINKING STATE: GOVERNANCE AND HUMAN DEVELOPMENT IN EASTERN EUROPE AND THE COMMONWEALTH OF INDEPENDENT STATES (1997).

ownership of the political process”<sup>171</sup> and that African governments must use “the legal order” to effect these changes.<sup>172</sup> The rule of law must become “the best means of conflict resolution.”<sup>173</sup> “[A]ttitudinal changes are required to counteract the citizens’ skepticism about the democratic process. These solutions . . . call for creative and imaginative lawyers to assist in defining, enforcing, and enhancing the principles and standards of democracy.”<sup>174</sup> Scholars recognize both the positive and negative roles played by lawyers:

The legal profession, more than any other segment of society, is in the best position to lead African nations to these goals. Lawyers play a prominent role in checking arbitrary governmental power, protecting civil rights, and reforming legal institutions. Yet most observers have largely ignored this role that the legal profession must play in building African democracies. Unfortunately, lawyers too often have tainted themselves by their association with despotic regimes, thus requiring the legal profession to regain the public trust. . . . Ultimately, . . . despite their current weaknesses, lawyers are well suited to solve the problems that the transition from authoritarianism presents.<sup>175</sup>

Writing constitutions and establishing political instruments is not enough.<sup>176</sup> Lawyers must lead the charge to “dislodge anti-democratic sentiments developed during years of military rule.”<sup>177</sup>

Furthermore, scholars like Professor Ndulo report that the United Nations and multilateral lending institutions, such as the World Bank,<sup>178</sup> are attributing the lack of economic prosperity in Africa to the fact that foreign investors are deterred from doing business in Africa by conditions of instability and poor governance.<sup>179</sup> He further concludes that “[g]ood governance promotes the rule of law.”<sup>180</sup>

So then the questions become the same as those asked in American law schools: what is in the national or public interest, what is good government, and how can we encourage our graduates to concern themselves with seek-

---

171. *Id.* at 368.

172. Ndulo *Understanding*, *supra* note 149, at 7.

173. Oko *Consolidating*, *supra* note 61, at 614.

174. *Id.* at 583.

175. *Id.* at 573-74.

176. *Id.* at 614.

177. *Id.* at 614-15.

178. Ndulo *Understanding*, *supra* note 149, at 4.

179. Ndulo, *The Democratization Process*, *supra* note 134, at 326-37.

180. *Id.* at 328.

ing those answers?<sup>181</sup> How can we train our students to be more professional and effective, regardless of the legal avocation they ultimately choose?<sup>182</sup> Perhaps fueled by the African constitutional movement of the era, old tenets of the law and development philosophy begin to be expressed anew, but reframed.<sup>183</sup>

The present state of the law itself creates a need for an imaginative lawyer. The African lawyer must not only be competent to administer and operate the law as it is now but he or she must be equipped and willing to reform it. . . . [I]t is a lawyer's responsi-

181. Even recruiting lawyers to work in the public service or public interest is difficult, as, in many cases, it is only private practice that pays them a living wage. See *Oko Consolidating*, *supra* note 61, at 631. Professor Oko further states, "The legal profession has failed to mount effective training mechanisms that prepare and sensitize lawyers to their obligations in a democracy. The narrow focus of legal education disables lawyers from understanding the society in which they live and practice." *Id.* at 633.

182. Professor Oko asserts that there is insufficient ethics training in African law schools. *Id.* at 635-36.

183. McKen Carrington, *Legal Education in Malawi*, T. MARSHALL L. REV. 55, 59-60 (1997) ("As the sole producer of lawyers in Malawi, the importance of the law department cannot be over-emphasized. Indeed, the success or failure of recent political, economic, and legal reforms undertaken by the nation is heavily dependent upon the lawyers produced by the law department. Without lawyers to serve in Malawi's judiciary, legislature, executive, and private sectors, the promise of a new emerging democracy may never be realized."); see also Wolf, *supra* note 157, at B13.

Without well-trained lawyers, the human-rights provisions in the new constitutions in Africa will not be fully understood or enforced; and without lawyers, these countries will not be able to . . . fully develop their national economies. As before, there will not be full checks on government powers. In fact, the development of a legal framework and the training of people to make it function are firm requirements for a successful democracy. What could be a more important demonstration that the University of Dar es Salaam had fully changed from its old role in socialist Tanzania than an excellent faculty of law? This will cost some money—but it will be money well spent.

Since 1994, the American Bar Association's African Law Initiative has worked with law schools in eight African countries, including the University of Dar es Salaam Faculty of Law. With funding from the United States Information Agency and the volunteer participation of deans and professors from American law schools, this project has worked to create 'sister law school' linkages between African and American law schools. It has assisted with curriculum development, faculty training in clinical teaching methodologies, and library development. The deans and faculty members at these African law schools know that their institutions have taken on increased importance, and they are working with extremely limited resources to update their curricula and methods of teaching to train lawyers to meet the needs of this new era. Some progress has been made, but the challenges and the resource constraints are daunting.

All of the talk about human rights and democracy and free markets is hollow without a functioning legal system and trained lawyers to run it and to explain it to a wider public. The law schools at the universities are therefore vital—as are the universities as a whole. More than simply surviving, they must thrive.

*Id.* In particular, American law professors no longer felt compelled to avow their "self-estrangement." "Teaching in a developing country can be among the most rewarding experiences of an academic career. There is an enormous sense that one is part of a larger process of development, and that what goes on in the classroom can actually make a difference in policy and reform." Cohn, *supra* note 120, at 108.



bility to help the policy makers determine whether the rules adopted will bring the latter's objective to fruition.<sup>184</sup>

But this is not your father's law and development. There is an earnest search for means to ensure that the mistakes of the past are not repeated, and that the new law and development movement is not another unfunded mandate with lofty aspirations and little, or at least unsustainable, means of achieving them.<sup>185</sup> As one member of the new law and development vanguard offered, "The lessons of the failure of 'legal liberalism' as a paradigm for law faculty working in the 1960's are important in considering whether law faculty working in developing countries today are making the same mistakes or similar ones."<sup>186</sup> Indeed, there is an emerging body of scholarship<sup>187</sup> intended to subject the renewed movement to a healthy scrutiny lacking in its first iteration.<sup>188</sup>

In response to the most valid points of the movement's critics, the revived law and development activities are characterized by an enthusiasm tempered by a new respect for the vital importance of cultural sensitivity and inclusion of local stakeholders at every level of programmatic development. "[T]he methodology needs to be more collaborative."<sup>189</sup> As Stuart R. Cohn, an early American participant in the revived law and development movement noted, "I have learned that a here's-how-it's-done approach is the antithesis of an effective foreign training or teaching program"<sup>190</sup>:

[B]oth U.S. funders and the consultants they support need to involve colleagues from the host country from the outset in establishing the purpose and the goals for projects. Further, the overseas visitors must thoroughly immerse themselves in the local context and culture early in the process and then maintain a high level of collaboration throughout all phases to insure that the reforms they recommend can work in the local context. Finally, particular attention should be paid prior to and during the collabora-

---

184. Ndulo *Understanding*, *supra* note 149, at 8-9.

185. See Maisel *Collaboration*, *supra* note 99, at 469 (urging an examination of the mistakes of the previous law and development movement).

186. Maisel Working Paper, *supra* note 42, at 30.

187. This author hopes that the present article will contribute to this emerging body of scholarship.

188. Maisel Working Paper, *supra* note 42, at 30.

189. Maisel *Collaboration*, *supra* note 99, at 465.

190. Cohn, *supra* note 120, at 101.

tion to factors that will help sustain the reforms after the formal consultation has ended.<sup>191</sup>

The African collaborators, not the American, should take the lead in setting the agenda.<sup>192</sup> “The growing number of emissaries of U.S. laws and technology can make enormous contributions to growth and development in foreign countries. But without an understanding of-and focus upon-local aspects, our efforts may too often be abstract and unsatisfactory excursions.”<sup>193</sup>

One such collaboration that has met with success is that of Professors Alphonso Gaskins and Sharon Barnett, who in 1994 assisted in founding a new Kenyan law school at Moi University.<sup>194</sup> Their efforts at collaboration and consensus building resulted not only in their successful championing of a new law school at Moi built on a clinical education model, but in Professor Gaskins being invited to stay on as the new law school’s first dean and in the law school’s sustenance after his departure:<sup>195</sup>

Professor Gaskins . . . had a specific goal in mind for the new law school he was asked to help create at Moi University in Kenya. He wanted to establish it as the first clinically based law school in Africa. Instead of simply announcing that this was the plan, however, he understood that it could not succeed without a total buy-in from his hosts. He therefore went about obtaining that support *before* actually beginning to implement his plan. As a result, he did not encounter significant opposition or resistance to utilizing such a radically different model for legal education. His experience . . . underscores how important it is for the hosts to play a significant role in establishing the goals and agenda.<sup>196</sup>

When asked to name the secrets of Moi’s success, Professor Gaskins cited the talent and enthusiasm of the school’s inaugural faculty, the importance of the bridges built with other departments of the university, and the support of outside organizations and individuals.<sup>197</sup> As Professor H.W.O. Okoth-Ogendo of the University of Nairobi Law Faculty confirms, “Developing

---

191. Maisel *Collaboration*, *supra* note 99, at 465-66.

192. Maisel Working Paper, *supra* note 42, at 30.

193. Cohn, *supra* note 120, at 109.

194. Maisel *Collaboration*, *supra* note 99, at 487.

195. *Id.* at 487-88.

196. *Id.* at 492 (emphasis added). Professor Maisel quotes Professor Barnett as explaining that their efforts at Moi were certainly aided by growing sentiment in Kenya for change: in the country’s constitution, in its legal system, and in its modes of practice, change particularly advocated by champions of women’s rights. Maisel Working Paper, *supra* note 42, at 44 n.116.

197. Maisel Working Paper, *supra* note 42, at 45.

linkages between and among universities is becoming an important thing in the world today.”<sup>198</sup> Similarly, in describing the implementation of a clinical legal education program in Iraq, Professor Hamoudi states:

The . . . important lesson I learned from this experience is that imposing any form of education, or any specific program, upon an institution that is not prepared for or otherwise resistant to it will not be successful. Our program achieved modest success precisely because we were very flexible and open, both in designing the program and in implementing it. We relied throughout the project on continuous dialogue with the respective faculties and made frequent adjustments to our plan when they objected or as circumstances required. This flexibility and open communication were necessary not only to ensure faculty support, but also to ensure that our program harmonized well with the needs of the law students.<sup>199</sup>

In addition to exponentially increased attention to collaboration and bridge building, the law and development renaissance is marked by a revolution in pedagogical methods. “A . . . distinction between Law and Development and the contemporary active teaching movement is that the active teaching method provides a clearer and more explicit statement of the objectives of legal education.”<sup>200</sup>

Thus, new developments at law schools in the United States—the discovery of America’s poor, the development of clinical programs, the training of nonlawyers, the emphasis on quasi-legal, nonadversary processes, and the discovery or rediscovery of social and behavioral science and social policy as lawyers’ tools—could bring a few of our most progressive law schools closer to the needs of the most promising law faculties in the LDC’s [less developed countries].<sup>201</sup>

Previously, when the law and development movement concerned itself with the reform of legal education to promote its societal goals, the focus was on the old chestnut “thinking like a lawyer”:

---

198. H.W.O. Okoth-Ogendo, University of Nairobi, Address to the Conference on the Pedagogy of Legal Writing in East Africa (Mar. 15, 2007) (on file with author) [hereinafter Okoth-Ogendo Address].

