

Short Order Rule of Law: A Role for the Short-Term Consultant

by

Stephen A. Rosenbaum*

INTRODUCTION

With honor and humility I accepted an invitation from the U.S. State Department to participate as a technical advisor in a weeklong rule of law¹ seminar in Togo, with attorneys, judges, law professors and students. My modest mission was to explain various models for delivery of free legal services and assist in developing proposals for establishing a bar association *pro bono* program in conjunction with the nation's principal law school at the Université de Lomé.

When the State Department first invited me to participate in its speaker specialist program, I admit that for me it was all about having a glimpse of an otherwise inaccessible part of the world and the attendant cultural, professional and intellectual exchange. Only after my initial program visit did I become familiar with the concept of "rule of law" (*l'état de droit*), as well as the related

* Lecturer, University of California, Berkeley School of Law and Stanford Law School; Chercheur Associé, Université d'Artois, Faculté de Droit; Adjunct Professor, Golden Gate Law School. Mr. Rosenbaum, a practicing civil rights attorney, is a periodic recipient of U.S. Department of State Speaker Specialist grants and coordinator of the newfound Francophone Africa Law Project (FALP). The views expressed here are the author's own and not necessarily those of the State Department. The author is indebted to Head of *Publicist*, Amy Endicott, for her editorial suggestions, to FALP Project Attorney Millette Marcos for her research assistance, and to Judge Paul Fogel, Alameda County Superior Court, who introduced him to the Speaker Specialist Program.

1. Rule of law (ROL) programs have been conducted in newly "democratic" countries by governmental, non-governmental, inter-governmental and private agencies. For a definitional framework and application of a term that refers to core elements of judicial and legal reform, see David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 30-33 (2006) ("Despite the ubiquity of its usage and the importance of the idea, the rule of law, much like the concepts of 'justice' or 'transitional justice,' is endowed with 'a multiplicity of definitions and understandings . . .'" and "'is not a recipe for detailed institutional design [but] an interconnected cluster of values.'") (citing Professor Gerhard Casper).

concepts of access to justice and the law and development movement.² This was to be the focus of my journey to Togo.

Beyond expressing a desire to discuss this general theme, no one at the State Department or the Embassy in Lomé, Togo explicitly informed me at the time of the invitation about the rationale for the seminar, its timing or how it corresponded to foreign policy or public diplomacy objectives in West Africa. While this seemed like a lot to accomplish in one week, the scenario was consistent with my experience on earlier sojourns.³

Typically, the visitor's scenario is broadly sketched by the Embassy's public affairs or cultural affairs attaché. These diplomats assume that American jurists have something to say of interest to our counterparts in developing democracies and that this is accomplished by a series of lectures or informal visits in small groups.

In Togo, the Embassy had reason to believe that the overall theme of legal aid to the indigent, particularly as it involved clinical legal education and *pro bono* service, was suitable for a program speaker. Whether the suitability was informed by discussions with the Togolese or by what was in vogue with Foreign Service colleagues in other African capitals or Washington, DC, I do not know. I was not given any background documentation beyond the standard State Department country report.

It was through my perusal of the relevant literature that I assumed the immediate need for legal aid was among prison detainees. Only after arrival in Togo did I learn that the nation had an inoperative legal assistance statute that had been on the books for decades. The statute, Ordonnance No. 70-35, Article 10 provided legal aid to the indigent but required the executive to issue an implementing decree. The legal community had also

2. It appears that I am in good company in my ignorance. See Leah Wortham, *Aiding Clinical Legal Education Abroad: What Can Be Gained and the Learning Curve on How to Do So Effectively*, 12 CLIN. L. REV. 615, 617 (2006) (confessing unfamiliarity with Law and Development Movement (LDM) scholarship until far into her experience with clinical education outside the United States). Scholar Erik Jensen cites several works “[f]or those who are interested in the great historical debates about the definition of rule of law.” Erik G. Jensen, *Justice and the Rule of Law*, in BUILDING STATES TO BUILD PEACE (ed. Charles T. Call 2008) 138, n. 16.

3. I had previously lectured in other French-speaking African states on such themes as judicial independence, human rights and alternative dispute resolution. See, e.g., Stephen A. Rosenbaum, *Supporting Democracy: Senegal Needs U.S. Help as it Races to Reform Juridical Institutions*, Daily J. (27 Sept. 2000). Since 2000, I have been awarded eight grants for rule of law projects in francophone Africa, viz., Senegal, Guinea, Chad, Central African Republic, Togo and Cameroon.

crafted a recent judicial modernization plan. I was also informed, once in Togo, about a new cooperation agreement between the principal law school and largest local bar association. In addition to this administrative framework, there existed an informal *pro bono* effort by members of the bar to make *ad hoc* visits to the prison to obtain some releases. These efforts represented the totality of the Togolese indigent legal services program.

The United States supports democratization efforts in countries, like Togo, which are transitioning from autocratic one-party states with underdeveloped judicial procedures. Typically, the American government contributes its resources to nations that display a modicum of stability and targets a mid-level elite receptive to reform. Given its history of political and electoral abuse and violence,⁴Togo was not well-placed to request financial or material aid from foreign governments or non-governmental sources at the time of my impending visit. Nonetheless, the on-site diplomatic corps endorsed an initiative to address the lack of a genuine legal assistance scheme and to improve Togolese citizens' access to justice.

In this essay, I describe: (1) the background for the visit, (2) the series of exchanges with my hosts, (3) the objectives for structural change in the spheres of education and practice, and (4) the Togolese legal and political culture. I hope to capture some of the flavor of the experience, reflect on the capacity of short-term consultants to have an impact on legal reform,⁵ and offer some advice for those who are similarly engaged in rule of law support and solidarity activities.

SETTING THE AGENDA

The scope of the program had been defined broadly with a focus on the mechanisms for reform. Thus, as was the case with my previous program visits to other countries, I was free to exercise virtually independent judgment about the project format and the content of my remarks. It was important to me that I not be viewed as yet one more speaker on the circuit—much less the Great White Savior—jetting in and out, offering standard

4. The violence in Togo had not totally abated. *See, e.g.*, U.S. Dep't of State, *Country Reports on Human Rights Practices* (Mar. 8, 2006).

