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Globalization, 'Law and Development', and Contemporary Africa

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A. Introduction

Contemporary Africa is often seen as one of the great paradoxes of polarization in much of the discourse pertaining to the global matrix. Although it may have progressed some way from Conrad's 'dark continent', its circumstances make it practically synonymous with the breadth of criteria that are relevant to the notion of Development. It probably has the highest incidence of structurally challenged political economies. In his much-acclaimed Reith Lecture,[1] Professor Anthony Giddens identified an intrinsic general 'uncertainty' that runs with Globalization. It is in the nature of things that this must have a special poignancy in the African context. The present article is a generalist survey of contemporary legal and developmental themes and patterns which characterize Africa in today's globalized world, that there is common ground between the effects of globalism and globalization on the one hand and, on the other, the indicia of development, that law and policy in Africa needs to embrace global trends which, by definition, transcend national boundaries. While there may be little need to explain the paper's resort to relatively recent globalization discourse – the next section expatiates the issues arising from this particular context – it is perhaps necessary to justify recourse

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[1] Anthony Giddens, 'Reith Lecture' (4 May 1999) (auspices of the LSE Foundation). The wider-ranging composite of lectures had dealt with Globalization, Risk, Tradition, Family, and Democracy. See generally also A. Giddens, *The Consequences of Modernity* (Cambridge, Polity 1990), at p. 64, globalization as '... the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa'.

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to 'Law and Development', given that the Movement, of the early 1960s, from which the particular theme directly takes its name has rightly been described as having either become retrenched or assumed newer or more relevant coherent forms (e.g. International Law of Development and, latterly, Development Law).[2] It has had considerable influence on cognate extra legal discourse[3] in the afterglow of the United Nations General Assembly's inauguration of a 'Development Decade' in its Resolution 1710 (XVI) of 1961, with increased focus on development issues generally.

For the present purpose, an important chronological perspective of the legal framework applicable to today's Africa, and by which useful insight and assessment is forthcoming, is afforded by applying a legal starting point associated with notional 'law and development'. In this connection, an heterogeneous developing world can be perceived to assert ideological autonomy, to configure its future on an expansionist, often pluralistic, consensualism. A broad consequence of this attitude is that it opens the way to inquiry into the normativity of conceptual points of view which are central to generalized consideration of international[4] and global orders. Incontrovertibly, however, and as the next section shows, a latent but pervasive binarity, of interpretation and application, subsists in these respective orders more so when the subject matter concerns north-south divides.

One significant consequence of cultural and legal relativism and interaction at the global level – at which level the civility of world society is as deterministic as is material development – is that local and global norms are constantly recharacterized, reinvented or renegotiated. Legal atavism and subjectivism are much eroded, in the sense of the old extremities of right and left being mostly defunct. But it is just as much a cautionary note that interpreting the ethos of globalism be restrained if it is to be constructive. Law and Africa interdependently develop apace, with the interface hallmarked to a greater or lesser extent by an unpampered civilizing of local society, constitutionalization, empowerment, facilitation, and regulation, through the rule of law. Thus, the legal relevancy of globalism is frequently a direct function of how fluent are otherwise relatively fixed conceptual and material boundaries from which discourse derives. Following this introductory section, the

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2 See generally P. Slinn, 'The International Law of Development: A Millennium Subject or A Relic of the Twentieth Century?' public lecture at SOAS (University of London, November 1997). The present writer is grateful to Dr Slinn for his having made available the transcript of his talk. See also his magisterial 'The Contribution of the United Nations to the Evolution of International Development Law' in (1995) *ASICL Proc*. 7, at p. 263.

3 Cf. M. Batou, 'Is Globalisation Ineluctable?': a 'Globalisation-Development' Conference presentation under the auspices of the American Association of Jurists, Centre Europe-Tiers Monde, and the International League for the Rights and Liberation of Peoples, at the Palais des Nations, Geneva, 26 March 1999. The speaker was Professor of Contemporary International History, University of Lausanne, Switzerland.

4 See, e.g., R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Clarendon 1994) at pp. 11–12.

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remainder of the article looks firstly at the context and consequence of globalization (including some discussion of the emerging notion of global law) and the legal order as these relate to post-modern Africa. Thereafter, some broad legal issues relating to development are analyzed more specifically, with a rapporteur's summary of particular aspects of public and private law which have a direct bearing on these issues, and which provide observational perspectives about the themes which comprise the title of the paper.