199. Haider Ala Hamoudi, *Toward a Rule of Law Society in Iraq: Introducing Clinical Legal Education into Iraqi Law Schools*, 23 BERKELEY J. INT’L L. 112, 133 (2005).

200. Wilson, *supra* note 156, at 443.

201. Thomas M. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?*, 1972 WIS. L. REV. 767, 796 (1972).

The legal development scholars produced critical appraisals of the law schools in Asia, Africa, and Latin America, arguing that by training lawyers to think more instrumentally, the schools could initiate change that would narrow the gap between the present performance of the legal profession and its developmental possibilities. Thus it was proposed that law schools study and explain the relationship between specific legal rules, doctrines, and procedures on one the hand, and national developmental goals on the other, urging their students to work to reform those laws and institutions that failed to further the goals.<sup>202</sup>

At a minimum, in order to be instrumental in furthering law and development goals, legal education must “emphasi[ze] . . . developing the ability to think clearly and critically rather than the memorization of rules of law”<sup>203</sup> fostered by the traditional *ex cathedra* pedagogical model, a “highly deferential, lecture-based educational format, [which], when applied exclusively, results in a certain passivity on the part of law students, [a] passivity [which] is not an admirable quality in any advocate in any jurisdiction.”<sup>204</sup> Professors Daniels and Trebilcock describe their view of an appropriate system of legal education as follows:

Formal legal education supportive of a procedurally oriented conception of the rule of law cannot be devoted either to a purely formalist perspective on legal education, which primarily emphasizes uncritical rote learning of existing substantive and procedural legal rules or to a single ideological conception of the rule of law in society, especially an ideology that immunizes the incumbent political regime or elite from external scrutiny and accountability. Instead, an effective formal legal education is likely to be ideologically or normatively pluralistic and should foster critical perspectives on ‘law in action’ or ‘law in society’ through clinical legal education and interdisciplinary and empirical teaching and research.<sup>205</sup>

Furthermore, as Professor Tewodros Alefe of the Mekelle University Law Faculty in Ethiopia states, “The study of law in Ethiopia has traditionally been a monologue or a dialogue between instructors and students in

---

202. Trubek & Galanter, *supra* note 130, at 1075-76.

203. Ndulo *Legal Education*, *supra* note 2, at 493.

204. Hamoudi, *supra* note 199, at 132.

205. Daniels & Trebilcock, *supra* note 3, at 117-18.

classrooms, with little or no time allocated to practice-oriented skills.”<sup>206</sup> Professor Shiv Dayal criticizes “[the traditional] brand of pedagogy [as] ‘doctrinal and didactic,’ ‘formalistic,’ ‘lacking in developmental perspectives’ which tends [sic] to curb ‘systematic and critical appraisal’ of the socio-legal reality and tangible development problems in the specific critical context.”<sup>207</sup> Stated in other terms:

The approach embraced . . . has laid much emphasis on theoretical abstraction of ideas. Students under the guidance of their teachers, engage in merely academic exposition of refined legal issues far removed from the practical settings underlying them. Consequently, students do not get the opportunity to assess the effect of legal theory on the legal system and on the lives of those it affects.<sup>208</sup>

Now it is eminently appropriate that the revived law and development movement have even more ambitious pedagogical goals. Chief Justice Oliver Wendell Holmes, Jr. stated:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.<sup>209</sup>

Professor Robert Morris states, “[s]tudents need to get grease on their hands—critical thinking mixed with practical doing,”<sup>210</sup> advice equally apposite for the American and the African fledgling lawyer. Thus, following the trajectory of American legal education, legal educators in Africa begin to embrace more progressive models of legal teaching and learning which preach that sharpened, logical legal thought avails little if the lawyer lacks the ability to communicate the ideas clearly to others. “A lawyer, in short,

---

206. Tewodros Alefe, Mekelle University, Remarks before the Conference on the Pedagogy of Legal Writing in East Africa (Mar. 16, 2007) (on file with author) [hereinafter Alefe Remarks].

207. Dayal *Dynamics*, *supra* note 86, at 99.

208. Ojienda & Oduor, *supra* note 31, at 50.

209. OLIVER WENDELL HOLMES, JR., *Lecture I*, in *THE COMMON LAW 5* (Mark DeWolfe Howe ed., Belknap Press of Harvard U. Press 1963) (1881).

210. Robert J. Morris, *Globalizing & De-Hermeticizing Legal Education*, 2005 *BYU EDUC. & L.J.* 53, 74.

must not just learn to think like a lawyer, he or she must learn to behave like a lawyer”<sup>211</sup>:

[L]aw professors have mistaken one aspect of lawyering, the cognitive or rational dimension, to be the whole of lawyer performance, and they have structured legal education accordingly. To overlook this conceptual barrier, [sic] requires looking beyond the curriculum to the world of lawyering in all its dimensions as the proper starting point for evaluating a law school’s academic program.<sup>212</sup>

It has been recognized that “many lawyers are ill equipped to efficiently and competently provide for their needs for development generally.”<sup>213</sup> Thus, this article proposes that the development of an effective lawyering skills pedagogy for East Africa is vital to the further progress of the law and development movement. “Law and development scholars in the instrumentalist mold have certainly been aware that . . . there is no perfect correspondence between law ‘on the books’ and law ‘in action.’”<sup>214</sup> The improvement of lawyering skills instruction is necessary to bridging that gap for Africa’s next generation of lawyers. In his article advocating for an increase in clinical legal education, Professor Iya lays out a useful blueprint, “[I]t should be recognised and emphasized:”

- that in addition to knowledge of legal doctrines and legal methods, lawyers need knowledge of all fundamental skills and values that competent, ethical and socially responsible practitioners use in solving problems;
- that lawyers need knowledge of the art of lawyering i.e. the process of acquiring those lawyering skills;
- that a significant amount of education and training in the art of lawyering should occur in schools;
- that law students must learn the art of lawyering through reflective (critique); live-client clinical education in a realist-setting under close supervision of experienced clinical teachers; and

---

211. John M. Burman, *The Role of Clinical Legal Education in Developing the Rule of Law in Russia*, 2 WYO. L. REV. 89, 107 (2002).

212. John O. Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 36 J. LEGAL EDUC. 189, 191 (1986).

213. Iya, *supra* note 63, at 28.

214. Burg, *supra* note 45, at 511.

- that professional responsibility on the part of law students require their sensitivity and positive contribution to social development through clinical programmes.<sup>215</sup>

The rise of new pedagogical methods is integral to the promotion of these values. Professor Joy Asiema observes:

Traditional methods of teaching law, particularly the lecture and Socratic methods [sic] continue to be applied today not only at the University of Nairobi's Faculty of Law but also in many other law schools worldwide. These may be suited to certain types of courses concerned mainly with substantive law. However, it is now being acknowledged that for students to acquire adequate skills and values that will equip them to be more effective and competent in their delivery of professional services, it is necessary to apply some form of clinical approach in the teaching of particular courses. . . .<sup>216</sup>

It is now further recognized that the delivery of this skills education must lie with the law faculties. Relying on the post-graduate law institutions, like the Kenya School of Law, and on the period of articling or pupilage, will not address the need:

Unfortunately, in many countries these institutes and colleges have not realized their objectives. As there is no full-time qualified practitioner on the staff, the plan to teach skills through a graded series of exercises is usually not in place. The institute has become a poor version of the university law school. Students attend lectures in various subjects, and the courses are increasingly taught as academic subjects. The only practical experience that students receive is through work at the various law firms to which the institutes are attached. Students are not allowed to appear in court. The trouble with such arrangements is that the practical skills which a student acquires depends on the enthusiasm and commitment of his or her supervisor within his or her assigned firm or government department. The average African law firm is small and often poorly organized. Generally, the experienced lawyers are too busy to assist in the development and training of the young lawyers. Moreover, in some cases, apprenticeship to members of

---

215. Iya, *supra* note 63, at 29.

216. Joy K. Asiema, *The Clinical Programme of the Faculty of Law of the University of Nairobi: A Hybrid Model*, at 8 (June 23-27, 2003) (Paper Presented at the First All Africa Clinical Legal Education Colloquium in Durban, South Africa) (on file with author).

the existing Bar may merely perpetuate the relatively low standards of old.<sup>217</sup>

Professors Ojienda and Oduor of Moi University opine, “The law office or the court house may not be the proper place for the instruction of students as they were not designed to perform such a function.”<sup>218</sup>

As was often the case in the United States, the development of a nascent, vibrant clinical legal education movement in Africa may serve as a bellwether for the emergence of a lawyering skills or legal writing pedagogy in the law schools. Arising from the ABA African Law Initiative Sister Law School Program, a workshop focusing on how clinical legal education could be adopted to African needs and context was held in 1996 in Addis Ababa<sup>219</sup> and since that time, clinical legal education has been on the rise as a pedagogical method in East Africa.<sup>220</sup> In some cases, the clinical professors take on the burden of legal writing professor as well. “Many students in the clinical program had never done any legal writing other than exam-writing, and so the clinical instructor was an ad hoc writing instructor as well.”<sup>221</sup> Early feedback from such programs indicates that the law students taught with teaching methodologies other than traditional lecture react with enthusiasm.<sup>222</sup>

Again, as has happened in the United States, while the clinical professors can play a crucial role promoting effective legal communication *in situ*,

217. Ndulo *Legal Education*, *supra* note 2, at 494. Anthony Monene of the Kenya School of Law also reports that many students have difficulty securing pupillage placements. Remarks of Anthony Monene, Kenya School of Law, to a delegation of American professors from the Conference on the Pedagogy of Legal Writing for East Africa (Mar. 13, 2007) (on file with author) [hereinafter Monene Remarks].

218. Ojienda & Oduor, *supra* note 31, at 51.

219. Jessup, *supra* note 85, at 391.

220. See generally Asiema, *supra* note 216 (describing the clinical legal education program at the University of Nairobi Faculty of Law); see also Daniels & Trebilcock, *supra* note 3, at 127 (“clinical education is becoming a more important part of a law school education [in English-speaking African countries]”). In 1978, a clinical legal education program was established at the University of Dar es Salaam. Iya, *supra* note 63, at 19. Uganda’s Law Development Center also has an active program which enumerates practical training as one of its stated goals. *Id.* at 20-21. University of Nairobi offers a “legal practice course into the second year with a court attachment program.” Peggy Maisel, *Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn from South Africa*, 30 *FORDHAM INT’L L.J.* 374, 378 n.19 (2007) [hereinafter Maisel *Expanding*]. Tewodros Alefe of Mekelle University Faculty of Law in Ethiopia reports that they have a clinical legal education program as well. Alefe Remarks, *supra* note 206. He reports that every Mekelle law student spends three months in his or her last semester of law school in an advocate’s office. *Id.* Perhaps most progressively, Kenya’s Moi University requires every student to take clinical legal education in order to graduate. Ojienda & Oduor, *supra* note 31, at 49.

221. Brook K. Baker, *Teaching Legal Skills in South Africa: A Transition from Cross-Cultural Collaboration to International HIV/AIDS Solidarity*, 9 *J. LEGAL WRITING INST.* 145, 150 (2003).

222. Maisel Working Paper, *supra* note 42, at 49.



the case can be made that the clinicians cannot do all that is necessary. A true, institutionalized lawyering skills course of instruction is needed. Like the 1996 Addis Ababa conference on clinical legal education, in 2007 a group of African and American legal educators with expertise in lawyering skills gathered together to explore how like clinical methodology, lawyering skills pedagogy could be more fully and effectively implemented in East Africa. Organized by Professors Laurel Oates and Mimi Samuel of the Seattle University School of Law, inspired by their significant teaching work in East Africa, particularly with the Ugandan judiciary, the conference had forty-eight American participants from law schools across the United States and from the American Bar Association, and twenty-seven African participants from seven nations.<sup>223</sup> Presentations covered a range of subjects including models for legal writing programs, the limits of transplanting U.S. models of teaching legal writing to other countries, learning theory, the nuts and bolts of legal pedagogy, the unique challenges posed in the African classrooms, and lawyering skills instructional efforts already underway in Africa.<sup>224</sup> American participants in the conference also toured several significant Kenyan legal institutions, including the Kenyan High Court, the University of Nairobi Faculty of Law, the Kenya School of Law, and two non-governmental organizations which advocate for the rights of women.