5. Otherwise, I leave myself open to the charge that this is tantamount to a "Cook's Tour" of Togo or what Professor Richard Wilson calls "how I spent my summer vacation developing clinics in [insert developing country name here]." Richard J. Wilson, *Western Europe: Last Holdout in the World-wide Acceptance of Clinical Legal Education*, 10 GERMAN L.J. 823, 823 (2009) (brackets in original). By way of self-criticism I must also ask myself whether I am not just another privileged overseas traveler, a charge that can be levied against the legal elites in the countries I visit.

prescriptions for reform.⁶ A criticism of “access-to-justice” or rule of law programs is their failure to “overcome transplant, formalist, and prescriptive criticisms of the 1960s law-and-development movement. . . .”⁷ This failure is most acute in rural areas where the justice system is inoperative and for poorer citizens. Such methods have also been less effective where justice is obtained through informal dispute mechanisms, social movements, or political struggle. Modern programs have evolved, however. Three characteristics that distinguish contemporary programs are: the involvement of practitioners (in addition to academics); participation of multinational actors, together with those from the United States; and an effort to work in *partnership* with African educators and practitioners to develop suitable institutions.

The program in Togo harnessed the effectiveness of this last change, in particular. Direct communication with Embassy staff was essential. I immediately contacted the relevant personnel in Togo and was able to correspond frequently by email with the Political Affairs Officer (PAO) and her assistant. Neither had a background in law. Both were generalists responsible for a number of programs in a small embassy. Since they were deferring to the local bar association for programmatic detail and leadership, the Embassy was either hesitant, or unable, to provide all the information needed to refine the topic, gauge expectations and determine logistics. My attempts to communicate directly with the bar association, however, were frustrated both by poor Internet connection and a lack of detail in the information the association sent my way. Despite my difficulties with communication, it became apparent that the two objectives for the Togolese were: (1) develop a bar association *pro bono* program and facilitate delivery of legal aid to the indigent; and (2) establish a clinical education component at the capital's law school.

The Togolese agenda made clear requests for technical assistance, but did not specify the types of pressing legal need that would be met by this aid. I took it upon myself to fill in the gaps. The literature suggested that unnecessary pretrial detention and prison conditions would be a priority. Like many other African nations, Togo has a history of detaining its citizens for unwarranted periods of time in overcrowded and unsanitary

6. What comes to mind is the image of former Treasury Secretary, university president and presidential advisor Lawrence Summers, who reportedly “blew into Jakarta for a few hours,’ after which he climbed the stairs to his plane, looked out over the unwashed, and said, ‘Indonesia needs the rule of law.’” Jensen, *supra*, note 2 at 122.

7. Jeremy Perelman, *The Way Ahead? Access-to-Justice, Public Interest Lawyering, and the Right to Legal Aid in South Africa: the Nkuzi Case*, 41 STANFORD J. INT'L L. 398 (2005) (footnote omitted).

conditions. With these objectives in mind I turned to the task of crafting a program that could address them.

PREPARATION

To create access to justice in Togo, it was essential to first understand what the existing system provided. Exercising my own initiative about the nature and scope of the assignment led to library and Internet research. The irony was that I was probably better positioned than my prospective Togolese hosts to access the texts that are fundamental to reforms in African legal education and practice of law. Whether due to the cost of printing, or transportation and communication obstacles, the very codes, reported appellate decisions and international accords on which African jurists rely actually may be unavailable to the judges and lawyers themselves.⁸

My research fell into three main topical areas: models for clinical education with an emphasis on developing countries; model civil law statutes for free legal services delivery; and reform campaigns aimed at reducing prison populations. Email exchanges with embassy contacts from an earlier visit to Senegal, visits to websites operated by prison reform advocates and French-language jurists, and materials housed in the Boalt Hall⁹ law library formed the bulk of my research.

My contacts at the Global Alliance for Justice Education (GAJE)¹⁰ provided a referral to Thomas Geraghty, the Associate Dean and Director of Northwestern University's Bluhm Legal Clinic. The Clinic had recently helped to facilitate a conference on African legal aid in the criminal justice system, organized by Penal Reform International. Professor Geraghty¹¹ was kind enough to quickly ship copies—in English and *French*—of a just published collection of detailed papers presented at that conference.

8. For example, during an earlier State Department visit to Guinea, I discovered a curious collection in my hotel gift shop: copies of legal codes on the bottom of a display case, mingled with local crafts and trinkets. While these “goods” were being offered to tourists, Guinean judges bemoaned their lack of access to legal materials.

9. The law school has since been re-anointed as “Berkeley Law.” See University of California Berkeley Law, Memorandum from Dean Christopher Edley (Apr. 24, 2008), available at <http://www.law.berkeley.edu/identity/edley-letter.html> (last visited Feb. 4, 2009). References to its former name are still permitted, at least in-house, notwithstanding the new name and public image. *Id.*

10. GAJE is an association of international clinical law faculty and other legal activists. See <http://www.gaje.org> (last visited Dec. 31, 2010).

11. I later learned that Professor Geraghty has an interest and expertise in African legal education, an area where the Bluhm Center's international human rights students have been active in the field.

My investigation had thus equipped me with the basic Togolese constitutional text, statutes from neighboring nations, reports on Togolese politics, African legal reforms and prison conditions, and press clippings. Armed with this information, I came to understand the expansive scope of the project. Email exchanges in the weeks before departure confirmed that the mission was overly ambitious: a three day conference to (1) draft a statute establishing free legal services for the poor; and (2) design a clinical legal education program at the University of Lomé faculty of law.

My research guided the creation of the program to accomplish the objectives of such an ambitious agenda. It was important to avoid an in-and-out visit complete with a one-size-fits-all reform model. Conference work should occur in small groups, book-ended by formal plenary sessions. My past experience and an e-comment from the PAO suggested that workshops, at least as conducted in most American “break out” settings, were not an established mechanism in most African nations. It was also unclear whether I was expected to facilitate or assist facilitation. At one point, it seemed the Embassy anticipated a series of lectures from me or even some skills simulation sessions. In attempting to meet the expectations of sponsors and the target audience, the consultant must be prepared for an alternate scenario or improvised presentations. Keenly aware of this reality, I departed for Togo with a tentative agenda and an open mind.