B. Law and Globalization: Conceptualization and Context

Much of the logic of globalization and concomitant discourse derives from the logic of territory and from the autonomy of capital. Globalization concerns the role of a volatile transnational society within a pre-existing international order which does not always adequately govern that society. In one breath, it throws up and juxtaposes a diversity of new questions; e.g., of issues of self-determination of peoples side by side with problems of how transnational corporations are to be regulated; of the inter-relationship between refugees and the environment; of minorities' rights in the world trading system. Information and communications are as advanced as the transmigration of peoples. There is a host of new types of social, economic, and environmental equity, and the inherently asymmetrical logic of globalization has only so much directly to do with development or with national legal situations which have not fully embraced its prerequirements of privatization and deregulation.

Yet, globalization is unavoidable, recent though it may be in terms of parlance and context. Its antecedents, particularly from the new world's viewpoint, include colonialism and colonization and their aftermath. The first real global crisis was World War I. Previous international crises – for example, in the wake of industrial and foreign policy conditions in Western Europe between 1870 and 1914 – were considerably regional, with points of contact with Africa being colonization and its afterlife wherein executive agencies are integrated into the surviving scheme of things. It would be misleading to disregard development accruing from this predominantly uni-directional scenario. The 'global' scenario itself belongs to the present century but it has repetitive antecedents from the course of world history in which Africa has had a locus that is temporally re-defined, along with the nature and limits of the continent's role and legitimate expectations.

As high a demographic proportion as 85 per cent of the world's population does still not materially benefit from globalization.[5] In 1913, exports to the less developed

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[5] See UN Doc. ST/ESA/STAT/SER.X/17, Table I (1991) (National Accounts Statistics: Analysis of Main Aggregates).

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world accounted for less than 15 per cent of the gross domestic product of countries which now form the Organization for Economic Co-operation and Development. In post-war Europe of the 1950s, the percentage fell to about 8 per cent, to rise a little over a decade later to the proportions just before World War I. The phenomena of modern economic dependence are manifest in very divergent ways, partly because of geographical and historical considerations, of the rules and techniques by which property may be transnationalized, and as a result of a certain liberalizing ideological process. Due attention to the requirements of context was never more important.

Tangible indicia of the globalized world include a destructuring of human resources alongside a conflict between economic progress and sustainable social ordering. Industry is delocalized. Employers of labour and resources on the one hand and consumers and end-users on the other are disengaged.[6] But transnational transactions can be concluded on the web, and social capital, by which productive community and collaboration is facilitated, grows fairly rapidly. The global process can be seen to apply its internal and external scope for resource mobilization to the welfare of the greater good. It does so, for example, through the processes by which non-governmental organizations exercise as much influence as, if not more than, states. In circumstances where private gain is at the heart of the inequality of gains from globalization, the progress of things is naturally to be resolved by optimal co-ordination of development-related systems with the environment in which they function. Much of developing Africa's debt crisis was to have been resolved by the structural adjustment programmes of the World Bank Group. These packages involved prerequirements of democratization and extensive fiscal reform which have been regarded with some scepticism as these programmes have progressed.

Generally speaking, law-and-globalization is about the role of non-state agencies and the burgeoned legal regimes they generate. Professor Teubner abstracts as follows:

> The difference between a highly globalized economy and a weakly globalized politics is pressing for the emergence of a global law that has no legislation, no political constitution and no politically ordered hierarchy of norms which could keep the paradox of self-validation latent.[7]

Globalization's 'post-modernist counterpart – local resistance against globalization' proves to be 'out of touch with the reality of a communicative world society'[8] even though the global process and law-in-action are simultaneously cogent and

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[6] This is represented as 'the depersonalisation of economic activity' by J. Flood and E. Skordaki, in 'Normative Bricolage: Informal Rule-Making by Accountants in Mega-Insolvencies' in *Global Law Without A State* (G.Teubner (ed.)) (Dartmouth 1997) p. 109, at p. 110.

[7] Op. cit., supra, at p. xiv.

[8] Ibid. at p. xvii.

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interdependent at many levels. Socio-economic development makes it necessary to provide new responses to negative fragmentation, and Africa's dependence on 'soft law' options is axiomatic of its place in the order of things global – legal and contemporary.

In a pluralist legal order, global law can be contrasted with the law of modern nation-states and, it is said, thence to 'a new body of law that emerges from various globalization processes in multiple sectors of civil society independently of the nation-states', existing 'in its own right which should not be measured against the standards of national systems...[and having] characteristics...explained by differentiation within world society itself. While global law lacks political and institutional support on the global level, it is closely coupled with globalized socio-economic processes'.[9] By its premise in interdependence, globalization may tend towards the integration of the world's communications, environmental and trading systems, but it does, or can, not imply either the standardization of these or other systems or the demise of the nation state. So called global law, therefore, is a(n) (emergent) sector of the overall legal ordering of things, and its obvious appeal to developing Africa cannot be contemned. Indeed, one is reminded that '[t]he theory of world-society relativizes, if not ignores, the distinction local/global'.[10] However, its true value is at best often only predictive, or in the terms of constituting an amorphous contingent alternative. Its context admits neither a Moses nor a Pied Piper, nor is the essence of law-and-globalization remotely chimaerical as would permit an over emphasis of so-called global law beyond the parameters of convention.