With the passage of time, this conference may emerge as a landmark event in the inauguration of new and dedicated international attention to create an effective lawyering skills pedagogy for East Africa and indeed may be illustrative of the importance of the promotion of lawyering skills in the entirety of the developing world. The conference was also the cradle of the new international legal writing organization Academics Promoting the Pedagogy of Effective Advocacy in Law (APPEAL), “an organization dedicated to promoting the exchange of ideas, information, and resources about the teaching of legal writing and effective advocacy among academics in the United States and academics in Africa.”<sup>225</sup> APPEAL has already sponsored several significant initiatives to support lawyering skills education in Africa, including scholarships to sponsor several African law instructors to attend the July 2008 Legal Writing Institute Conference, the discipline’s

---

223. See Conference Schedule for the Conference for Legal Writing Pedagogy for East Africa (on file with author) [hereinafter Conference Schedule] (listing conference participants and presenters).

224. See *id.* (listing titles and subject matter of conference presentations).

225. E-mail from Mimi Samuels, Co-President, APPEAL, to Kirsten Dauphinais and other members of APPEAL (Sept. 6, 2007) (on file with author).

preeminent gathering,<sup>226</sup> and a book drive for East African law school libraries.<sup>227</sup>

The participants in the Nairobi conference and the members of APPEAL, both African and American, bear witness to the reassertion of the law and development credo that well educated lawyers can promote nation building and human rights. George W.K.L. Kasozi, Dean of Uganda Christian University Faculty of Law, states that the “[i]mportance of writing effectively in advancement of human rights can not [sic] be overemphasized.”<sup>228</sup> Seeking the means to provide the fledgling African lawyer with the right tools for the job could be a useful starting point for a new and wiser role for legal educators in the law and development movement.

Moreover, whatever one’s normative take on the law and development movement, it is difficult to quarrel with Mother’s admonition that “Whatever is worth doing is worth doing well.” Perhaps Professor Franck put it best: “good law aids development; archaic law hinders it. Good lawyers help, bad lawyers do not.”<sup>229</sup> “[L]aw and legal institutions are themselves empty bottles. Their worth to society depends upon the quality of the wine poured into them.”<sup>230</sup> Michael Hager concludes:

[T]he performance of a legal system is no better than its practitioners. Lawyers are not only products of their environment and social milieu, but also of their training. Legal education, whether in a law school or under an apprenticeship system, delimits the scope of the lawyer’s activity and gives him certain tools to the exclusion of others.<sup>231</sup>

## VI. CONDITIONS AND CHALLENGES FACING LAWYERING SKILLS PEDAGOGY IN EAST AFRICA TODAY

In his discussion of his experience teaching lawyering skills in South Africa, Professor Brook Baker lays out a list of differences between teaching law in South Africa and the United States.<sup>232</sup> This list, with a few re-

---

226. E-mail from Mimi Samuels, Co-President, APPEAL, to Kirsten Dauphinais and other members of APPEAL (Apr. 8, 2008) (on file with author).

227. E-Mail from Michele Butts, Chair, APPEAL Book Exchange Committee, to Kirsten Dauphinais and other members of the Book Exchange Committee (Mar. 11, 2008) (on file with author).

228. George W.K.J. Kasozi, Uganda Christian University, Paper Delivered to the Conference on the Pedagogy of Legal Writing in East Africa (Mar. 16, 2007).

229. Franck, *supra* note 201, at 788.

230. Hager, *supra* note 52, at 37.

231. *Id.* at 38.

232. Baker, *supra* note 221, at 147-48.

gional adjustments, serves as a starting point for delineating the challenges facing a lawyering skills professor in East Africa:

(1) teaching undergraduates; (2) teaching students for whom English is a second, third, or fourth language; (3) teaching students who, because of Bantu education, have had limited exposure to reading, analysis, and writing; (4) teaching students from tribal and religious backgrounds, e.g. Zulu, Muslim, and Hindu, with which I have little familiarity; (5) teaching students in a legal system that blends Dutch-Roman law, English common law, customary/tribal/religious law, and a new human rights constitution; (6) teaching students within a legal system and a legal academy that have historically used legal formalism to mask judicial power; (7) teaching diverse students who have had very limited cross-racial interaction; (8) teaching students under severe resource constraints; (9) teaching students in an educational culture that is not student-centered, that is lecture-based, and that favors passivity and deference; (10) teaching in a society where cultural tradition generate unfamiliar legal disputes; and (11) teaching in cultures that value oracy over literacy.<sup>233</sup>

As when legal education began in East Africa, the law degree is an LLB; students are, for the most part, young, lacking in experience and the broad-based benefits of a liberal arts college education. As Expedit Kkaaya of the Law Development Centre of Uganda explains, “[The] background of our students in writing is concerning . . . [W]riting is not stressed in secondary school.”<sup>234</sup>

The in-class challenges Professor Baker lists would be familiar in many East African law schools as well:

There were no first-year skills programs. Instead, students took a regime of full-year, huge lecture courses (200-500 students in a

---

233. *Id.* Significant resource constraints certainly remain:

[F]unding for education is threatened by the failure of government to maintain budget allocations in the face of economic decline and the need to switch domestic resources to meet debt-servicing requirements. This constraint is particularly significant in Africa where almost all law schools are state-funded institutions. It has left the future of educational programs dependent on donor finance. . . . Reduced expenditures on education have resulted in reduced support for law schools throughout Africa. This is compounded by increased pressure to take on much larger numbers of students into the existing facilities. In fact, many law schools have doubled their intake of students during the last decade while not making similar adjustments to numbers of faculty, libraries, etc. These changes have adversely affected the learning environment.

Ndulo *Legal Education*, *supra* note 2, at 496-97.

234. Expedit Kkaaya, Law Development Centre of Uganda, Remarks at the Conference on Legal Writing Pedagogy in East Africa (Mar. 15, 2007) (on file with author).

class) in which they passively took notes. Many could not afford course materials, the library resources were scandalous, and frequently students could not understand the dialect of the instructor. . . . [F]or the most part students had few opportunities to actively engage in legal analysis or to discuss the material they were studying. As a consequence, the failure rate for written exams was extraordinarily high—in some classes . . . as high as seventy-five percent! . . . [S]tudents took required courses only, and it was not until the final year that they had a skills course, called Professional Legal Training, which included some copycat legal drafting and a two-week moot court program. This program required unguided library research and unguided writing of Heads of Argument in preparation for a fifteen-minute oral argument before a faculty member. Students were not permitted to collaborate with each other or to seek advice from faculty, there was no library instruction, there were no research and writing textbooks. The judges graded the Heads of Argument, but provided no written feedback.<sup>235</sup>

Despite the attention paid to the issue by the early law and development scholars:

[L]egal training in most African countries today is said to be overly formalistic and rule-based so that students do not receive the opportunity to cultivate flexibility and creativity in legal thinking, thus arguably limiting their ability to address the legal problems

---

235. Baker, *supra* note 221, at 149. Professor Zecharias Fassil also reported very large numbers of students in the lawyering skills course he teaches at Haramaya University—240 in a class. Zecharias Fassil, Remarks at the Conference on Legal Writing Pedagogy in East Africa (Mar. 15, 2007) (on file with author) [hereinafter Fassil Remarks]. Matthew Cavell reported 320 students' participation in the legal writing course he taught at Haramaya. Matthew Cavell, Remarks at the Conference on Legal Writing Pedagogy for East Africa (Mar. 15, 2007) [hereinafter Cavell Remarks]. Dean Okech-Owiti, acting dean of the University of Nairobi Faculty of Law, reported an enrollment of 130-170 students in that faculty's legal writing classes. Okech-Owiti Remarks, *supra* note 33. Dean George Kasozi reported a class size of 130 students in courses at Uganda Christian University's Law Faculty that teach legal writing. E-mail from George W.K.L. Kasozi, Senior Lecturer and Dean, Uganda Christian University Faculty of Law, to Kirsten A. Dauphinais, then Assistant Professor of Law, University of North Dakota School of Law (July 26, 2007) (on file with author) [hereinafter Kasozi E-mail]. See also Ndulo *Legal Education*, *supra* note 2, at 492 (characterizing teaching loads for African law professors as "heavy").

With regard to textbooks, Edwin Abuya reports that at Moi University Faculty of Law in Kenya, the students can access textbooks for legal writing courses in the library, but seldom own their own copies. Telephone Interview with Edwin Abuya, Instructor, Moi University Faculty of Law and then Visiting Assistant Professor of Legal Writing at Seattle University School of Law (Aug. 27, 2007) (on file with author) [hereinafter Abuya Telephone Interview]. Dean George Kasozi reports that at Uganda Christian, approximately 30% of students have access to legal writing textbooks, although a few copies are available in the school library. Kasozi E-Mail, *supra* note 235.

that arise as a result of the interaction between local and foreign contexts.<sup>236</sup>

The lack of material resources provides perhaps the first line of struggle. This includes not only teaching and writing resources, but a lack of basic access to the materials of the law itself.<sup>237</sup> Professor Edwin Abuya of the Moi University Faculty of Law states, “People need to go electronic . . .

---

236. Daniels & Trebilcock, *supra* note 3, at 127. Professors Daniels and Trebilcock do go on to note that “[o]ne positive change in African law schools is that education in international human rights subjects is receiving more attention,” and indeed various sources seem to bear that out. *Id.*

Matthew Cavell remarked that in Ethiopia, as is still sometimes the case in the United States, there is little interest on the part of the faculty, university administration, or Ministry of Education in promoting the teaching of lawyering skills. Cavell Remarks, *supra* note 235. Even where lawyering skills is taught, Dean George Kasozi confirms that at Uganda Christian University, the lecture method, coupled with individual assignments, is the predominant teaching methodology. Kasozi E-mail, *supra* note 235.

237. See Cohn, *supra* note 120, at 104 n.10. Printed law can be especially hard to acquire: In Uganda, as I learned is true in many less developed countries, it is extremely difficult to get hold of statutes and regulations. There is a government printing office available for public purchase of documents, but that office is often unable to produce requested material. I asked on numerous occasions whether the problem was financial. The usual reply was that finances were not the problem, that the unavailability of statutes and regulations is simply a way of life. One of the most appreciated byproducts of our course was a notebook that included all the relevant statutes and regulations.

*Id.* This lack of legal resources is reported in Ethiopia as well by Matthew Cavell, then of the Haramaya University Faculty of Law. Cavell Remarks, *supra* note 235; see also Ndulo *Legal Education*, *supra* note 2, at 492 (discussing the inaccessibility of legal resources).