THE LONG JOURNEY

In a sense, my journey to the conference began before physical departure, with this research and rumination. While it took about a day and a half to travel to Lomé, with stopovers and time zone changes, the distance was as much cultural as it was spatial or temporal. The adjustment to the formalities, lack of amenities, slavish adherence to bureaucratic protocols, and the pace of daily life outdid the effects of jet lag.

My experience was also colored by my relationship with my immediate hosts. The rapport between us was important for the sake of my visit, as my hosts played the role of guides, mentors, minders and tutors. The PAO was an ex-Peace Corps volunteer married to a musician from neighboring Benin. She seemed to be a less conventional diplomat than her assistant, a long-time Embassy staffer and Togolese national with a daughter attending college in the United States. They represented an elite sector of society, with slightly more mobility than the jurists I would encounter.¹²

12. After my visit, both eventually would leave their jobs in Lomé, one for another diplomatic post and the other for life in America.

Outside the Embassy, the nation's politics dominated discussion. My visit coincided with the Togolese electoral campaign, which the national television station covered extensively. The two-week campaign period had been launched on the day of my arrival and the excitement was palpable. At least thirty-two parties ran candidates and voters were presented with 395 party lists. Walls were plastered with partisan posters. My hotel appeared to be the headquarters for the European Union election observers, with their many olive green trucks lined up in the front parking lot. I actually awoke one morning to find a photocopied letter slipped under the door of my room. It was a "Call to the Nation" from the President, urging a peaceful balloting: "*Togolaises, Togolais, Mes très chers compatriotes. . . Vive la démocratie! Vive la paix!*" A blow-up version of the letter was mounted conspicuously on an easel in the lobby. One would be unlikely to encounter a similar display of civic boosterism at an upscale tourist hotel, or indeed any hotel, in western countries.

Elections have a different significance in post-colonial Africa than in western democracies. These elections, which the population anticipated with a mix of celebration and angst, represented much more than an exercise in the right to vote freely. This tangible symbol of democracy meant the government could effect change through the political process and opposition parties could have a chance at power. In Togo, and the rest of post-liberation Africa, this process of *alternance* or change in leadership is itself a confirmation of belief in the rule of law.

Togo has a long history under one-party rule. For over thirty years, an autocratic head of state, Son Excellence, Eyadema Gnassingbé, governed the country. Today, his dynasty continues with his son, Fauré. The text at the bottom of ubiquitous framed photos of the leader still reads "His Excellency." Despite this tradition of praise and obedience, the election raised expectations of democratization in Togo. The previous general elections, in April 2005, resulted in widespread violence, condemnation by African leaders and a loss in foreign aid. The political elite was keen to avoid a repeat scenario.

Although the electoral campaign and the results would not have a direct impact on the seminar and its outcome, they formed an important backdrop. Legal reform in general and access to justice in particular would figure as important components of a genuine democracy.

PREPARING FOR DISCUSSION

The first day was devoted to briefings and logistical preparation. I held two key preparatory meetings: one with the president of the local bar association, Maître Aquereburu, and the other with U.S. Ambassador Dunn. The bar association was

officially in charge of the impending workshop. Characteristically, the bar association was neither sufficiently staffed nor financed to independently plan or organize this kind of event. The bar president (*Le Bâtonnier*) is a very prestigious position in Togo, as elsewhere in francophone Africa and one that may even warrant office space at the bar headquarters. It appears to be a post filled by a full-time practitioner who cannot devote much attention to non-litigation matters, beyond attending meetings or special events.

In the upcoming seminar discussions, beginning with the meeting at the bar headquarters, participants frequently invoked Article 10 of *Ordonnance* No. 78-35, the sole existing statute addressing subsidized legal assistance.¹³ Article 10, and the failure to appropriate funds and implement the law by executive decree, assumed an almost exaggerated importance. Two other documents also appeared central to the debate. First, the Ministry of Justice had issued a draft judicial modernization program¹⁴ a little more than two years earlier. This document notes that the legal aid fund allegedly created in 1978 never received any government appropriations.¹⁵ Second, the nation's largest bar association and law school had entered into a partnership agreement or memorandum of understanding earlier in the year. The document envisions such activities as continuing education of the bar, theoretical and practical training of students, attorney-taught courses and curriculum planning, and student externships (*recevoir en stage . . . des étudiants*).¹⁶

The modernization program had the potential to serve as a springboard for a fully developed legal assistance operation. There was no indication, however, that the modernization planning document would be translated into reality. Curiously, prior to my arrival, no one had made reference to the judicial modernization plan, the law school-bar association agreement or the longstanding

13. ORGANISATION JUDICIAIRE *Ordonnance* No. 78-35, art. 10, para. 2 (09/07/78). (Togo), in *Journal Officiel de la République Togolaise* (No. 21 (bis) 11 Sept. 1978).

14. MINISTERE DE LA JUSTICE, REPUBLIQUE TOGOLAISE, PROGRAMME NATIONAL DE MODERNISATION DE LA JUSTICE 2005-2010 (Amended Final Draft, Aug. 2005) (on file with author).

15. "Public cynicism will grow if rules are introduced without attention to pace, sequence, local context, and of course implementation." Jensen, *supra*, note 2, at 122. "[T]oo many rules in low-capacity regimes can undermine public support and state legitimacy." *Id.*

16. Protocole d'Accord de Partenariat entre Le Barreau de Lomé et l'Université de Lomé (18 Jan. 2007) (hereinafter Protocole d'Accord) (on file with author).

legal assistance statute.¹⁷ The modernization program's coordinator, Judge Hohueto, was actually present at the meeting with bar members that afternoon, but she did not appear to have a leadership role in the planning of the seminar, much less the implementation of any future legal reform.

Despite the dysfunctional nature of the legal aid framework, some free legal service was available. In what constitutes a *pro bono* tradition in Togo, members of the Lomé bar association have occasionally visited the local prisons *en masse*. This effort to clear the legal backlog would occur during an annual holiday as an act of charity or concurrently with the opening of a new term of the Supreme Court, the *rentrée solonelle*, mentioned to me in passing at a reception held the evening before. These *journées de consultation juridique gratuite*, sometimes underwritten by the American Embassy, were an *ad hoc* practice that had the potential for something more formalized.