The subtext in this regard is simple: that globalization is not usefully to be disengaged from rational empowerment and responsibility (civil-political as well as socio-economic), that interaction between the local and the global is optimized where it proceeds mindful of the cogency and consequentialism of this subtext. In considering the current shape of world trade, for example, it is necessary to factor in certain humanistic variables which closely run with worthwhile economic development: international human rights issues, sustainability, co-operation, transparency and good governance, and so on. These overlap with typical areas of global law e.g., so-called *lex mercatoria*, multinational enterprise law, human rights law and its subdivisions and novelties, general and specialist transnational law. The quality of collective responses to these factors often proves to be very much a useful benchmark of the extent to, and the manner in, which contemporary Africa can be said to be responsively globalized. Another useful benchmark is the quality of the incremental

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9 Ibid. at p. 4 ("Global Bukowina': Legal Pluralism in the World Society').

10 A. Schutz, 'The Twilight of the Global Polis: On Losing Paradigms, Environing Systems and Observing World Society' in Teubner (ed.), *supra* note 6, p. 257, at p. 279. See also, B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York 1995), e.g. at p. 263: '... the core countries specialize in globalized localisms, while upon the peripheral countries is imposed the choice of localized globalisms', and at pp. 365–373, a prognosis concerning a *ius humanitatis*.

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confluence of so-called public law and private law, for example, as this is manifest in national, regional and international policy formulation, which is where, with respect, the consequential impact of global processes may be institutionalized at the level of the rule of conventional law in the metaphorical 'global village'. With its inherent shortcomings, the bandwagon that may be global law is perhaps apt to profoundly influence the direction of conventional law either by a less formal affinity or responsiveness to developments and new problems, rather than be permanently consigned to the periphery of useful consideration of the concept of law.

C. Development and Law

The renewed continuity of the nexus between law and development is entrenched in the Preamble to the United Nations General Assembly's Declaration on the Right to Development 1986:[11]

> [D]evelopment is a comprehensive economic, social, cultural and political process which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

At the notional level, this definition is not only properly wide-ranging but also, for the perspective of this paper, relevant to contemporary legal parameters. Its indebtedness to the Law and Development Movement is confirmed by the gradual dynamic accretion of international legal principles and dimensions from those humbler origins. However, much remains to be resolved, particularly in the case of African legal systems, at the level of national policy. Multi-disciplinary approaches are paramount in these regards, as presently will be discussed in the next section of this paper. These policy issues are not usefully to be isolated from a broader contemporary milieu – in which, e.g., international peace and security, non-governmentalism, and humanitarianism also vie for priority in the relevant agenda – where they must contend with the free-market philosophy that is central to globalism. A good deal of these factors have contributed to what now substantively constitutes contemporary development law.

Illustrations of the new dimensions are rife, wherein developed and developing or transitional states are constructively subject to a principle of positive differentiation, are thus encouraged to begin to compete in the burgeoned global economy. Through the Lome Conventions, African Caribbean and Pacific (ACP) states are partners in international development with the European Union Member States. At the First

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[11] Annex to GA Res. 41/128, 4 December 1986.

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ACP Heads of State and Government Summit in November 1997, this principle was recognized in the ensuing Declaration. Likewise, Article 20(2) of the Biodiversity Convention 1992 imposes firm obligations on developed countries to renew financial aid for the specific purpose of the treaty, in the interests of worthwhile global development.

Doubtless, there are as many considerable good effects from internationalization as there are important concomitant issues which need to be addressed by the economies that stand to be enhanced from it. Co-operation can only be fruitful if it is approached on this basis. So it is that international relations and development are conjunctive, as is borne out in the nature of the more recently evolved applicable principles which hinge upon sustainability in much the same way as they include a reconstruction of international law as would include the attributes of globalism, and as these principles counteract the uni-directional circumstances and effects of globalization.

Conceptually speaking, development has acquired conventional, or virtually classical, status as a legal theme, is no longer a marginal issue, nor is it one that can ever become irrelevant. The issue of its relevancy, and the ways in which law-in-action responds to it, is taken further as the underlying consideration in the next section.