Professor Ndulo continues: [I]n order for Africa to take full advantage of the technological advances, it is necessary to develop indigenous capacity in this field. Only then can African law schools gain access to the legal information that is available. *Id.* at 499. A promising development along these lines is the advent of LawAfrica in 1999. *Brief History of LawAfrica*, <http://www.lawafrica.com/history.asp> (last visited September 12, 2009). It partners with LexisNexis Butterworths “to fill the gap in legal publishing in East Africa” and offers the widest collection of law reports and legal resources in East Africa. *Id.*

There have been notable developments in the field of legal publishing: Firstly, the World Bank has financed a legal reform project in Kenya with the object of computerizing the Judiciary. This is seen as essential in putting in place the necessary infrastructure for efficiency in the administration of justice. Secondly, the Kenya Law Report Commission has initiated a pilot project to publish Law Reports that had remained unpublished since 1978. It is anticipated that by the end of 2004, the Law Reports for 2002 would have been published. And lastly, . . . LawAfrica Ltd. has recently published up-to-date print and CDROM formats of the East Africa Law Reports. The same are available at an equivalent of US \$254 per pack. This is a landmark development especially in relation to the use of digital technologies to publish regional case law.

Dennis Aganyo Onwonga, *LawNet Initiative: A Case for the East African Legal Information Institute*, at 8, available at [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2003\\_1/onwonga/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2003_1/onwonga/) [hereinafter Onwonga *LawNet*]. Professor Onwonga’s article further describes the East African Legal Information Institute (EALII), which has the goal of “undertak[ing] the computerisation of primary and secondary legal materials covering the East African region and converting it to a consistent format with a generalised set of search and hypertext facilities.” *Id.* at 10. He further emphasizes the importance of investment in and development of the sub-Saharan African internet. *Id.* at 14.

[law students] cannot conduct meaningful research.”<sup>238</sup> His law school has “a reading room, not a library.”<sup>239</sup> “From nation to nation, the problems are very similar. The difficulties obviously lie in arranging the supply of judgments and in organizing adequate editorial and printing services.”<sup>240</sup> Additionally, the kinds of technological aids to teaching taken for granted by Western professors, such as overhead projectors and in-class access to internet display, are also often lacking in East Africa.<sup>241</sup>

East African law instructors remain underpaid and overextended, often needing to take outside employment in order to make ends meet.<sup>242</sup> This leaves little time for academic scholarship, thus a necessary “forum for [the] discussion” of important legal ideas is missing.<sup>243</sup> Furthermore, “[I]ow salaries, adjunct status, heavy teaching demands, and the extensive outside practices of most law faculty also act as disincentives to the preparation of new course approaches and materials.”<sup>244</sup> Finally, low salaries are a significant impediment to the recruitment and retention of qualified law teachers.<sup>245</sup>

---

238. Edwin Abuya, Moi University Faculty of Law, Remarks at the Conference for Legal Writing Pedagogy in East Africa (Mar. 15, 2007) (on file with author) [hereinafter Abuya Remarks]. Professor Abuya reports that only some students at Moi have personal computers and many students borrow computers or go to internet cafes to complete written assignments. Abuya Telephone Interview, *supra* note 235. He further reports that Moi has no computer lab and that all internet access his students enjoy would be dial-up and not wireless. *Id.* Professor Onwonga also notes a “shortage of workstations and insufficient hardware within law schools.” Onwonga *Law-Net*, *supra* note 237, at 14. Professor Abuya opines that even partnering with U.S. law schools for the purpose of having access to passwords for electronic databases would be enormously helpful to lawyering skills pedagogical efforts. Abuya Remarks, *supra* note 238.

239. Dean George W.K.L. Kasozi reports that thirty percent of his students at Uganda Christian have access to computers, although the school does have a computer lab and offers further access to computers at the university’s Law and Health Sciences Library. Kasozi E-Mail, *supra* note 235. However, the school cannot afford to provide printing for its students due to the great expense, so students download needed material and then print it at secretarial bureaus. *Id.* Professor Ndulo confirms,

Large numbers of students can read case law and other legal materials more efficiently by use of a computer rather than having them queue up for access to a limited number of books in the library. The problem in Africa is the ability of universities to acquire the computers and software that is needed to make this possible.

Ndulo *Legal Education*, *supra* note 2, at 499.

240. Abuya Remarks, *supra* note 238.

241. Alan Milner, *The African Law Reports*, 61 LAW LIBR. J. 11, 11 (1968). Forty years later, Dr. Milner’s observations still remain apt.

242. See Abuya Telephone Interview, *supra* note 235 (describing technical challenges at Moi University Faculty of Law).

243. Abuya Remarks, *supra* note 238. Professor Okoth-Ogendo confirmed that these conditions of low pay prevail at his faculty at the University of Nairobi as well. Okoth-Ogendo Address, *supra* note 198.

244. Abuya Remarks, *supra* note 238.

245. Wilson, *supra* note 156, at 447.

246. Ndulo *Legal Education*, *supra* note 2, at 501; see also Ojwang & Salter *Legal Education*, *supra* note 91, at 87 (arguing that low pay renders it “difficult to retain a stable staff.”). Sala-

The dauntingly high faculty to student ratios is a significant impediment to the implementation of one of the basic tenets of sound legal education, giving feedback on student performance. Professor Terry LeClercq explains the value of getting feedback:

Knowing what you know and don't know focuses learning. Students need appropriate feedback on performance to benefit from courses. When getting started, students need help in assessing existing knowledge and competence. In classes, students need frequent opportunities to perform and receive suggestions for improvement. At various points . . . , and at the end, students need chances to reflect on what they have learned, what they still need to know, and how to assess themselves.<sup>246</sup>

The numbers also impede another bedrock pedagogical technique of lawyering skills instruction: one-on-one student conferencing.<sup>247</sup> While many African law schools have a culture of offering summative evaluation in the form of final examinations in law courses, it is formative evaluation during the course of the semester that is most helpful to the development of lawyering skills and most challenging for the professor to provide in classrooms where he or she is burdened by too many students.<sup>248</sup>

As crucial as effective legal writing education is to legal education in the United States, it may well be exponentially more important to the training of lawyers in Africa. As Professor Baker describes in the South African context:

The absence of a writing pedagogy was incapacitating for Black African students, most of whom spoke English as a second or third language and had had little opportunity under Bantu education to learn basic English, let alone to have any real experience in critical reading, textual analysis, and composition. As a consequence, some students tried to compose their exams mentally in Zulu and then simultaneously translated back into English with predictable,

---

ries for professors in Ethiopia, Tanzania, Uganda, Malawi, and Ghana average \$400 to \$500 a month. Thomas Geraghty & Emmanuel Quansah, *African Legal Education: A Missed Opportunity and Suggestions for Change: A Call for Renewed Attention to a Neglected Means of Securing Human Rights and Legal Predictability*, 5 LOY. U. CHI. INT'L L. REV. 87, 98 (2007-2008).

246. Terry LeClercq, *Principle 4: Good Practice Gives Prompt Feedback*, 49 J. LEGAL EDUC. 418, 418 (1999).

247. Abuya Telephone Interview, *supra* note 235. Professor Abuya reports that it is "very difficult to have one-on-one discussion with students." *Id.*

248. LeClercq, *supra* note 246, at 421-22.

disastrous results given the enormous incongruities of grammar, diction, and syntax.<sup>249</sup>

Professor Zecharias Fassil and Matthew Cavell report that the same conditions prevail in Ethiopia.<sup>250</sup> Professor Baker's colleague Tefferi Yishak Kassa states that this language difficulty renders much of the legal writing instruction offered "irrelevant."<sup>251</sup>

Unfortunately, another grave difficulty which cannot be ignored is that the promotion of an active and empowered class of attorneys might place those lawyers and the instructors who teach them in jeopardy with the state. "[O]nce the obstacle of a passive legal profession is removed, instrumentalist solutions will play themselves out,"<sup>252</sup> thus lawyers are "frequent[ly] harass[ed] by the military."<sup>253</sup> In some ways reminiscent of colonial authorities dragging their feet regarding the education of black lawyers pre-independence, there is anecdotal evidence that government authorities stand as a powerful force against the reform or improvement of legal education. Professors have faced government disapproval of scholarly research.<sup>254</sup> As in India sixty years ago, recent pro-democracy activity in Pakistan, Kenya, and Zimbabwe amply demonstrates that, just as the earliest law and development scholars envisioned, there are myriad examples of lawyers advocating courageously for human and civil rights.<sup>255</sup> In some developing na-

249. Baker, *supra* note 221, at 150.

250. Fassil Remarks, *supra* note 235; Cavell Remarks, *supra* note 235.

251. Tefferi Yishak Kassa, Mekelle University, Remarks at the Conference for Legal Writing Pedagogy for East Africa (Mar. 16, 2007) (on file with author) [hereinafter Kassa Remarks]. Most students in Ethiopia speak Amharic or a regional dialect and most legal instruction is in English. *Id.*

252. Burg, *supra* note 45, at 511.

253. Oko *Consolidating*, *supra* note 61, at 631.

254. Ghai, *supra* note 5, at 776. Professor Ghai in 1987 commented, "In some countries, like Kenya or Malawi now or Uganda until recently, the environment for research is highly inhospitable due to the hostility of the government." *Id.*

255. See Pamela Constable, *Pakistan's Lawyers in the Front Lines*, WASH. POST, Nov. 19, 2007, at A12. The Washington Post gives a glimpse into the efforts of Pakistan's legal professionals:

[T]he black-suited lawyers of Pakistan have been at the forefront of the campaign against President Pervez Musharraf, boycotting courts across the country, protesting the emergency rule he imposed on Nov. 3. The strike has delayed thousands of bail hearings, lawsuits, and trials.

... 'How can you walk into a courtroom and address a judge as 'My lord' if he has taken an oath to a dictator?' demanded Asad Abbasi, a bar association leader in Islamabad who leads daily marches around the district court but sleeps in a different house each night, fearing arrest.

... [O]n many levels, Musharraf's... important adversary is Iktikhar Mohammed Chaudhary, the twice-deposed chief justice of the Supreme Court. After a battle of legal rulings and public protests that erupted when Musharraf first removed Chaudhry in March, the outspoken judge is now also under house arrest in the capital, enshrined as a democratic hero while Musharraf struggles to remain in power.



tions, government officials do not want to improve the ability of lawyers to communicate. “The procedural and substantive values that are associated with law are jettisoned at the convenience of those in power; law is a stick

---

. . . Judges have been deposed, arrested and required to sign loyalty oaths while the constitution is suspended. Hundreds of lawyers have been detained during demonstrations this month and some given jail terms under emergency laws. A small group of senior lawyers, mostly activists in Bhutto’s party who filed the legal challenges to Musharraf’s election, are being held in prison.

Pakistan has between 80,000 and 90,000 lawyers, an elite class in a country of high illiteracy and poverty. Protest leaders say 90 percent of them have joined the cause. Bar associations all over the country are boycotting proceedings at superior courts until further notice, and temporarily shut down district courts until early last week.

‘The political parties have their own interests, but the legal fraternity is united,’ said Sultan Mahmoud, president of the district bar association in the city of Rawalpindi. More than 100 of its 2,000 members are in custody under emergency laws. ‘We struggled against Musharraf in March and we succeeded,’ he said. ‘Now we are struggling again, and our bottom line is that military rule must end.’

*Id.*; see also Tad Dagherhart, *Keepers of the Gate*, in LEGAL TRENDS NETWORK, May 11, 2008 [sic], available at [www.legaltrends.net/world/2008-5/keepers-of-the-gate](http://www.legaltrends.net/world/2008-5/keepers-of-the-gate) (“Through the situation in Pakistan we can see the importance of lawyers in the role of peacekeeping.”); see also Matthew Solis et al., *Central and South Asia: Musharraf Imposes Emergency rule in Pakistan*, 15 No. 1 HUM. RTS. BRIEF 30, 37 (2007) (describing Pakistan’s struggle between President Musharraf and the legal profession); *Lawyers flee persecution in Zimbabwe*, SUNDAY STANDARD REPORTER, June 22, 2008, available at [www.sundaystandard.info/news/news\\_item.php?NewsID=3345&GroupID=1](http://www.sundaystandard.info/news/news_item.php?NewsID=3345&GroupID=1). The Sunday Standard of Botswana explained the oppression of lawyers in neighboring Zimbabwe:

Zimbabwean lawyers have not escaped the wrath of political violence visited on that country by the state and ruling party supporters.