Having received local perspective and background from bar president Aquereburu, I next met with Ambassador Dunn. The practice of setting up a briefing with the ambassador, particularly if he has a professional interest in a visitor's area of expertise, is not unusual in a small country. Meeting Embassy expectations about a program and its results can be challenging. Often, these expectations are not articulated, except in the broadest of terms. They must also be reconciled with one's own personal or professional objectives. Ambassador Dunn and I spoke about the need for legal reform and what that might entail. He clearly cared about institutionalizing rule of law principles and leveraging U.S. funds to do so. Acting on this interest, the Ambassador would appear at the opening of the seminar the next day along with Togolese Justice Ministry and bar association officials to speak on the issue.

OPENING REMARKS

Having made the necessary introductions and set out expectations on both sides of the project, my work began in earnest in the conference room of Ghis Palace, a modest hotel on the outskirts of the city. A smart hand-painted banner announcing the seminar was hung across the front of the room, reading: "Legal Aid and Strengthening of the Rule of Law in Togo." Long rectangular tables were joined together horseshoe-style. Young men arrived wearing wide neckties and pointy, fashionable shoes, as did women in western and traditional dresses, together with some older men in dark suits. Ardent mid-level and junior jurists

17. I say this not to chastise the hosting Embassy staff or host country representatives, but as an acknowledgment that some of the obvious background materials for a visit may not be provided to the visitor.

(including the daughter of a current or former prime minister) were seated around the horseshoe, but it was not clear whether the more senior men would remain for the work that needed to be done after the plenary. Indeed, many of the younger lawyers later expressed unhappiness with the location of the seminar. Although lunch and a stipend were provided, the cost of transportation outside the city center was significant.

The plenary session¹⁸ was opened by President Aquereburu of the Lomé Bar Association, who acknowledged the ineffectiveness of legal aid in Togo, in spite of measures provided in Article 10. Yet, he did not give as much attention to the concept of free legal assistance itself as to its legal underpinnings or to the precise term of art, which varied from *l'aide juridique* to *l'assistance judiciaire* to *l'aide juridictionnelle*. Nonetheless, he expressed hope that the seminar work would establish the necessary support for implementing a legal aid program.

In another set of opening remarks, Ambassador Dunn noted how the United States, along with bilateral and multilateral partners, had participated in the process of modernization of Togo's courts. He told those assembled that the American government sought to establish a judicial system that protects and respects individual and group liberties, as well as fundamental rights.

Following Dunn's remarks, the cabinet attaché from the Justice Ministry described the seminar as part of a vast and ambitious program of justice modernization and reiterated that the essential subject was legal aid. He thanked President Gnassingbé for "nourish[ing] his people with the hope of a promising future through the legal system" and emphasized that justice is "at the heart of the new societal contract" to which Togo had subscribed. Despite this executive endorsement, Judge Agbetomey of the Supreme Court was among the many jurists to evoke Article 10 and note that the Executive had never adopted an implementing decree for the law.

The usual round of comments and questions followed each speaker. Hands were raised and the moderator called on three people at a time. Each of them would begin by thanking the speaker for valuable remarks and then might deliver a rather lengthy comment or pose a question. The speaker then responded to a series of three interventions. For example, in response to Agbetomey's address, seminar participants suggested that consumer-friendly orientation and assistance booths be stationed in strategic locations, possibly in courthouse lobbies. They also

18. The proceedings are recorded in *Rapport Général du Séminaire: Aide Juridictionnelle et Consolidation de l'Etat de Droit Au Togo* (2–4 Oct. 2007) (on file with author).

agreed to implement specific recommendations at the end of the seminar, which would serve as the foundation of a *décret*, or decree, implementing Article 10. This decree would address such matters as the definition of indigence, legal aid eligibility, amount of legal aid, qualifications for assistance and the procedure for requesting aid.

Professor Kpodar of the law faculty was among the few speakers to offer a concrete plan of action. Kpodar suggested that the concept of legal aid to the indigent be sufficiently publicized and integrated into general university programs, and into law school programs in particular. He called for the creation of a Center for Law and Reflection, under the supervision of lawyers, judges and university faculty. The center would be staffed by students preparing for their CAPA¹⁹ or for the national judiciary college, the Ecole Nationale de la Magistrature.

Kpodar emphasized that legal aid is at the heart of human rights protection but cannot be effective if citizens' access to justice in their own country is not facilitated by the State through adequate human and financial resources. He urged the State to make assistance available to the most impoverished in order to avoid the "ill-fated effects of private justice," which he characterized as a source of violence.

It is not clear whether the center Kpodar proposed would be more inclined toward service than scholarship. Nonetheless, the ability of law school faculty to run such a legal clinic is highly questionable, given the theoretical nature of their training and orientation. Even if they did not run the clinic, the support of senior faculty would remain essential to the survival of any curriculum change made to accommodate the clinic, particularly those changes that might involve a reallocation of teaching resources and other funds or the awarding of academic credit.

In remarks entitled "The Necessity of Teaching Legal Aid to Students," attorney Attoh-Mensah echoed Professor Kpodar's emphasis of the need for state financial aid. He defined legal aid as a subsidy granted by the state to allow its poorer citizens to exercise their legal rights in legal matters (*mâtère gracieuse ou contentieuse*). He recommended that judges, lawyers and other legal professionals familiarize themselves with the free legal aid concept at an early stage in their training so they could integrate it in their professional lives. He argued that the bar's recognition of legal aid as a necessity for improving access to justice was an important step in the struggle to provide assistance to the underserved. To capitalize on this momentum, Maître Attoh-

19. The CAPA (*Certificat d'Aptitude à la Profession d'Avocat*) is the postgraduate legal qualification needed to practice law in Togo.

Mensah asserted that the political and legal authorities should be encouraged to implement an adequate means to provide effective legal aid.

Lastly, Attoh-Mensah proposed the establishment of a legal assistance fund administered by a committee of judges, lawyers and others. The funding source could be appellate court fines and interest on fees deposited by court clerks in bank accounts. His remarks elicited favorable comments, with some participants noting how an effective aid program would permit eradication of the *démarchage* phenomenon, or the unseemly practice by which lawyers “sell their wares” in the corridors of the Lomé courthouse.

I spoke next, offering a way to put these ideas into action by presenting American legal aid options and those that have prevailed in certain African countries. It remains surprising that a white American lawyer from a common law regime has something to say to French-speaking, black African jurists working in a Germano-Roman civil law system. Yet, these differences failed to raise large obstacles to communication, despite their divisive potential. To the contrary, I felt a bond that was both professional and personal.