D. A Recapitulation: Issues, Concepts, and Horizons

> [I]n analysing the contemporary world, it is often not enough to focus on the traditional cast of small actors: sovereign states, official international organizations, and individuals ... The concept of legal personality, an old favourite in Austinian analytical jurisprudence, may be ripe for a revival in a global context.[12]

Much of the literature on phenomena associated with globalization, some of which has been referred to in passing in this present paper, deals with and, indeed, significantly relies on the notion or concept of 'civil society'.[13] Read against the background of the preceding section, in which the considerable impact and the inherent limitations of global law were raised, it is hardly surprising that expectations of a further widening of the gap between developed and developing

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[12] W. Twining, 'Globalization and Legal Theory: Some Local Implications' in *Current Legal Problems 1996* (M.D.A. Freeman (ed.)) (Oxford, Clarendon 1996) p. 1, at p. 6.

[13] Cf. M. Walzer (ed.), *Towards a Global Civil Society* (Oxford, Berghahn 1994), generally. *The Report of the Commission on Global Governance: Our Global Neighbourhood* (Oxford 1995), at p. 32, defines 'civil society' as '... a multitude of institutions, voluntary associations, and networks ... [which] channel the interests and energies of many communities outside government, from business and the professions to individuals ...'.

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systems is the issue to be restrained on this conceptual count. The dualism of systemic dispositions towards such an integral concept are as divergent as ever they were or could be, be the context hard economics or humanization through the legal process.

Webb pointedly articulates the African problem, in discussing legal system reform in the less developed world, thus:[14]

> It is widely recognized that a system of universal and abstract rules, with institutions that enforce them, and predictable mechanisms to regulate conflicts over both the rules and their enforcement, has contributed to the economic success of the Western nation-state ... Where the party-state has been dominant (as in much of Africa and in some parts of Asia), the role of law is confined to legitimizing the actions of a strong centralized government ..., is a vehicle through which the government can exercise authority ...
>
> In countries where the legal reform process has permitted customary laws to exist side by side with new laws (often the case in countries which were colonized), the potential for legal conflict between the customary laws and the new formal system adds yet another dimension of uncertainty to the functioning of the economy.
>
> In such a setting, laws and legal institutions exhibit a number of characteristics impacting on the capacity of the private sector to assume an expanded role in the economy.

Another writer[15] refers to a 'more significant' non-economic 'difference...in the absolutist objectivity of the developed world versus the relativist subjectivity of the developing world', that:

> ... [d]eveloped societies have the capacity to create, grasp, and rely on a belief system of abstract ideals (e.g., equal justice for all, equal application of the law, due process, democratic representation and governance). In developing societies, the subjective, personal element, where loyalties are given not to abstract concepts but to families, patrons, rulers, ethnic or religious identities or leaders, tends to be more prevalent.

The Report of the Commission on Global Governance reiterates:[16]

> The agents of change within civil society can help this process through arrangements to ensure balanced participation of their own varying interests and positions through manageable modes of participation.

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14 In 'Legal System Reform and Private Sector Development in Developing Countries' in *Economic Development, Foreign Investment and the Law: Issues of Private Sector Involvement, Foreign Investment and the Rule of Law in a New Era* (R. Pritchard (ed.)) (London, Kluwer and the IBA 1996) 45, at p. 47.

15 R. Sarkar, *Development Law and International Finance* (Boston, Kluwer 1999) at pp. 7–8.

16 Ibid. at p. 35, also, see, e.g., ibid. pp. 198–201 on NGOs and economic development.

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The concept of law (and policy) is the obvious pivot for long-term change. On the whole, in the context of this paper, a plea for a conscious general globalist or transnationalist legal attitude, a response to an increasing disengagement of law and state, is difficult to avoid.

E. The African Law Seminar Series 1999: Rapporteur's Report

In the course of the first series of meetings of its kind within the University of London (School of Oriental and African Studies Law Department) in which topics of African law were the exclusive subject matter, a number of issues were mooted. Without making any value judgments as to the content or quality of individual presentations in the series itself, for the vast majority of participants (many of whom would claim a familiarity with contemporary African legal issues), some of the more interesting and provocative were those which pertained to human rights at some level of generalization, mindful that the panorama of legal topics is best approached homogeneously. The following discussion is not at all confined to the material raised at the seminars but it has nevertheless to be highly selective.

To summarize, Gbolahan Elias gave the first talk, about foreign investment law in pre-democratic Nigeria, and identified areas in which reform was necessary. Rachel Murray thoughtfully reviewed the role of non-governmental organizations apropos of human rights. Kene Omalu deliberated comparativist issues of mining policy as these impacted on transnational corporate activity and sustainable investment. Kwame Akuffo brought his experience to bear on customary law issues of land use and tenure. Biko Agozino teased apart the legal treatment of women in the contexts of criminal law, colonialism and ideological decolonization, attempting to point out the inadequacies of existing theories and practices. Oliver Phillips gave an excellent paper on law and homosexuality in Zimbabwe, arguing for a more responsive legal policy framework to suit contemporary requirements. Ahmed Motala compared and contrasted human rights' protection and constitutionalism as between anglophone and francophone African countries, emphasizing the need for an interdisciplinary and multifaceted culture and environment in which these rights can flourish as they should, and in which the international dimensions of human rights law are to be realized.