This week the Law Society of Botswana hosted a Zimbabwean lawyer Andrew Makoni who is on the run, having fled his country after he learnt that his life was in danger.

Before he fled his country, Makoni and his partners at their law firm had been continually arrested and harassed by the state ‘only for being lawyers who, having taken our oath, dared to defend our clients.’

Addressing a press conference on Friday, Makoni said democratic space has shrunk, adding that the same violence that is meted against opposition activists has now been extended to human rights lawyers and Non-Governmental activists.

He said it has become practically impossible for human rights litigants in Zimbabwe to go about their work without interference from government and its supporters. Makoni said it would be a miracle if the coming presidential elections run-off was free and fair.

‘There is no clear separation of powers in Zimbabwe. Four months after elections the Members of Parliament have not been sworn in. They have not sat for a single day,’ he said. He said the situation is such that lawyers who remain inside the country will not be able to carry out their duties as that would put their lives in danger.

The same situation applied to judicial officers like magistrates, with two of them already arrested under suspicions that they were sympathetic to the opposition. ‘Some magistrates have also fled the country,’ said Makoni.

. . . To illustrate the intensity of political persecution on lawyers by the state, a Senior Advocate, Eric Matinenga, remains in jail for having represented the MDC leader, Morgan Tsvangirai, during the treason trial. . . .

*Id.*

with which to beat the opposition.”<sup>256</sup> Unfortunately, these acts of brutality and intimidation work:

Insecurity has fundamentally altered the way in which lawyers practice their trade. Lawyers place much premium on survival and are thus unable to discharge their obligations to the society. Fear weighs heavily in a lawyer’s decision to aggressively defend and protect rights and liberties. Far more concerned with staying alive than practicing law, lawyers devote most of their time devising survival strategies that will keep them out of harms [sic] way.<sup>257</sup>

The necessity of protecting the safety of our African colleagues must always inform any consideration of changes to the process of legal education. Professor Abigail Salisbury at Mekelle in Ethiopia reports that forty percent of one of her classes inserted a special section into a paper on a human rights issue, begging her not to show the papers to anyone else, for fear that they would be turned in to the government and punished.<sup>258</sup> Moreover, even if instructors’ and students’ lives are not endangered by improving advocacy skills, sometimes there are strong cultural presumptions to overcome in teaching students to communicate more effectively. Professor Matthew Cavell, a visiting American instructor teaching at Haramaya University Faculty of Law in Ethiopia, reported at the Nairobi Conference that, in Ethiopia, persuasive writing in a court-filed document is viewed to be an insulting usurpation of the judge’s prerogative to know and decide what the law is.<sup>259</sup> Thus, the importation of an effective lawyering skills pedagogy would, at least in some cases, have to overcome strong culturally embedded norms, not only about legal education, but also about the practice of law it-

---

256. Ghai, *supra* note 5, at 776. As early as 1977, Canadian Professor Robert Martin gives a harrowing account of his incarceration in Kenyan prison due to his activity in the human rights movement. Robert Martin, *Teaching of Law in Kenya: A Personal Footnote*, 14 AFR. L. STUD. 63, *passim* (1977). As of late 2008, Professor Abigail Salisbury in an interview with Ethiomedia described restrictions on her academic freedom at Mekelle University, including a clause in her employment contract that she not advocate any political views “whatsoever.” *Ethiomedia Interview with Prof. Abigail Salisbury*, Apr. 24, 2008, available at [http://www.ethiomedia.com/abai/ethiomedia\\_interviews\\_abigail\\_salisbury.html](http://www.ethiomedia.com/abai/ethiomedia_interviews_abigail_salisbury.html).

257. Okechukwu Oko, *The Problems and Challenges of Lawyering in Developing Societies*, 35 RUTGERS L.J. 569, 594 (2003-2004) [hereinafter *Oko Developing*].

258. Abigail Salisbury, *Linking Human Rights and Foreign Aid for Ethiopia: The Case of HR 2003*, JURIST, Jan. 16, 2008, available at [www.hr2003.org/index.php/component/content/article/1-amharicnews/12-linking-rights-and-foreign-aid-for-ethiopia-the-case-of-hr-2003](http://www.hr2003.org/index.php/component/content/article/1-amharicnews/12-linking-rights-and-foreign-aid-for-ethiopia-the-case-of-hr-2003).

259. Cavell Remarks, *supra* note 235. Cavell also reports a notable lack of academic freedom for the faculty of Haramaya. *Id.* Cavell further notes that while brevity in legal writing is encouraged in standard lawyering skills pedagogy, in Ethiopia the lengthier a writing submitted to the court, the more persuasive it is viewed to be. *Id.*; see also Ndulo *Legal Education*, *supra* note 2, at 501 (calling African universities “autocratic”).

self. As Cavell's colleague Zecharias Fasil asks, "Law and society - who should be the cart and who should be the horse?"<sup>260</sup>

## VII. MEASURES TO IMPROVE THE EFFECTIVENESS OF THE EAST AFRICAN LAWYERING SKILLS PEDAGOGY

*Tell me, and I will forget. Show me, and I may remember  
Involve me, and I will understand.*<sup>261</sup>

We must develop, in the words of Professor Brook K. Baker, "culturally competent collaboration."<sup>262</sup> Professor Cohn provides sage wisdom as a starting place for any American professor interested in participating in the building of a lawyering skills pedagogy in this new law and development climate:

*Thoroughly study the country and culture.* As obvious as this recommendation appears, I have been told in more than one country of visiting 'experts' who arrive knowing practically nothing about where they are, and who deliver set lectures that barely, if at all, touch local concerns. It does not matter how technical the subject matter: an instructor's failure to know local laws, history, and culture undermines the effectiveness of the presentation and the rapport within the classroom.

*Get early classroom feedback on local concerns and conditions.* Advance study of domestic issues is necessary but must be supplemented by early and direct classroom discussion. Even if a course is devoted exclusively to U.S. laws or policies, the teaching and discussion will be enhanced by comparison to the laws or policies that the class participants must deal with in their professional capacities. My experience suggests that participants eagerly respond to inquiries regarding local matters, especially where questions reflect a degree of preexisting knowledge or research. In . . . Uganda, discussions in early sessions provided information and perspectives that altered the syllabus in terms of material, timing, and emphasis. In Uganda the feedback was accomplished by hypothetical case studies that drew out many concerns, policy issues, and perceptions that became incorporated into our discussions and instruction.

---

260. Fasil Remarks, *supra* note 235.

261. Steven Hartwell, *Six Easy Pieces: Teaching Experientially*, 41 SAN DIEGO L. REV. 1011, 1011 (2004) (attributed to Confucius, *circa* 450 B.C.E.).

262. Baker, *supra* note 221, at 145.

*Use local materials as much as possible.* Because we are often asked to engage in teaching and training based on our American experience and expertise, there is a great temptation to focus on U.S. [S]tatutes and give cursory attention to local laws. I suggest the converse, which complicates preparation but in the long run means that course participants can contribute significantly. Even in courses designed to teach U.S. laws and policies, frequent comparative reference to local laws will enhance students' understanding and enrich the discussion. If local materials do not exist, materials from neighboring countries or from similar legal or economic systems may be preferable to U.S.-oriented materials.

*Avoid the temptation to preach U.S. laws and policies.* This is more than a subtle temptation. In many subject areas, U.S. laws and policies are models for lawmakers throughout the world. The invitation to teach in a foreign country reflects the fact that our knowledge of U.S. laws is a valuable asset. Indeed it is, but the asset is misused if not tailored to local conditions . . . . Laws and policies are so much the product of local circumstances that we must be wary of their wholesale application to other lands.

*Make use of local events and issues.* Chances are good that during a course there will be news items or events relevant to the subject matter. If not, or if you don't understand the language of the local media, discussions with students and others are likely to provide appropriate live examples. Not only will discussion of local issues enliven the subject: student responses will give further insight into political, legal, and economic problems that may not have been apparent to us. The Ugandan newspapers were a great source for classroom discussion, but had there been no relevant articles we would have (as we did anyway) poked around for useful local facts and issues.

*Don't assume knowledge of local laws.* . . . Ugandan law school training focuses with difficulty on Ugandan statutes and cases, because those are not available in sufficient quantities to use for teaching purposes. . . . [P]racticing lawyers also do not have ready access to these materials. Even when we provided the materials to the course participants, their lack of training and experience led to many elementary discussions on meanings and interpretations. I had been misled initially by my assumption that the sophisticated-looking statutes and regulations represented a fair degree of knowledge. . . . That assumption was simply wrong. Although the de-

gree of knowledge and experience varied among course participants, our most satisfactory approach was to start at a basic level.<sup>263</sup>

Sustainability is a watchword as applicable to legal education as it is to every other aspect of development. Mindful of the law and development critics scoffing at short-term “cook’s tours,” but recognizing that not every Western expert who visits East Africa can stay long term, the Western law professor involving him or herself in this process must nurture an ethos the opposite of cut and run. Common sense dictates, “[I]t takes time to master all the subtleties of a new culture including its legal system and method of legal education, develop new materials or institute changes in teaching methodology or curriculum, and build the relationships that create the capacity to sustain the changes.”<sup>264</sup>

Even in the absence of an extended stay, visitors can more thoughtfully utilize the time before, after, and between their African trips. For instance, Professors Gaskins and Barnett would use the time between their overseas trips to get to know Kenyan expatriates living in the United States, who could acquaint them more thoroughly with the country and its legal system.<sup>265</sup> They also employed this time to study the curricula at other East African law schools.<sup>266</sup> Such advance work improves the fruitfulness of the collaboration with local African colleagues.<sup>267</sup> “The starting point for any course or seminar should be the local conditions, regulations, and goals. They preexist our courses and remain after we have gone.”<sup>268</sup>

A collaborative effort also supports the professional development of the African law instructors, aiding them in carrying out the crucial labor of the sustainability of new curricula, materials, and teaching methodologies.<sup>269</sup> Such collaborations could include both co-teaching of classes and

---

263. Cohn, *supra* note 120, at 107-08. The need to identify and develop locally-oriented teaching materials is among the most imperative items on Cohn’s list. As Professor Ndulo describes:

African societies are in the midst of radical social and economic change on all fronts. This situation makes it more likely that the ‘right answer,’ probably the British solution to a particular problem which the student was taught a relatively short time ago is no longer right or relevant because the society in which the rule is to be applied has changed in the interim.

Ndulo *Legal Education*, *supra* note 2, at 493.

264. Maisel Working Paper, *supra* note 42, at 77.

265. Maisel *Collaboration*, *supra* note 99, at 493.

266. *Id.*

267. *Id.* at 496.

268. Cohn, *supra* note 120, at 108-09.

269. Maisel *Collaboration*, *supra* note 99, at 497.

co-authoring of course materials.<sup>270</sup> Indeed, Professor Gaskins's last act as dean at Moi was to conduct a three day seminar for the school's instructors, focused on legal education pedagogy, highlighting in particular methods of teaching legal analysis.<sup>271</sup>

Another productive exercise in sustainability was fostered by Professor Don Peters, a clinical law professor from the University of Florida, when, over a five year span of time, he collaborated with the Law Development Centre of Uganda to improve their ten month mandatory post graduate educational program, injecting a greater skills element.<sup>272</sup> Perhaps other Western law professors can similarly manage repeated visits, even where competing commitments prohibit extended ones.