In the same vein, one might ask why any former French colony would look to the United States for technical assistance? Our language, legal and educational systems, and culture are so distinct from what these nations inherited from France, and continue to rely on in government, schooling, commerce and public discourse. Notwithstanding the French legacy, and Togo’s mostly positive diplomatic and economic relations with France, there is perhaps a lingering distrust or rejection associated with the ex-colonial master. Yet, my preparations for the program convinced me that the U.S. system provides an instructive model for examining contemporary judicial and legal educational innovations necessary in francophone-Africa, despite deriving from a history of hegemony, similar to that of France.

There was a long period of incubation before the American institutions of democratic governance and due process protections took shape, I explained to the audience. The Supreme Court required 170 years to clearly define the contours of the Sixth Amendment to the U.S. Constitution—a fundamental provision of the Bill of Rights establishing the principle of legal assistance to those accused of committing a crime.²⁰ Extending the right to counsel for the indigent can thus be a long process in the making for a relatively young government and legal regime. In Togo, the practices and funding would take time to catch up with the legal texts. This slow development of a right to representation contrasts

20. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

with the civil law system of stipulated rights inherited from the French colonial empire.

I went on to describe a second unique method of the Anglo-American legal system that could prove instructive in Togo's struggle to provide services to the indigent: the development of clinical programs serving the poor. Through these programs, law schools set up clinics permitting students to work under the supervision of lawyers, or skilled teachers, and hold them accountable to indigent clients. Indeed, clinical education has developed elsewhere in Africa, in Anglophone countries and in legal regimes with no longstanding clinical or practice-oriented tradition. Although the clinical model is not intrinsic to common law, the development of law school clinics appears to be a creature of the Anglo-American system. In contrast, the Western European civil law countries—and France in particular—have historically failed to embrace clinical education or *formation pratique*.

A third easily translatable American method for providing service is the notion of mandatory *pro bono* hours for every practicing attorney. In terms of *pro bono* norms, the American Bar Association has “set the bar,” by placing responsibility on each attorney to aspire to contribute a certain number of uncompensated hours to the defense of indigent clients and worthy cases or causes. In Africa, a system of *pro bono* work may be emerging, in which lawyers and paralegals provide free representation to indigent criminal defendants, independent of any state aid. Paralegals have made a significant contribution to the legal assistance efforts in some nations.

I concluded my remarks by describing some of the independent efforts within Africa to incorporate the idea of *pro bono* service into the practice of law. Various declarations and other texts adopted by the African Commission on Human and Peoples' Rights in the last decade or earlier call on the courts, the bar and law faculties to take on a greater role in assuring the judicial systems are accessible to their fellow citizens, particularly long-term detainees.²¹ Although ratification of these texts does not by itself guarantee effective implementation, the principles enunciated in them should nonetheless inform any African legal aid scheme.

21 See, e.g., Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa and Plan of Action (2004), *reprinted in* PENAL REFORM INT'L AND BLUHM LEGAL CLINIC, ACCESS TO JUSTICE IN AFRICA AND BEYOND 42–44 (Nw. U. Sch. of L., ed. 2007); see also, UN Basic Principles on the Role of Lawyers (1990), *reprinted in* ACCESS TO JUSTICE IN AFRICA AND BEYOND at 268–69; ACHPR Resolution Legal Assistance and Dakar Declaration (1999), *reprinted in* ACCESS TO JUSTICE IN AFRICA AND BEYOND at 177 (“Bar Associations should. . . [e]stablish programs for pro-bono representation of accused in criminal proceedings. . .”).

Curiously, most seminar participants at Ghis Palace seemed to be unfamiliar with these declarations adopted by a series of *African* congresses of jurists, all of which have provisions requiring their promulgation and publication for lawyers, law students and the population at-large. This lack of familiarity also seems to extend to legal aid laws on the books in neighboring countries, some dating back to the early years of independence.

Despite the relevance of outside models, I kept in mind the reality that, in adapting a legal aid model, each country must take into account its own laws, traditions, habits and customs. As one veteran rule of law scholar has noted: "The transplantation of laws and legal institutions is not always wrong, but formalistic transplantation should come with a *caveat emptor*. . . ."²² When the law and legal institutions are adapted to local needs, governments will allocate resources to enforcing and developing responses to meet those needs. Furthermore, intermediary authorities can be more effective when dealing with laws that are "broadly compatible with the preexisting legal order."²³ Without such integration of the preexisting legal structure, the challenge of providing access would prove much more formidable.

Lastly, having proposed several models for guidance and discussed their applicability, I urged the creation of a law school-associated clinic in Togo, which could benefit greatly from a theory-practice collaboration resulting from the recent partnership agreement entered into by the local bar association and the University of Lomé.²⁴ In short, Togo presented a rare opportunity to establish a clinic in French-speaking sub-Saharan Africa. Yet, despite the adaptability of the nascent legal infrastructure, setting up any legal clinic would require mastering some less theoretical dilemmas. Lack of funding and staffing is a huge obstacle for legal clinics in developing countries. The most dilapidated U.S. inner city school is a palace next to some African university campuses. It is not simply that the paint is peeling, windows are cracked, the paths are unpaved and landscaping is untended. Office space is limited and lacking in the usual fixtures and furnishings, classrooms are scarce and libraries are comprised of a few bookshelves and a single computer terminal. The commons, cafeteria, secretarial pools and student meeting rooms are all but non-existent. To locate a physical space for a future *clinique juridique*, would require more than a well-hybridized legal approach.

22. Jensen, *supra*, note 2 at 136.

23. *Id.* (based on extensive regressions; footnotes omitted).

24. Protocole d'Accord, *supra*, note 16.

In the last of the formal seminar presentations, Judge Hohoueto, the National Justice Modernization Program coordinator, spoke on the theme of "Legal Aid and the Modernization of Justice in Togo." She described the six objectives of the national program, which included improving accessibility to the legal system. Hohoueto stated that widespread illiteracy and ignorance of law were factors that impeded the effectiveness of measures, such as the indigence provisions of the Code of Civil Procedure.²⁵

Following Hohoueto's remarks, some of the assembled jurists raised questions about the issue of court fees and costs and their impact on access to justice. Not only do lawyers and notaries charge fees, but the marshals and bailiffs also require payment before service of summonses or subpoenas or the seizure of goods. As there seemed to be no provision in Togolese law for fee waivers, judicial process was simply unavailable for numerous poor, would-be litigants.