It is neither intended nor verily possible for this paper to attempt to exhaust the full range of such topics in their complexity. The identified area of proficiency does, however, coincide with the (non-pejorative) civilization of society in Africa apace of global trends. The notion of 'civil society' applies with a degree of immediacy to the idea of development, at the consequential humanistic level. More of this in due course of the section, the rest of which is subdivided into two broad and further subdivided parts: transnational trade, investment and corporate activity, dispute

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resolution, and contemporary Africa; civil society, entrenchment of human rights, and contemporary Africa. It cannot be over emphasized that this individuation facilitates presentation, that the respective topics are a great deal more interconnected than their separate consideration might infer.

As the series proceeded, it became clear that there were a number of recurrent themes, either from the participants themselves or in reflecting upon the deliberations. As has already been mentioned, interpreting the functioning of law and the legal systems in question would often raise issues of how best to optimalize the demarcation, for what it may be worth, between public regulation law and private transactional law, if indeed the preservation of this particular dichotomy would retain much of its value in relation to globalism and, more specifically, to deregulation. Another pervasive theme was that if the common ground of principles between a broadly-couched but focused law on development and globalism is to be exploited, then local and externally potent civil society must needs be locally empowered to assist in bringing about that desirable result, whatever be the law subject-specific context.

Further yet, and mindful of the reality of an international legal principle of co-operation, an internalized, quasi-ideological, pro-globalization ethic presents itself as a realistic thematic precondition for legal development in developing Africa, that – as has been reiterated – globally responsive policy formulation, by state and private sectors, is a sine qua non for the continent. It is trite that the performance of developing political economies is directly related to how well their local and external systems function, and that the evolution and future of regional legal ordering is likely to better accommodate the newer models of states' external relations.

Inevitably, however, because the development-related issues arising are first and foremost people-centred concerns, it also seemed vital that infrastructural progress of itself was an inaccurate vector, that the essential aspects of sustained and sustainable development needed to be grounded in a durable process of legal humanization. As former UN Secretary-General Boutros Boutros-Ghali put it:[17]

> There can be no flowering of development without the parallel advance of another key concept: democratization. Peace is a prerequisite to development; democracy is essential if development is to succeed over the long-term. The real development of a state must be based on the participation of its population; this requires human rights and democracy.

A generalized 'human right to development' is here to stay and, as Dr. Slinn closed his lecture previously referred to, 'its value ... as a legal concept will be to focus on the needs of civil society in order to realise and assure on a continuing basis the goals of social and sustainable development'. Article 22 of the African Charter on Human

[17] Report of the Secretary-General on the Work of the Organization, A/48/1, 10 September 1993, at p. 5.

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and Peoples' Rights[18] entrenches this as a legal right. It is now proposed to look more closely at particular areas of transnational law and civil society, which are of direct relevance to the context of law and development.

F. Some Selected Topics

I. Transnational Trade, Investment and Corporate Activity, Dispute Resolution, and Contemporary Africa.

It is often convincingly stated that a new transnational *ius mercatoria* avails legal practice in the global present, especially in those areas in which traditional international law is or appears to be ill-equipped or limited in its responses.[19] The special context of international arbitration is presently discussed below in this subsection, as are developments through the World Trade Organization, transnational investment and competition law, and the globalization of civil litigation, and it is necessary to elide as between normative issues and those which go to resolving disputes.

(1) *The World Trade Organization*: In order to introduce fairness into the world trading system, the 'Uruguay Round' of negotiation concluded on 15th December 1993 produced a Final Act.[20] Besides creating the administrative

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[18] OAU Doc. CAB/LEG/67/3/Rev.5 (1981).

[19] See, e.g., H.-J. Mertens, 'Lex Mercatoria: A Self-Applying System Beyond National Law?' in Teubner (ed.), *supra* note 6, p. 31, especially at pp. 35 (on its norm-creating potential), 36 (as to its undisputed role in international commercial arbitration), 38 (concerning its usurpation of public international law), and 39–40 (about the objective fulfilment of its applicability, through 'the existence of a global society, a global market, the changing attitudes of governments towards self-organized institutions of society, the changing in attitude of legal systems towards a procedural programming of sociological self-control ... the tendency towards a universal business law increased by multinational firms, auditing companies, ... by the international arbitration systems and the increasing number of conflicts that cannot be resolved under national law ... [T]he application of lex mercatoria is also supported by the increasing number of goods, services and mechanisms of trade and payment that are designed for the international market. Furthermore, private unification of law seems to be a superior device for international business transactions in comparison with the traditional passage of international statutes by the national states, the latter being less flexible and more influenced by – sometimes arbitrary – policy considerations ... Thus, under certain aspects of legal policy, lex mercatoria appears today as an important element of international arbitration'. See generally, L. Fortier, 'International Arbitration on the Eve of the Millennium' in (1997) *Int. ALR*, at pp. 1–3 (ibid. at p. 3: 'The emergence of a harmonised procedure may be one of the great benefits which international arbitration will bring to the legal world', and that '[t]he evolution of arbitration as the preferred method for the resolution of international commercial disputes has resulted in the creation of a truly global Bar').