Day to day, Professor Cohn recalls his experience teaching a clinical course in Uganda, "The original syllabus was a useful reminder of topics to be covered, but we needed to be flexible and adaptive every day. The course had a life of its own, for we were constantly moved by questions, comments, and unanticipated events."<sup>273</sup> With regard to classroom materials, Professor Greenbaum noted that "bringing helpful samples is great provided the U.S. visitor is genuinely interested in working on adapting materials so that they meet local needs and are appropriate."<sup>274</sup> One possible adaptive technique in the face of the limited printed legal source material in Africa was described by Professor Cohn, who turned to the daily newspaper as a teaching resource.<sup>275</sup> Professor Theodora Webale of the Law Development Centre of Uganda reports a lack of textbooks; they rely on handout copies instead.<sup>276</sup>

In the face of severe resource restrictions, both material and human, many instructors have come up with creative solutions and the burgeoning scholarship of teaching and learning in legal education could provide ideas for pedagogical methods that are both viable and sustainable in this unique culture. Similar to American legal educators who have often been criticized as lacking any formal educational training, Professor Ndulo opines that

---

270. *Id.* at 504.

271. *Id.* at 499. Professor McKinney in her efforts in Kenya also participated in a week-long curriculum planning retreat for the University of Nairobi faculty. Maisel Working Paper, *supra* note 42, at 48-49.

272. Maisel *Collaboration*, *supra* note 99, at 499-500. Professor Maisel performed similar service at Kenya's parallel entity, the Kenya School of Law. Monene Remarks, *supra* note 217. That program now includes role play simulation, trial advocacy, appellate advocacy, drafting, and client interviewing and counseling. *Id.*

273. Cohn, *supra* note 120, at 106.

274. Maisel *Collaboration*, *supra* note 99, at 494.

275. Cohn, *supra* note 120, at 106.

276. Theodora Webale, Remarks at the Conference on Legal Writing Pedagogy in East Africa (Mar. 15, 2007).

“preparation is . . . inadequate as lecturers frequently lack the necessary orientation.”<sup>277</sup> Dean Okech-Owiti of University of Nairobi Faculty of Law states even more bluntly, “What we have realized is that many of us do not know how to teach.”<sup>278</sup>

Moreover, an additional challenge is that, again as is often true in the United States, would-be legal writing instructors are impaired in their efforts to learn how to effectively teach legal writing by the fact that they themselves, when in law school, were never taught legal writing, nor was their instruction in the subject terribly sound when they received it on the job, if they received it at all.<sup>279</sup>

However, one cause for optimism is that, in some respects, East Africa provides a particularly promising proving ground for the introduction of innovative pedagogical techniques from the United States, given its common law culture and the English literacy of most of its students and faculty.<sup>280</sup>

The professor could provide guidelines for students to grade their own paper drafts<sup>281</sup> or the professor could, in class, walk the students through the process of creating their own self-evaluating rubrics.<sup>282</sup> This might take the form of providing a detailed checklist, “a series of questions, in the sequence they might arise in editing and revising a legal memorandum, that enable students to test whether they have followed the steps needed to write a high quality legal memorandum.”<sup>283</sup> The checklist could walk the students through the basics of an “IRAC” structure, that mainstay of American legal education, and end with basic double-checks on grammar and readability.<sup>284</sup> The students could also be encouraged to create themselves a re-

---

277. Ndulo *Legal Education*, *supra* note 2, at 492.

278. Okech-Owiti Remarks, *supra* note 33.

279. See Kassa Remarks, *supra* note 251 (describing challenges faced by legal writing instructors at his law faculty).

280. See Maisel Working Paper, *supra* note 42, at 73-74 (describing how these commonalities facilitated collaboration).

281. See Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 J. LEGAL WRITING INST. 175, 197 (1997) (laying out suggested guidelines for self-graded drafts).

282. LeClercq, *supra* note 246, at 420.

283. Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719, 727-28 (1996-1997).

284. *Id.* at 728. As any American legal writing professor could tell you, there are a myriad of acronyms similar to the most famous “IRAC—Issue, Rule, Analysis, Conclusion.” These include CRuPAC, TREAT, and CRAC and are each the creation of the authors of one of many of the extraordinarily well-written textbooks the discipline has at its disposal. However, given the limited availability of textbooks in East Africa, the legal writing instructor should feel free to use the paradigm utilized in the text most readily available or with which the instructor is most familiar. While each paradigm has its refinements, they are similar in essentials. Again, the important matter is that some model of organization be taught and used. “The purpose of the checklist is to give students clear, explicit, objective criteria of a good legal memorandum and a tool to use to

flective self-evaluation form, in which they assess their papers' strengths and weaknesses.<sup>285</sup> This form could be reviewed by the instructor, a teaching assistant, a peer, or simply be completed by the student for the benefits of the exercise itself. While certainly a self-evaluation process such as the one just outlined is not a fully adequate substitute for instructor feedback, under the pedagogical circumstances that prevail in many East African law school classrooms, it is still a vastly superior alternative to not providing any guidance or not assigning papers at all in situations where professors know there are inadequate resources to allow written work to be graded.

Professors could also seek daily feedback on classes by asking students to submit notecards anonymously on the way out the door, delineating any questions they might have or matters that require clarification for the professor to address at the beginning of the next class.<sup>286</sup> This process could also be conducted over a longer period of time by asking students to submit introspective journals reflecting the students' interaction with the course material, which the professor or a course teaching assistant could review periodically.<sup>287</sup> Finally, instructors could hold mass question-and-answer or "debriefing" sessions every few classes, where the focus would be review and reinforcement of already-taught material, rather than new instruction.<sup>288</sup>

Cooperative and collaborative learning is another pedagogical method East African law instructors could explore in light of limited resources. The following excerpt from the *Journal of Legal Writing Instruction* provides a clear explanation:

Cooperative and collaborative learning share many common points, but are theoretically distinct. Cooperative learning focuses on individual mastery of the subject through group work. Cooperative learning involves a structured framework for the group work in which the teacher defines the students' roles, tasks, and responsibilities, as well as the form of the final product. However, each student individually produces the final product. Thus, cooperative learning is group work with a shared goal; this creates the foundation for each student to then create his or her own final work product, which is individually evaluated. In contrast, collaborative learning focuses on group work toward a unified final project that is all or partially group-produced and all or partially

---

satisfy those criteria. The checklist also teaches students how and why to rigorously critique their own writing." *Id.* at 729.

285. *Id.* at 730.

286. LeClercq, *supra* note 246, at 419.

287. *Id.* at 420.

288. *Id.* at 419.



group-graded. In a collaborative project, group members negotiate tasks, roles, and responsibilities. In essence, the goal of collaborative learning is a group project in which the group process will produce a better final product through the students' discourse. Thus, cooperative and collaborative learning are not completely distinct, but rather "more like an arbor of vines growing in parallel, crossing, or intertwined."<sup>289</sup>

In studies of group learning techniques, students have reported that this style of learning not only deepens and advances their cognitive understanding of the material, but also promotes their psychological and emotional well-being by improving self-worth and nurturing personal and professional relationships, which could be an asset under difficult circumstances to the aspiring lawyers for decades to come.<sup>290</sup> "Cooperative groups provide an arena in which individuals develop the interpersonal and small group skills needed to work effectively with diverse schoolmates. Students learn how to communicate effectively, provide leadership, help the group make good decisions, build trust, repair hurt feelings, and understand other's [sic] perspectives."<sup>291</sup>

One specific type of group learning that could be useful to African instructors overwhelmed by daunting instructor/student ratios is peer editing. The instructor could provide guidelines to allow students to grade each other and a worksheet on which to record impressions.<sup>292</sup> The activity could be done as a read-aloud in class, exchange and critique in class, or in a more formal manner, with the work taken home and a lengthier evaluation written.<sup>293</sup> The efforts of a few of the pairs could be displayed on an overhead projector, if available, and reviewed in class by the professor as examples.<sup>294</sup> The pairs or groups could be student chosen, professor assigned, or selected at random.<sup>295</sup> This exercise yields the double benefit of providing students feedback from another, as well as aiding the student editor in becoming more proficient in spotting the flaws in his or her own work and

---

289. Elizabeth L. Inglehart et al., 9 LEGAL WRITING: J. LEGAL WRITING INST. 185, 188-89 (2003) (quoting Jean MacGregor, *Collaborative Learning: Reframing the Classroom*, in COLLABORATIVE LEARNING: A SOURCEBOOK FOR HIGHER EDUCATION 37 (Anne S. Goodsell et al. eds., Natl. Ctr. On Postsecondary Teaching, Learning & Assessment (1992))).

290. Inglehart, *supra* note 289, at 192; *see also* David W. Johnson & Roger T. Johnson, *Making Cooperative Learning Work*, 38 THEORY INTO PRACTICE 67, 73 (1999) (describing benefits of cooperative learning).

291. Johnson & Johnson, *supra* note 290, at 73.

292. LeClercq, *supra* note 246, at 419; *see* Durako, *supra* note 283, at 728.

293. Inglehart, *supra* note 289, at 197.

294. LeClercq, *supra* note 246, at 419.

295. Inglehart, *supra* note 289, at 200.

more deeply appreciative of how difficult it is to read shoddily edited work.<sup>296</sup> Upon the conclusion of such an exercise, the experience could also be fodder for a productive class discussion,<sup>297</sup> perhaps loosening the tongues of students who are often loath to participate.

Students could also “work collaboratively at any and every stage in the process of writing a legal document: issue development, brainstorming, research, outlining, writing, editing, rewriting, critiquing, and proofreading.”<sup>298</sup> A group of American professors utilizing such techniques in their legal writing classrooms reported:

In general, we were very pleased with the results of our students’ collaborative written assignments. Particularly on the assignments in which the students researched and wrote the first draft collaboratively, we felt that working with another person had a number of advantages for the students’ writing process. They tended to get started earlier on researching and writing the assignments. Working together, they were able to fill in holes in each others’ research abilities. Because the final written product had to satisfy both of them, they had to put more thought into justifying their analysis, and their analysis tended to become more thoughtful and sophisticated as a result of discussing it at length with each other. They also acted as editors to improve each other’s writing and as proofreaders to eliminate typos. As a result, their joint written products were, on average, better than their individually written products.

Perhaps the most remarkable result was the disappearance of the lowest grades in the class. Through the group writing process, the weaknesses that typically pervade the weakest papers were addressed and corrected. Best of all, the students reported that they felt that they had learned a great deal from each other; they felt that the presence of an additional viewpoint helped them to see perspectives that they would not have come up with on their own and helped them to understand the legal analysis better than they would have working on their own.<sup>299</sup>

---

296. Durako, *supra* note 283, at 728.

297. Kirsten K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 1, 13 (2003).

298. Inglehart, *supra* note 289, at 197.

299. *Id.* at 210.