DISCUSSIONS

After the opening remarks, participants divided into two working groups. The first group's theme was: "Reflection and Proposal of a Legal Text on the Utility of Legal Aid in Togo." The second theme was: "Reflection and Writing a Program for Teaching Legal Aid to CAPA-level Students."

I sat in on the second working group. None of the academics participated in this group, but there were veteran attorneys and those who had recently been students themselves. Its members operated with a good deal of formality. It also appeared that any recommendations made at this gathering about a changed curriculum or establishment of a legal clinic would be subject later to a formidable and centralized decisionmaking process. At a minimum, a change in law school policy or practice would need approval by University authorities or even the Ministries of Education and Justice.

In an American setting, a scribe or reporter might volunteer to do duty at this juncture. Here, however, a committee chair was chosen more-or-less by acclamation and he then received comments from the others in an orderly fashion. Some of the seminar's formal plenary session protocols carried over to the working group. There was discussion about adding new law courses: Legal Aid, Social Justice, Clinical Techniques, Legal Practicum. There was also talk about training paraprofessionals and references to clinical education in South Africa. Externships, as part of the law school curriculum, could offer future lawyers the

25. §§ 405-07.

opportunity to work directly in law firms, non-governmental organizations and public law offices. For example, students could work under the supervision of an attorney for a specified time, for the purpose of acquiring professional experience, absorbing values inherent to the profession and mastering the professional code of ethics.

In examining possible curriculum changes, the group focused on instituting practical or skills-based clinical education, inculcating the spirit of volunteerism and social justice. This would permit students to acquire legal knowledge before they became practicing lawyers. As already noted, there are now legal clinics throughout Africa. These clinics sometimes specialize in a particular field of law or clientèle such as the rights of women or abandoned children. But, with few exceptions, these clinics are all situated in Anglophone countries with a common law tradition.

Nonetheless, the obstacles to developing law school clinics in Africa have more to do with the traditional legal *educational* models than the country's particular inherited legal scheme. This problem begins with the type of instructors available. For the most part, professors are recruited directly from the Academy, with no law practice experience or training. Classes are almost exclusively about theory, delivered lecture style in a large hall, with minimal to no student interaction or opportunities for *formation pratique*.

Upon further discussion, it became apparent that students who enter the faculty of law right out of secondary school may have insufficient background or professional orientation at that stage to fully participate in a legal clinic designed for would-be lawyers. Other scholars in the field have echoed this view. Professor Frank Bloch, an active GAJE member, has previously observed that a clinical program for an upper teen at an undergraduate college of law in a "lecture-based, code-dominated curriculum" may look different than it does for his American law school counterpart. According to Bloch, the American student tends to be older, desirous of a career in the legal field and engaged in an "interactive and advocacy-oriented course of study."²⁶ Professor Leah Wortham, a veteran clinician in the international arena, goes further with her sage advice, insisting that American consultants not be wedded to their "home country model" of what constitutes a law school clinic.²⁷ Providing a springboard for deviation from that model, Professor Richard Wilson has devised a ten-step program in clinic construction, complete with five foundational principles.²⁸

²⁶ Frank S. Bloch, *Access to Justice and the Global Clinical Movement*, 28 WASHINGTON UNIV. J. L. & POL'Y 111, 115 (2008).

²⁷ Wortham, *supra*, note 2, at 670-74.

Thus, one must adopt a model that is compatible not only with national legal institutions and practices, but also with the educational system.

Though the group did not raise the issue, I knew from past experience and research that funding the clinic could also prove to be a huge hurdle. Especially as the expectation in the case of a legal clinic is that the host government or academic institution commit its own resources, and not rely exclusively on the American government or other foreign donors. Togo was not in a position to easily allocate such funds.

Nevertheless, as I listened to the discussion, I was pleased with this direction of the discourse, as these were themes I had promoted earlier in the week. But, as an advisor and foreign jurist, I was wary of steering the group toward a predetermined conclusion, rather than allowing the Togolese to organically develop and nurture proposals that met their needs.

REPORTS AND PROPOSALS

After the discussions, the final plenary of the symposium was devoted to reports from the working groups. The members of Group One proposed the adoption of a regulation or *décret* to implement the existing indigent assistance statute, Article 10, by laying out a definition of legal aid, conditions of access and limitations. Even in this proposal, there remained a near obsession with the statute and the failure of the executive to implement it for almost three decades. It was as if, until the decree issued and the bureaucratic machinery cranked up, no legal assistance could be offered the indigent. On the other hand, the executive delay might be considered reasonable in light of the constitutional separation of powers between the independent judiciary and the government. Under this framework, action by the executive branch to implement judicial guarantees such as access to the courts might conceivably be viewed as interference. This tension may well explain the stagnation of the law, even in light of democratic transition in Togo.

Group One also called for the installation of orientation and assistance booths in all Togolese courts. Its members advocated for promotion and reinforcement of the role played by the bench and bar. This approach would include legal aid programs based in law faculties. I believed these steps could truly foster a *pro bono* ethic, building on the current *bénévolat* and annual visits by lawyers to the prisons. It could also give meaning to the recently adopted protocol between the Lomé bar and the law school.

28. Richard J. Wilson, *Ten Practical Steps to Organization and Operation of a Law School Clinic* (Feb. 2004) (unpublished paper on file with author).

Group Two proposed similar changes. It pushed for a training program, with theoretical and practical emphases as an elective at the judicial college and faculty of law. The theoretical curriculum would focus on conceptual definitions, ethical norms, legal foundations, inter-university exchanges and alternative methods of conflict resolution. The practical program would concentrate on statutory amendments (*redaction d'actes*), creation and implementation of "drop-in and orientation" centers and legal clinics as well as utilization of paralegals. The objective, they said, was to give future attorneys and judges the necessary tools to familiarize citizens with their rights and to facilitate their access to justice. When the seminar participants expressed some concern about the clinic proposal, the Group responded that its mandate was to suggest a general orientation about instilling "legal aid consciousness," but to leave it to the University to determine the practical methods of teaching the subject matter.