[20] The Agreement to Establish the World Trade Organization, reproduced in (1994) 33 *ILM* 13.

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and quasi-judicial World Trade Organization specifically to administer the Rules, it also introduces interventionist dispute resolution via arbitration and an appellate body. This is necessitated, as Professor Thomas Franck has pointed out,[21] by the need to mitigate the effects of divergent standpoints as between the developed and the less developed at the level of states, it being trite that that the most significant source of necessary capital for developing countries is to be found in the private sectors of developed economies. The present writer has elsewhere respectively considered the international foreign investment, and the competition, law aspects of transnational corporate finance especially as these fit the emergence of a truly global capital market, and should like not to labour these here. The reader may wish to consult the addendum of related papers at the end of the present one. All in all, and in keeping with the pluralistic texture of the general law on international investment, it is to be noted that the transnationalization of transactions increasingly means that the parties are able to subject their arrangements to other consensual law besides national laws which, as with public international law, are often inapposite to the exigencies. By doing so, the parties to these private agreements can make their arrangements more responsive to economic development. One area in which developing country action is necessary has to be that of the legal personality to be ascribed to external participants. In this particular area, the incidence of human rights law is increasingly strong, e.g., to protect investors' rights and/or property or the entitlements of legal or natural persons who stand to be violated as a direct consequence of economic activity.

(2) *International arbitration*: This is not the place to extensively recount the virtues of arbitration – a means which has always been characterized by flexibility, practicability and, above all, equitability – in resolving international and commercial legal disputes between states as well as private entities. The World Bank's Convention on the Settlement of Investment Disputes between States and Nationals of other States 1966[22] sets out a transnational process around the International Centre for Settlement of Investment Disputes (ICSID). As much ink has since been spilled as there has been water beneath the bridge, as the legal systems of the world have adapted, or valiantly sought to do so, to the global economic market and its diverse connotations. Having identified likely cultural implications of the place for an arbitration, and in the course of examining international commercial arbitration as a judicial answer to the globalization of the economy in relation to the resolution of international arbitration conflicts, one commentator recommends 'a more interactive approach to ensure real communication among those who participate in arbitration to meet the

[21] In *Fairness in International Law and Institutions* (Oxford, Clarendon 1995) at p. 438.
[22] 575 UNTS 160, No. 8359, 160, 17 October 1966.

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expectations of the parties who select this method as the best means to resolve their international commercial conflicts'.[23] Globalization and arbitral mechanisms, especially in their flexibility and scope for reliance on non-state law, are of special interest to contemporary Africa. It is to be hoped that globalization of arbitration practice will provide the necessary support for cross-border transaction, more so where the globalization of civil procedure is less than optimal, as the next topic shows.

(3) *Transnational litigation*: A reading of a leading text on transnational civil procedure[24] provides, disappointingly for this writer, that practically no African state's legal regime for the transnationalization of civil justice is worthy of mention, even though national statute books are replete with legislation in point, and despite the observable incidence, within the writer's knowledge, of cross-border judicial enforcement of judgments. It is not at all unusual for foreign parties to litigate in African courts, but it is the exception that African states participate in current international efforts to produce a convention on the subject. The reasons for this are given to be cultural and systemic difference, such that Africa, literally as a whole, would remain marginalized in this case.

(4) *Transnational corporations*: Professor Muchlinski[25] takes forward the role of multinationals – non-state actors – in the significant context of law making

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[23] B. Cremades, 'Overcoming the Clash of Legal Cultures: the Role of Interactive Arbitration' in (1998) 14 *Arbitration International* 157, at p. 172; for a plea which centres on turning around the under-utilization of arbitration procedure in Africa, see A. Asouzu, 'Some Contributions of the United Nations, its Organs and Agencies to International Commercial Arbitration and Conciliation: Implications for Africa's Economic Development' in (1995) *ASICL Proc*. 7, at p. 213. For further discussion, particularly of the special and differential treatment for developing countries, see D. Palmeter and P. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (London, Kluwer 1999) e.g. at pp. 99–100, 102–103, and 119–120. See also M. Bagheri, *Conflicts of Economic Regulation in Private International Arbitration* (London, Kluwer, forthcoming), which may be particularly useful in its analysis of public regulatory issues arising in the context of private dispute resolution.