Indeed, at least one successful experiment in peer editing has been reported in East Africa by Edwin Abuya of Moi University Faculty of Law.<sup>300</sup> Professor Abuya states, “[I] make the students critique other students’ work, so they have a feel of what it is like to critique another’s work and so the other students know whether their work is good or . . . average.”<sup>301</sup> Peer resources could also be utilized in encouraging or requiring students to form study groups or “law firms” to aid in their acquisition and retention of subject matter and to serve as a source of student moral and educational support.<sup>302</sup>

While effective writing skills are essential to the success of any lawyer, a lawyering skills class should feature instruction in other activities lawyers must of necessity perform, including client counseling, oral communication and argument, and negotiation. Teaching fledgling lawyers effective transactional skills is imperative in a part of the world that “has the dubious distinction of being both the least developed and, in terms of natural resources, the most endowed continent in the world.”<sup>303</sup>

But these kinds of lawyering skills are being notably neglected in East African law schools. Professor Ronald Naluwairo argues that what lawyering skills education is offered at his school, Makerere University in Kampala, Uganda, is solely geared toward the law student interested in becoming a litigator, an “advocate” in local parlance.<sup>304</sup> Such training is too limited for the needs of East Africa. Professor Muna Ndulo explains:

The acquisition of insights into the development process is the beginning and not the end of the lawyer’s task in Africa. Ultimately he or she must concern himself or herself with the translation of government policy into a legal framework, and to contribute as far as he or she can to its successful implementation. This is a concern which goes beyond mechanical legal drafting and into institution building. This in turn requires an awareness of the perimeters or limitations of law as a technique of social control and a study of the kinds of considerations that will augment the efficacy of laws. This poses a great challenge to the average lawyer trained for liti-

---

300. Abuya Telephone Interview, *supra* note 235.

301. *Id.*

302. See LeClercq, *supra* note 246, at 420-21 (describing benefits of peer collaboration).

303. Ndulo *The Democratization Process*, *supra* note 134, at 325.

304. Ronald Naluwairo, Makerere University, Remarks at the Conference for Legal Writing Pedagogy in East Africa (Mar. 15, 2007) (on file with author). It should be noted that the same criticism is often leveled at American legal writing programs. Kenneth D. Chestek, *Reality Programming Meets LRW: The Moot Case Approach to Teaching in the First Year*, 38 GONZ. L. REV. 57, 80 (2003).

gation. The main concern of the practicing lawyer, engaged in litigation, is to predict the result of litigation, whereas the task of the lawyer concerned with institution building is to predict whether a specific piece of legislation will attain its intended objectives.<sup>305</sup>

To promote lawyering skills other than legal writing, simulations of legal situations could be used: “[S]imulations [are] the performance of a lawyering task . . . using a hypothetical situation which emulates reality.”<sup>306</sup> According to Professor Ferber, “simulations allow law students to develop more of [their multiple intelligences] than does traditional legal education.”<sup>307</sup> Once the parameters are set up, simulations could be a relatively self-executing or peer-executed effective teaching method:

[S]imulations generally provide students with greater motivation to learn than methods such as lectures, discussions and case studies. Perhaps the reason for this is that simulations tend to remove the teacher from the central position in the classroom, so that messages more easily flow between students. . . . [S]imulations give students the opportunity to talk and listen in groups as small as two or three, enabling those who are anxious and largely silent during large class discussions to participate more readily.<sup>308</sup>

Simulations can vary in time duration and scope. One possible category is the simple simulation. This type of simulation is usually one class in length, where part of the class session is used to plan, then perform the simulation, then reflect upon it. An example of simple simulation I use in my legal writing classes is to give my students instruction on the drafting of questions presented and argument points for a hypothetical appellate brief, breaking them out into groups to draft these materials, and then diagramming their examples on the chalkboard at the end of class. Another commonplace example in our law schools is the practice of oral arguments, where other classmates serve as judges.

Another category of simulation that can be utilized is the extended simulation, which “involves the creation of a complex world and . . . runs over a significant period of time, seeking to ap-

---

305. Ndulo *Understanding*, *supra* note 149, at 11.

306. Paul S. Ferber, *Adult Learning Theory and Simulation-Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417, 418 (2002).

307. Kirsten A. Dauphinais, *Valuing and Nurturing Multiple Intelligences: A Paradigm Shift*, 11 WASH. & LEE RACE ANC. ETHNIC & L.J. 1, 35 (2005) (quoting Ferber, *supra* note 306, at 418).

308. Paul Bergman et al., *Learning from Experience: Nonlegally-Specific Role Plays*, 37 J. LEGAL EDUC. 535, 538 (1987).

proximate the same duration as in the real world, and requiring students to engage in multiple tasks.’<sup>309</sup>

Reports from the Nairobi conference seem to bear out that East African law faculties, in the face of the aforementioned staggering resource limitations, have not been as successful at transforming legal education from the “traditionist conception of . . . osmotic transmission of tacit knowledge”<sup>310</sup> as might have been hoped. An emphasis on the use of “participatory, experiential learning techniques—for example, exercises, role playing, filed work, seminars, and counseling,”<sup>311</sup> would be consistent with principles of andragogy, or “the art and science of helping adults learn.”<sup>312</sup> In his article describing the consonance between andragogy and the clinical legal education movement, Professor Frank S. Bloch reviews bedrock tenets of andragogy as laid out by Dr. Malcolm Knowles, the founder of the field:

The first assumption which Knowles makes is that adults see themselves as self-directing personalities, unlike children who expect the will of adults to be imposed on them. Adults’ self-concept is such that they expect to make their own decisions, face the consequences of their decisions, and manage their own lives. Indeed, Knowles asserts that one becomes an adult psychologically only when one perceives of oneself as wholly self-directing.

The second assumption underlying the theory of andragogy is that adults accumulate a greater amount and variety of experience than children, and, as a result, their experiences becomes a greater resource for learning. In addition, Knowles argues that his difference of quantity and quality of experience is heightened by a difference between children and adults as to the importance of their experiences to them. According to Knowles, while children take note of their experiences, ‘to an adult, his experience is him. He defines who he is, establishes his self-identity, in terms of his accumulation of a unique set of experiences.’

The third assumption is based on the concept of ‘developmental tasks.’ Developmental tasks are those tasks that must be dealt with at various stages in life if one is to pass from one phase of personal

---

309. Dauphinais, *supra* note 307, at 35 (quoting Ferber, *supra* note 306, at 423). I have used extended simulation at both Howard University School of Law and the University of North Dakota School of Law to support client letter drafting, negotiation, and contract drafting exercises. *See id.* at 35-36.

310. Harrington & Manji, *supra* note 25, at 396.

311. Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 331 (1982)

312. MALCOLM S. KNOWLES, *THE MODERN PRACTICE OF ADULT EDUCATION* 38 (1970).

development to the next. Educators have found that children demonstrate a heightened readiness to learn those tasks that are appropriate for them to master at a given phase of their development. Knowles assumes from this finding that adults also will have a heightened readiness to learn those developmental tasks that are appropriate for them. Adult development tasks are keyed primarily to the various social roles that adults must fulfill. Thus, as adults' social roles change, their developmental tasks change, and their readiness to learn any particular subject matter or skill changes with each change in appropriate developmental tasks.

Knowles' final assumption is that adults seek to apply learning immediately, while children tend to see acquired knowledge solely as a future benefit. . . . [A]dults 'engage in learning largely in response to pressures they feel from their current life situation. . . . They tend, therefore, to enter an educational activity in a *problem-centered* frame of mind.'<sup>313</sup>

These notions are fundamentally at odds with the *ex-cathedra* teaching method prevalent in African law schools. Bloch continues that:

[T]he most important aspect of the adult learning environment is the psychological climate, which 'should be one which causes adults to feel accepted, respected, and supported: in which there exists a spirit of mutuality between teachers and students as joint inquirers.' Knowles believes that andragogical [sic] methodology requires teachers to show interest in and respect for their students by listening [sic] to them and making use of their contributions; educators should not view their students as 'receiving sets for [the teacher's] transmissions of wisdom.'<sup>314</sup>

This in turn may be at odds with the newer African teaching vogue imported from the States: the Socratic Method.<sup>315</sup> Professor Robin Boyle recognizes the toll the Socratic Method takes on the professor, a toll that could only be worse in the East African classroom where the professor to student ratio is even more daunting and compensation for the task is less worthwhile. She recommends a shift in the expenditure of energy from professor to student for the good of all:

---

313. Bloch, *supra* note 311, at 328-30 (quoting KNOWLES, *supra* note 312, at 39-48).

314. *Id.* at 330 (citing KNOWLES, *supra* note 311, at 41).

315. See Dauphinais, *supra* note 307, at 27-28 (describing detriments of the Socratic Method).

Teaching a law school class, whether it is doctrinal or skills-based, can be a tiring experience. At the conclusion of class, law professors often experience fatigue, partly from coming to a calm after being on-stage and partly from expending excessive energy lecturing or engaging students with the Socratic method. Law professors who are exhausted after a sixty or ninety-minute class, while their students sit passively except for random one-on-one questioning, are overworking. Chances are the majority of the students are under-performing because they . . . do not learn best by either lecture or the Socratic method.<sup>316</sup>

One reason for the persistence of the Socratic method is the erroneous assumption that a student not actively engaged in dialogue with the teacher will gain the benefit of the dialogue ‘symbiotically’ by hearing and engaging in the discussion through the conundrums of fellow students. Unfortunately, this is neither factually nor pedagogically true. Many students lose attention, drifting away when they are not the active participant (or target) of the teacher’s discussion.<sup>317</sup>

Utilizing innovative teaching techniques can also actually aid in the promotion of the most traditional of law school pedagogical goals:

Law professors increasingly are teaching with ‘active learning’ strategies for the reason that actively engaged students absorb complex material better than if they have been taught traditionally. . . . Paula Lustbader, an advocate of active learning, described it as, [sic] ‘requir[ing] each student to manipulate and process information in his or her own way in order to fully understand it.’ Lustbader advocated active learning because merely memorizing cases is not an effective way for students to use legal reasoning skills. Active learning helps students to learn the holding and the reasoning of cases and to apply the cases to different factual situations.<sup>318</sup>

Boyle continues:

Gerald Hess, another advocate of active learning, espoused that ‘[a]ctive learning promotes higher level thinking (analysis, synthesis, and evaluation) and develops skills, both of which are promi-

---

316. Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 1, 1 (2003-2004).

317. Wilson, *supra* note 156, at 412.

318. Boyle, *supra* note 316, at 3-4.

ment goals of most adult education, including law school.’ The use of active learning techniques is a more effective way of helping students to learn the doctrine or the skills being taught.<sup>319</sup>

[I]t has been rightly suggested that the curriculum should contain some activities outside the classroom which expose the students to direct contact with social and professional reality so as to provide stimulation and motivation; ‘practical’ and technical skills; more realistic perspectives about law; incentives for research and extrapolation of theory from actual experience.<sup>320</sup>

As a supplement to brief and extended simulations, the legal instructor: could provide varied assignments that cut across different intelligences and invoke stimulating, real-world experiences.

For instance, to engage linguistic intelligence, we professors could encourage student participation in class discussion and assign the writing of student narratives or even traditional research papers. We could urge our students to get out and interview legal experts or stretch their own pedagogical muscles by interpreting a chapter of text or otherwise lecturing their classmates on a legal topic. To create opportunities for our spatially and visually gifted students, we could assign them to paint, draw, or create a mockup of an evidentiary exhibit or chart a legal issue. Those whose spatial gifts give them a computerized bent could learn with computer programs or even design a software program as a study aid. For our part, we instructors could utilize the chalkboard, multimedia, and audiovisual equipment as much as possible in our teaching.

To promote the bodily/kinesthetic intelligence of the actors in our student ranks, the professor could assign students to perform in mock oral argument or moot court . . . play games such as charades. . . , create skits demonstrating a legal principle or scenario, or use their feet to get out into the community to travel to courts and other legal institutions to witness lawyering tasks firsthand. For those whose gifts run to music, students could be given the opportunity to write songs to demonstrate legal principles and we could reward our students when they exhibit musicality in the form of eloquence into their oral class performances. Those interpersonally intelligent could interview legal professionals, team teach

---

319. *Id.* at 4-5 (quoting Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F. L. REV. 941, 943 (1997)).