Before the closing ceremony, those assembled adopted the recommendations of both working groups in their final report.²⁹ The session adjourned and we abandoned the air-conditioned hotel meeting room for the hot, dry late afternoon air.

Participants completed twenty evaluation forms and returned them to the Embassy staff. With the exception of remarks about the hardship associated with travel to the site, the comments were all positive and endorsed the seminar themes and recommendations. When asked to name three ideas they retained from the seminar for use in their professional life, many referred to the concept of practical legal education, including: *cliniques juridiques*, externships for upper-level law students, and fostering a legal aid ethic in the curriculum offered at the law faculty and the Ecole Nationale de la Magistrature. Others referenced the need to finally implement Article 10, to create a legal aid funding scheme, to establish a *pro bono* program, and to set affordable attorney's fees for clients. Evaluators also mentioned increased utilization of paralegals and more know-your-rights outreach to the public about legal assistance.

As for suggestions for the future, respondents indicated that more such practice-oriented continuing education seminars should be held. They urged expanding participation in such seminars to bailiffs, marshals, clerks, notaries, law students, judicial college students, senior attorneys, the human rights minister, and members of civil society and non-governmental organizations. Rather than restrict such gatherings to the capital, participants urged that seminars be held in other cities throughout the country and that the seminar be open to the media. Overall, the suggestions urged

29. *Rapport Général du Séminaire, supra*, note 18.

continuation of the program. For example, one participant liked the comparative law perspective. Another respondent was anxious to see positive effects from the group's recommendations and produce the fruits of their labor ("*produire leurs fruits*") in a reasonable amount of time. In the same vein, another voiced concern that the work-product not collect dust in file cabinets ("*classés dans des tiroirs*").

Before reviewing evaluations and planning the next steps, the coordinators and a small group of participants celebrated the close of the program at the home of Maître Attoh-Mensah. An established member of the bar who supports human rights causes and appeared to share the aims of the seminar, Attoh-Mensah had previously traveled to the United States on State Department legal reform exchanges.

The Chair of National Human Rights Commission, Koffi Kounté was among the guests. One of my Embassy hosts had informed me that he had a genuine concern about prisoners with mental illness. In the moment, he struck me as someone in a position of responsibility with whom I should have some follow-up contact about treatment of detainees. We exchanged email addresses. We talked about the delays in processing prisoner cases and how this was particularly detrimental for mentally ill detainees. I suggested that student or postgraduate *stagiaires*,³⁰ might help judges alleviate their docket. He seemed a bit skeptical at the prospect of anyone but the judge actually managing a case. To me, however, encouraging the judiciary to utilize students is merely a variation on the larger effort to convince the bar to supervise and train its future members.

We continued our informal conversations over a meal served in a gated courtyard under the stars, with no particular agenda and no need for decisionmaking. It is important to have this type of meeting with prospective reformers outside of formal settings. There is more opportunity for candor and reiteration. This is particularly the case where the conference is long on theory and short on pragmatics. For real change to take place, we must develop interpersonal relationships to build confidence and to continue the dialogue once the seminar banner is packed away. I only regret that I am not always able to maintain these contacts upon departure or to monitor progress on proposed reforms.

CLOSING REMARKS

The bar association devoted the day after the seminar ended to a presentation of the conclusions and recommendations to the full

30. This translates as "apprentices," "externs," "interns" or, in some countries as "pupil-lawyers."

bar membership and the media. I shared the podium that morning in a darkened hall at the bar association headquarters, with the bar's program coordinator, Maître Afangbedji, who also served as liaison to the Embassy. The auditorium was full. I recognized very few people from the seminar, and I was uncertain who in this crowd was an attorney, a journalist, a government official or an NGO activist.

Afangbedji and I each spoke briefly about the recommendations made at the close of the Ghis Palace conference concerning legal aid, voluntary lawyer services and legal education. We referenced the protocol signed between the Lomé bar association and the law school earlier that year. What neither of us noted in the moment is that in establishing a law school clinical program of any sort, the temptation is to rely on members of the private bar or an NGO-affiliated attorney, as they have more practical knowledge and experience rather than on the professoriat. For long-term sustainability, however, it is necessary to have law faculty involvement.

Questions and comments followed. Most of the audience comments focused on the role of paralegals, law student clinics and student externships. More than one lawyer expressed skepticism about this advocacy model. Their concern generally centered on competition for clients, professional integrity or both. Bar associations in many countries tend to be ingrown and protectionist, with restricted access to membership. Although small in numbers, the Togolese bar is no less concerned than its counterparts in developed countries about nonlawyers giving advice and counsel.

In addition to asking about the program, members of the media also asked about the United States' human rights record at home. These questions are typical of the inquiries made to official visitors. Reporters and others asked about the death penalty and its uneven application across the states, the status of Guantánamo Bay detainees, police abuse and racism. Although embassy staff during other program visits have sometimes tried to shield me from impertinent or provocative questions, I did not feel the need to censor my answers. In fact, I believe these issues merit discussion even in the context of a rule of law conference, in part because a government that is promoting democratization and celebrating civil society and rule of law must bare its own account. Accordingly, journalists often take advantage of the opportunity to question an American visitor even if these are not the topics on the speaker's menu *du jour*.

After the press conference and some individual television and radio interviews, I walked down a long unpaved road with a group of lawyers in the late morning heat, to one of the principal prisons

in Lomé. Most of these lawyers were newer members of the bar, including *stagiaires*, and had attended the Ghis Palace seminar. I am not sure if the trip to the prison was impromptu or anticipated, but I was glad for the chance to have a personal observation of the prospective clients whose prolonged detention prompted the renewed call for legal assistance.

About eight to ten of us entered a dusty prison yard in our suits and ties. The scene before us was overflowing with humanity, and yet a degree of normalcy, as if all the hot, sweaty, teeming life of the streets and shanty towns was transported to this sunny, open, but densely populated space. I saw only a few uniformed guards and they did not carry weapons. Near the entry, a plainly lettered sign had been posted by the European Union with the number of current detainees—a number I do not recall. Was this meant to assure monitors and visitors, or was it displayed as a proud banner, to see how Togo ranks on the overcrowding scale with its neighbors on the continent?