[24] C. Platto and W. Horton (eds), *Enforcement of Foreign Judgments Worldwide* (London, Kluwer and the IBA, 1993).

[25] In ' 'Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community' in Teubner (ed.), *supra* note 6, at p. 79 (pp. 79–80, for the passages in the main text above); see, generally, also his seminal *Multinational Enterprises and the Law* (Oxford, Blackwell 1995). See, J.-P. Robe, 'Multinational Enterprises: The Constitution of a Pluralistic Legal Order' in Teubner (ed.), *supra* note 6 (pp. 45–77; at p. 49: 'The transnationalization of society is challenging the sovereignty of the state; it is challenging the self-ascertained monopoly that state sovereignty claims for itself in the production of norms, and even states' mere capacity to produce effective norms ... What is under way is the objectivization of a new, pluralist, system of the exercise of power which translates into a new constitutional structure for the world where a multitude of partial legal orders, both territorial and functional, cohabit, co-operate and compete within one global legal system').

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(or, more narrowly, of 'global proto-law'), pointing out that 'the significant issue may not be how a business association organizes its internal operations, but how it endeavours to influence the external legal environment that affects the markets in which it operates', that 'the more powerful the market actor the more likely it is to generate the generally accepted commercial customs of that market, perhaps to go further and to enshrine those customs into standard form contracts, and, at the highest level of influence, to persuade courts and legislatures to give official legal sanctions to those customs through recognition in case law and/or codification through statute', and that 'where international business practices are involved, the process may entail the need to influence home states to use their influence over host states, and over the operations of international organizations that engage in the regulation of international business practices, in a manner that is favourable to home-based firms'. In recognition of the enormous role and potential of international corporations in the special context of development, one should like to add the legal policy burden, on developing political economies such as in contemporary Africa, to accommodate the legality and wider ramifications of these corporations. The main consequence of the challenge from globalization of economics is that state regulation of transnational corporate activity stands to be profoundly affected, and with it the classical position by which states have been viewed as the main, but alas sometimes ineffectual, actors on the scene.

On the transnational plane, the issues which affect the developing world generally and Africa in particular are more complex than the present medium would allow for their extended deliberation. It is perhaps sufficient to identify the following themes:

(1) in relation to the emerging capital market which hardly has an African presence, macro-economic strategies and policies aimed at creating streamlined and transparent local, national and (or) regional financial structures that are conducive to mobilizing and raising the levels of foreign direct investment are essential; so are responsive reforms of the existing sub-optimal legal and regulatory frameworks and instruments such as can assist the transition to 'emerging financial market' status for these economies so that they can productively participate, e.g., in raising equity on international capital markets and securities exchanges;

(2) at the level of international institutions, the ability of developing states to provide this basic framework would enable the formulation of new universally relevant and applicable legal and related development-based norms. Some of these have been referred to in this paper, e.g., in the areas of environmental protection as it increasingly impacts on trade, of transparency and governance as these influence the course of evolution of an equitable playing field. The primary issue in this present context is that of the international, or in response to the multi-speed nature of the law and legal processes involved, transnational legal personality – e.g., to enter into legally

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binding arrangements with other parties; to exercise other important legal functions and capacities, such as to own property – to be accorded to these institutions generally, be they governmental or autonomous.

These are points which can be enhanced by the pluralistic texture of the broader context to which they belong and with which there is the common objective of bridging the gap and reducing the friction between the developed and developing worlds.

II. Civil Society, Entrenchment of Human Rights, and Contemporary Africa

The role of civil society in Africa, as it is elsewhere, is to co-ordinate matters pertaining to governance of the public and the private institutions of the respective countries and regions and, ultimately, of the whole continent and beyond. This function is crucial in the context of material development. Civil society is about humanization. Its credence turns upon the cogency with which it addresses issues of human rights. Civil society intersects with governmental action (e.g., through the work of organizations which collaborate with governments), and it co-exists with the stratifications within national systems. In this part, reasons for closer reconciliation of the materialist aspects of the development of contemporary Africa are discussed, to reinforce the argument that progress in the globalized world is misdirected if it wants for a firm cultural and constitutional foundation at the local level.

As the seminar papers in point were shown to have indicated, it is much the unfortunate case that many African countries appear to de-prioritize human rights at the normative level. Constitutions provide for these rights but with variable degrees of protection, either because the rights themselves are not received into national law or ratified in their best cast or because of the relative ease with which derogation or suspension or outright manipulation of these rights can be secured by national authorities. Inevitably, democratization is retarded and, with it, the fruits of a constructive levelling of development-oriented political ideology. What is to be pleaded for in these regards is hardly a homogenization of states' attitudes to human rights; not because this is undesirable – it actually is, and the promulgation of the African Charter has to be a large step in the right direction – but because it is, realistically speaking, perhaps a little premature and utopianistic to do so as one might correctly derive from Phillips' and Motala's respective presentations.