320. Dayal *Dynamics*, *supra* note 86, at 100 (internal quotations omitted).



a legal concept with other students or the instructor, participate in team-oriented . . . projects and externships, . . . or assume the role of a legal stakeholder within the context of the utilization of the problem method.

Those whose gifts turn inward could be given the chance to earn credit for writing a journal reflecting on a legal experience, for discussing the ethics relating to a legal argument, and earn extra credit for being diligent in setting and attaining goals regarding the quality and timeliness of work product. The effort grade need not be reserved to [primary] school. Our legal Steven Jay Goulds gifted with naturalistic intelligence could be called on in class to compare and contrast legal situations and master the art of the analogy, and our spiritual and existential leaders could be recognized in a tangible way when they act as leaders in the law school community or speak up in class about the moral and philosophical content of a legal debate.<sup>321</sup>

Significantly, “[o]ne cross-cultural education study has found that the utility of active teaching methods holds true across cultural boundaries. . . . The study concludes, . . . that rote and ritual learning were consistent negative variables, while the encouragement of independent student work was consistently positive.”<sup>322</sup>

Moreover, active learning experiences can also provide law students with the exposure to other fields, such as the social sciences, presently lacking in many East African law school curricula, but necessary to an understanding of concepts of sustainable development.<sup>323</sup> In short, “the underlying theme of these various approaches is a shift in the model from professor-centered to student-centered instruction.”<sup>324</sup>

## VIII. CONCLUSION

There is much cause for optimism in East Africa. Law school instructors and administrators display as much passion and dedication to their missions as their predecessors did forty years ago. For instance, when asked

---

321. Dauphinais, *supra* note 307, at 33-34.

322. Wilson, *supra* note 156, at 407 (citing J. TORNEY ET AL., CIVIC EDUCATION IN TEN COUNTRIES: AN EMPIRICAL STUDY 151-53 (1975)). The countries studied were the Federal Republic of Germany, Finland, Iran, Ireland, Italy, the Netherlands, New Zealand, Sweden, and the United States. *Id.*

323. See Ndulo *Legal Education*, *supra* note 2, at 501 (stating that “[u]niversities and law schools need more imaginative degree programs”).

324. Boyle, *supra* note 316, at 5-6.

the greatest strength of his law school, George Kasozi, Senior Lecturer and Dean of Uganda Christian University Faculty of Law replied:

The greatest strength of UCU's legal program is the teaching of law in a way that integrates law and faith. This initiative brings in issues of ethics and morality into the curriculum. We do this because we realise there is moral decadence in the Ugandan society. The legal ethics we teach are grounded on the Judeo-Christian values, which we endeavor to uphold as we train future lawyers. Our objective is to produce lawyers with a difference. This [sic] however, should not be construed that we do not respect the faith and views of other religions.<sup>325</sup>

Indeed, there is much that East Africa can teach American legal educators. While most American law schools are not opting to pursue a deepened consciousness of legal ethics and professional identity through a faith-based initiative, Uganda Christian's dedicated attention to this issue with which many American law schools are only beginning to grapple in a systematic way is admirable. The long-standing required pupillage for the prospective bar admittee might yet be coming in the United States in the wake of opinions like the Carnegie Report. East African law professors often have a much more international orientation and more international experience than their average American counterpart.<sup>326</sup> Furthermore, "[o]ne area in which there has been encouraging change in most African countries is the increasing attention paid to the teaching of international human rights subjects in law schools."<sup>327</sup>

Moreover, there is already evidence that more active pedagogical techniques are starting to be utilized in East Africa. As a starting place, almost all African law schools require students in their final year to submit a satisfactory piece of legal writing, in some cases dubbed the LL.B. dissertation,<sup>328</sup> prepared under the supervision of a faculty member.<sup>329</sup> Many law schools feature moot court programs for their first<sup>330</sup> or second year law students.<sup>331</sup>

---

325. Kasozi E-mail, *supra* note 235.

326. *See* Abuya Remarks, *supra* note 238 (noting international orientation of African law professors); *see also* Abuya Telephone Interview, *supra* note 235 (citing as an advantage international orientation of African law professors).

327. Ndulo *Legal Education*, *supra* note 2, at 499.

328. *See* Ojwang & Salter *Legal Education*, *supra* note 91, at 84.

329. Ndulo *Internationalisation*, *supra* note 13, at 33.

330. Ojwang & Salter *Legal Education*, *supra* note 91, at 84.

331. Ndulo *Internationalisation*, *supra* note 13, at 33.

There is also incipient classroom-based legal writing instruction. For instance, at the Nairobi conference, Richard Mundia Kariuki of the University of Nairobi demonstrated the techniques he uses in his lawyering skills classroom.<sup>332</sup> His acting dean Okech-Owiti further reported that every University of Nairobi law student has experiences with group work, problem research, and presentations.<sup>333</sup> Tefferi Yishak Kassa reported that formal legal writing classes were introduced at Mekelle University in Ethiopia in 2002.<sup>334</sup> His colleague reported that in these courses Mekelle was offering exercises in drafting memoranda, petitions, pleadings and court documents, legislation, client counseling, negotiation and client representation, as well as live-client clinical experiences.<sup>335</sup> Hanudi Majamba of the ever-trailblazing Faculty of Law at Dar Es Salaam reported that there was a compulsory class in the first law called “Communication Skills for Lawyers” and advanced instruction on drafting and transactional work in the fourth year.<sup>336</sup> Moi University’s pioneering clinical curriculum has legal writing classes as small as twelve and thirty-eight students, thus enabling the instructor to offer individual written feedback, and give, by Edwin Abuya’s estimations, four hours a week of instruction, and require the drafting of critical essays and legislation during their course.<sup>337</sup> It also offers extensive simulation experiences.<sup>338</sup> George Kasozi reports that “[Uganda Christian is] going to make a case for making legal writing a course in its o[w]n right, during the 2008 University curriculum review.”<sup>339</sup>

This effort could further be served by the promotion of opportunities for African professors and students to spend time in residence at American law schools, where they would have the opportunity to view these pedagogical techniques in action.<sup>340</sup> Also new opportunities for long-term American stays are being explored, utilizing promising recent law graduates, a cadre of American talent sometimes less burdened with long term obligations and able to commit an extended period of time to teaching in an

---

332. Richard Mundia Kariuki, *Back to Basics—Effective (Legal) Communication*, Conference on the Pedagogy of Legal Writing, Nairobi, Kenya (Mar. 15-17, 2007).

333. Okech-Owiti Remarks, *supra* note 33.

334. Kassa Remarks, *supra* note 251.

335. Alefe Remarks, *supra* note 206.

336. Hanudi Majamba, Remarks at the Conference for Legal Writing Pedagogy for East Africa (Mar. 15, 2007) (on file with author). He also reported, however, that the first year class had an enrollment of 350 students. *Id.*

337. Abuya Telephone Interview, *supra* note 235. The courses are, however, elective rather than mandatory. *Id.*

338. Ojienda & Oduor, *supra* note 31, at 56.

339. Kasozi E-Mail, *supra* note 235.

340. GOWER, *supra* note 8, at 139. This sort of exchange was also recommended by Professor Okoth-Ogendo of the University of Nairobi. Okoth-Ogendo Address, *supra* note 198.

African law school. The Nairobi Conference was addressed by one such instructor, Matthew Cavell, who was teaching legal writing in Ethiopia. Professor Maisel in her article describes as well the efforts of Professor Louise McKinney of Case Western Reserve University School of Law, who arranged for one of her gifted recent students to serve a post graduate year as Coordinator of the Clinical Program at the National University's Law Department in Botswana.<sup>341</sup> Perhaps a similar model could be employed to recruit longer term directors of legal writing for East African law faculties. African legal pedagogy could also be aided by professor exchanges between Africa and America and joint publication efforts or dialogues.<sup>342</sup>

The will on the part of East African professors to teach lawyering skills is there. Dean Kasozi calls the Ugandan law schools "determined."<sup>343</sup> The commitment is there. When asked what East Africa needed to teach lawyering skills, Edwin Abuya asked for "materials and resources."<sup>344</sup> "It can thus be stated that *funding* is the only limitation on these opportunities to advance legal education that cannot be overcome by changes in attitudes and by innovative programs."<sup>345</sup>

When asked what he would most like American academics and lawyers to know about East African lawyering skills pedagogy, Professor Abuya replied that he wanted it to be known that "[t]here is . . . legal education and legal writing in Africa. . . . It's not all bad. [However, American academics would be] most welcome to come and spend a sabbatical in Kenya."<sup>346</sup> One African instructor who wished to remain anonymous because the instructor did not have the authorization of his or her university to speak seconded Professor Abuya's invitation to Western scholars. "[W]e really need their help as far as legal education is concerned generally[. W]e have no teaching materials, too many students . . . it is a hard job with little pay."<sup>347</sup>

---

341. Maisel *Collaboration*, *supra* note 99, at 501.

342. Okoth-Ogendo Address, *supra* note 198. Edwin Abuya also believes that "exchange programs are very useful." Abuya Telephone Interview, *supra* note 235.

343. Kasozi E-Mail, *supra* note 235.

344. Abuya Telephone Interview, *supra* note 235. He mirthfully added, "[I]t would be helpful for Kirsten [this author] to come to Kenya and teach legal writing for two weeks." *Id.* Dean Kasozi of Uganda Christian also cites as his most pressing need "current textbooks and materials, particularly e-journals" and states that the "provision of more books on legal writing and computers" would be most helpful to his law faculty, and further states that instructional materials are, at present, inadequate. Kasozi E-Mail, *supra* note 235.

345. Ndulo *Legal Education*, *supra* note 2, at 499 (emphasis in original).

346. Abuya Telephone Interview, *supra* note 235.

347. E-Mail from an East African law instructor who wishes to remain anonymous (identity known to author), to Kirsten A. Dauphinais, then Assistant Professor of Law, University of North Dakota School of Law (July 23, 2008).

Muna Ndulo stated in 1984 that “[i]t seems self-evident that the future of the legal profession, and the role of law itself, is bound up with the type of legal education the country offers.”<sup>348</sup> He continues:

The lawyers produced by the present system of legal education in Africa are trained to become legal technicians. They are encouraged to have little or no interest or comprehension of the policy issues inherent in the law. They are generally reluctant to criticize current law. Even as technicians they have limits, for few are competent to represent national and commercial interests in international transactions, involving complexities of taxation and international finance. Africa needs lawyers with the technical competence to do a first-class job in negotiating a contract, to understand international banking, and to draft the papers for an international loan. . . . Good lawyers, properly trained in international concessions agreements, and good legislative draftsmen and women can move the wheels of progress, while narrow, pedantic, unimaginative, and ill-trained lawyers will hinder much needed development.

Courageous and imaginative lawyers can help achieve political stability in a multi-cultural society by helping design viable political institutions. . . . African lawyers are expected to relate legal institutions, as well as social and political institutions, to the general and specific premises of expansion and development. To do this, a lawyer needs a broadly-based education to enable him or her to adapt himself or herself to new and different situations.<sup>349</sup>

The effective teaching of lawyering skills will transform the social technician into a social engineer to effect a law and development revolution. Given the proper tools, East African legal education can and will do just that. Never doubt that “[a] small group of thoughtful, committed citizens can change the world. Indeed, it’s the only thing that ever has.”<sup>350</sup>

---

348. MUNA NDULO, *LAW IN ZAMBIA* i (1984).

349. Ndulo *Legal Education*, *supra* note 2, at 500.

350. Attributed to Margaret Mead; the more specific source of the quotation is unknown. Margaret Mead Quotes, <http://www.brainyquote.com/quotes/quotes/m/margaretme130543.html> (last visited Aug. 13, 2009).