The prison yard was a picture of *petit commerce*, visiting, and the biding of time. It was at once industrious and carefree. Off to the sides were dark caves of cells filled with thin mats, and walls hung with laundry and personal effects. There were no bars on the cells. Masses of shirtless men and boys talking, sitting, lying down, selling and buying. We came as sympathetic observers, and yet it was hard not to feel like voyeurs.

The Kampala Plan of Action, which followed the 1996 Conference on Prison Conditions in Africa, recommends educational activities, skills-based training and a work program, incorporating elements of self-sufficiency and sustainability.³¹ The 2002 Ouagadougou Plan of Action on Accelerating Prison and Penal Reform in Africa recommends nationally certified vocational training programs, rehabilitation and development programs, with ensured access for “unsentenced” prisoners, literacy and skills training.³² The latter plan also calls for more self-sufficient prisons by fostering prison agriculture, workshops, locally managed industries and other enterprises “for the good of prisoners and staff.”³³ None of that was going on here.

Chez les femmes, the women’s section, revealed a slightly different story. The handful of incarcerated women (and one or more with a child) were actually separated from the men. Throughout the world, women are a minority of the prison

31. Kampala Plan of Action, *reprinted in* ACCESS TO JUSTICE IN AFRICA AND BEYOND, *supra*, note 21 at 226.

32. Ouagadougou Plan of Action, *reprinted in* ACCESS TO JUSTICE IN AFRICA AND BEYOND, *supra*, note 21 at 235

33. *Id.*

population, but their numbers are increasing. According to Penal Reform International, the increase is “fueling the global trend” toward overuse of imprisonment and under-use of alternative sanctions.³⁴ At the Lomé prison, the women’s quarters were more spacious than the men’s. They were almost homey in a modest way. Not all was out of sync with the lofty declarations and plans of action: the staff proudly showed us how some of the women were learning to sew as an eventual trade.

We were told that there was a woman prisoner with a mental disability. “*C'est une folle.*”³⁵ I do not remember if I caught a glimpse of her, isolated in a dark cell, or if there were just the whispers. On the subject of mentally ill prisoners, the Kampala and Ouagadougou conferences yielded some broad legal standards. The Kampala Declaration and Plan of Action, for instance, urge the adoption of “urgent and concrete measures” to improve conditions for persons with mental illness and disabilities,³⁶ including adequate treatment during arrest, trial and detention, and that access to doctors be allowed.³⁷ The subsequent Ouagadougou action plan recommends prison alternatives for people with “mental health or addiction problems” and social and psychological support by professionals.³⁸ The Togolese constitution also addresses the need for medical treatment, preservation of dignity and non-arbitrary detention.³⁹

Yet, there we were, witnessing what we and other legal reformers in Africa hoped to alleviate. It is possible that “sidebar” conversations were taking place outside my view, and the attorneys accompanying me were able to process minor cases on the spot, helping to clear the backlog of pretrial detainees. Surely,

34. See *Penal Reform Briefing No. 3* (2008)(1), available at <http://www.penalreform.org> (last visited December 19, 2010).

35. “It's a crazy woman.”

36. As disability rights has been the bread-and-butter of my law practice in the United States, I try to find ways to make some connection to the local disability community on these speaker specialist visits. The best I managed during my stay in Togo was a Saturday morning visit to the Lomé marketplace, where the Coopérative des Handicapés de Niamtougou (CODHANI), based in the northern part of the country, maintains a small shop of textiles and other crafts made by persons with disabilities. I found their shop after wandering through a warren of vendors—fabrics, spices, potions, ceramics, household goods—with the help of an Embassy aide and after many inquiries for directions.

37. See, *Kampala Declaration on Prison Conditions in Africa* (1996), reprinted in *ACCESS TO JUSTICE IN AFRICA AND BEYOND*, *supra*, note 21 at 222, and *Plan of Action*, *supra*, note 31 at 227.

38. See *Ouagadougou Plan of Action*, *supra*, note 32, at 233 & 235.

39. Constitution, arts. 15, 16.

that is what happens during the periodic *journées de consultation juridique gratuite*. Could those free consultation days be institutionalized through a routine bar association *pro bono* program? Could a law student clinic assist those lawyers or help train paralegals, or provide community education and outreach to families, street merchants, secondary school students, rural villagers and others? Could law students serve as externs to magistrates to help them clear the detention backlog? A few small and creative steps could begin to breathe life into the promises embedded in a plethora of declarations, action plans, minimum standards, principles, statutes and constitutions.

CONCLUSIONS

The tape that keeps playing in my head throughout this and other visits goes something like: *Les conférences, les entretiens, les visites*. The lectures, the meetings, the visits. *A quoi ça sert, tout ça?*⁴⁰ It goes without saying that short-term visits and short-term foreign visitors have their limitations. I knew before I left Berkeley that I could not will the establishment of a *clinique juridique* or a volunteer legal services program in Togo in one week, nor one semester—perhaps not even in one year. The logistical and cultural gaps are huge.

The successful establishment of a clinic takes time and it takes others. There must be more face-to-face exchanges of longer duration. There must be a greater interchange between Togolese who study, observe, teach or consult abroad—in Africa, Europe or the United States—in law school, law practice or NGO settings and foreigners who come to Togo to do the same. Any attempt at establishing a clinical system will also require public and private funds, administrative and technical feasibility, and political will.

The key for the consultant is to encourage trends or the creation of a new legal or socio-political culture in a way that does not trigger a divisive response. The question inspired should not be: “how can a *pays en voie de développement*—or, the Global South—be expected to adopt the measures and practices that are available to a *pays développé*?” This question misses the mark, because the efforts at issue are not a prescription for establishing relativist standards, but a recognition that a country with fewer resources will have to husband those resources for higher priorities.

In the same vein, one must strive to impart information and exchange ideas in a spirit of mutual respect, and not by way of the sermon or financial carrot-and-stick. Would-be clinical instructors

40. The English does not quite capture the meaning: What is it all about? What is the point in all this?

and bar association activists in Togo, or elsewhere, must not feel overwhelmed or demoralized by the knowledge that arguably “better” policies or customs are in place in the United States in the establishment of law school clinics and *pro bono* programs. Instead, the process of establishing a clinical program and *pro bono* system is all about the encouragement of what is possible within the existing legal, political, socio-cultural and economic frameworks. The visitor then leaves behind a little reflection and self-criticism, a little passion, some commitment, a lot of goodwill and solidarity—and asks for the same in return.