Today's Africa is more complex and politically differentiated than any attempt to compendiously discuss the problems arising could show up. There is a wealth of governance-derived, as well as scholarly, responses which have attempted to deal with these problems in national, international and global contexts. These efforts are to be complimented, especially where they have contributed to the advancement of basic norms upon which worthwhile development is to rest. It would be in order to make a few accessible observations.

Human rights in Africa need a complete reappraisal at the level of application and

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enforcement. Much of the disposition towards them is typified by lip service to the norms. Consider that there are jurisdictions in which, in the present day and age, it is still the case that nationals are unable to own or to succeed to property on the basis of their gender, that, on an identical basis, there are limitations on the capacity to participate in and contribute to the nurturing of local and, therefore, global civil society, even though the possible question of their ability to do so is to be answered only by reference to an atavistic cultural disposition that has absolutely nothing by which to commend it.

One could contentedly look to the convenor of the series of seminars referred to in this paper for the admirable work she has done and continues to do in her niche in the area of women's rights and family law reform in southern Africa; contented, in the rational belief that the fortunes of the continent which often promises so much but delivers little for itself can be turned around by what, alas, appears to be a sea change away from the banality of exclusionary laws and policies. At the cultural level, it is one thing to recognize and to protect diversity and its attributes going to the preservation of peoples as being a tenable factor in the global process. It is quite another to use it as a basis for perpetuating regressive attitudes that can only spawn inapposite legal provisions, particularly in the global present.

Human rights are construed in the context of law and globalization, for example, by Bianchi,[26] in terms that true universalization of legal human rights norms at the global level may likely eventuate as 'the germ of the process of globalization of human rights law via the dynamics of a transnational civil society'. As part of the process of bringing forward the merits of international legal norms, the individual has come thus far, as has done the influence of public opinion on the development of the applicable law. It is to be genuinely hoped that the part played by civil society in these respects will be encouraged and engendered by national governments.

G. Envoi: Defragmentation

Many topical issues deserving of consideration could only have been broached in this essay on the legal aspects of globalization and contemporary Africa. The empowered autonomy of its component nation states and political economies has been shown to be the denominator in making its fortunes comply with the requirements of the globalizing world, particularly those concerning development and law in their wider ramifications. It is exorbitant and, more to the point, grossly distortionary to seek to represent globalization as a theme which is remotely capable of rendering the world

[26] 'Globalization of Human Rights: the Role of Non-state Actors' in Teubner (ed.), *supra* note 6, at pp. 179–212; on the role of NGOs and professional associations, see especially ibid. pp. 185–194.

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uniform. Indeed, it is accepted that it does not necessarily encompass the sum of human activity, notionally or geographically, rather like the classical locus of Africa in the history of world civilization. All the same, it is clear that the coupled contexts of development and law are considerably augmented by the middle ground subsisting between the standard legal regimes of international law and the less formal legal processes of the globalized world, and that the human fortunes of the political economies of the continent stand to be revalorized by the exploitation of this common ground. The future of these economies is as dependent on the outlook its leadership displays in responding to the fragmented current shape of things. It is submitted that in the amplification and intensification of civil society in contemporary Africa and, consequently, in an unambitious transnationalism, lies the beginning of the shape of things to be.

Addendum

Some related papers by the writer:

'Law of Competition Policy on Transnational Corporate Finance in Transitional Markets': W.G. Hart Legal Workshop, Institute of Advanced Legal Studies, University of London, July 1998;

'United Nations Law of Corporations: Some International Law Issues from Globalized Economics and Development': a Departmental Working Paper delivered in the Comparative and International Law Seminar Series, S.O.A.S. Law Department, January 1997;

'Law of Foreign Investment and Participation in Developing Africa: Private Law, Global Governance': Seventh Annual Conference of the African Society for International and Comparative Law, Johannesburg, 21–24 August 1995, in (1995) 7 *ASICL Proc*, at pp. 238–250;

'*Global Law and Policy: A Review Article*' in (1998) 10 *Revue Africaine de Droit International et Comparé,* at pp. 390–404;

'*Law in the Global Village: A Books Review*' in (1996) 8 *Revue Africaine de Droit International et Comparé,* at pp. 1031–1040;

Book reviews, e.g., of A.G. Hopkins's *An Economic History of West Africa* in *West Africa Since 1917* (May 1996), *Africa Financing Review* in (1994) 6 *Revue Africaine de Droit International et Comparé*, and *The Report of the Commission on Global Governance – Our Global Neighbourhood* in (1995) 7 *Revue Africaine de Droit International et Comparé.*