Chapter 10
African Legal Traditions

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10.1 The Struggle for Recognition

One fundamental question about African law relates to its place among the legal systems of the world. Although this expression has always been used as a popular descriptor encompassing all African legal systems, the question whether it exists *per se* has always been controversial among comparative law scholars. Consequently, the answers to this question have varied over time depending on legal, temporal and historical contexts.

African law started gaining formal, albeit limited, recognition in the colonial era. This was somewhat triggered by the 'West African Conference' in Berlin (1884–1885), which led to both the partition of the Continent and the establishment of European formal empires. The first attempts to define African law date back to this period: the expression designates a set of legal rules applicable to groups and communities and, within them, to individuals. African law comprises the totality of legal institutions and refers to both public and private law: law-making, marriage, kinship, family, civil and public wrongs, law of obligations, evidence and land law fall under this wide-ranging legal descriptor.

European colonial approaches towards African law varied enormously. France's colonial policy, for example, pursued social and legal uniformity: its *mission civilisatrice* endeavoured to assimilate African natives by deliberately propagating "the best of French culture along with the rationalist and libertarian values deriving from the Enlightenment and French revolution."[1] It also forged the *indigénat*:

[1] Sharkey (2013), pp. 153–154. For a critical evaluation of French colonial policy see Sir Harris (1912), p. 97.

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originally established in Algeria in 1881, this policy was applied across French colonies and eventually abolished in 1946. The *indigénat* neither recognised indigenous legal systems nor recollected customary law; by merely defining "the very status of 'native'," it listed the "offenses that 'by definition' only 'natives' could commit."[2]

In South Africa, the Boer Republics of Transvaal and Orange Free State recognised customary law in 1885. The creation of the Union of South Africa (1910) resulted in even more conflicting approaches: there was "complete non-recognition in the Cape, limited application in the Transvaal and full recognition and application in Natal and the Transkeian territories."[3] Odd as it may seem, African customary law obtained full recognition with the implementation of apartheid; the *South African Native Administration Act* (Act No 38 of 1927) recognised customary law and established a separate system of courts for Africans with the main purpose of fostering separateness among the different races living within the Dominion.

African indigenous law was granted limited application in tropical Africa. In British colonies—and, to a lesser extent, in Spanish colonies—, this was facilitated by the indirect rule, i.e. a method of administration whereby natives were associated to colonial governance.[4]

The limited recognition of African legal systems is usually traced back to its intrinsic features. Not only does African law comprise a variety of systems of law, but it is also handed down by means of oral transmission: law-making is a communal performance, the output of which is collective legal wisdom. As, for example, s 3(3) (c) *Traditional Authorities Act 25 of 2000* (Namibia) states, "In the performance of its duties and functions [. . .] a traditional authority may [. . .] make customary laws." Hence, legislators act as "poets and singers" on behalf of the whole society.[5]

These features hardly squared with the Western legal mentality and colonial policies. Since oral transmission might well have favoured contrasting interpretations of customary law, in dispute resolutions colonial agents depended on native assessors, i.e. 'reliable informants' on customary law.[6] Furthermore, local variations in customary law were reduced through legislative action and restatement, whereby customary rules were recollected in written form and accommodated to the colonial legal framework. In addition, European colonial authorities established legal dualism, within which customary law and European law coexisted. Their mutual interactions were arranged upon a hierarchical scale: according to the repugnancy clauses appended to restated law, African law was applied to the extent that it was not "contrary to justice and humanity."[7] In the event of inconsistency between European law and African law, the former prevailed.

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[2]Mann (2009), p. 336.

[3]Grant (2006), p. 13. See Himonga and Nhapo (2014), pp. 9–13.

[4]See Frederick (1922), pp. 192–213. And see Mann and Roberts (1991), p. 20.

[5]Leman (2009), p. 109.

[6]Ubink (2010), p. 96. On *native assessors* see, among others, s 48 *Indian Evidence Act*, 1872; s 19 *Supreme Court Ordinance* 1876 (Ghana); s 8 *Swaziland High Court Proclamation* 1938; and s 222 *Criminal Procedure Act of Northern Rhodesia* 1939.

[7]See, among others, s 12(1) (a) *Local Courts Act* 1966, Act No. 20 of 1966 (Zambia).

A new approach emerged in the 1950s and 1960s in the wake of decolonisation. As they gained independence, African countries addressed the topic within the broader framework of the dualistic legal regime they had received during the colonial era. It was not just a matter of defining African law; the application of customary law posed methodological problems. There was continuity between the colonial past and independent Africa. At the same time, however, the study of African law entailed a full understanding of its cultural underpinnings: it became a cross-disciplinary field of research for legal scholars, anthropologists and legal anthropologists.[8]

The winds of democratic change, which blew over Africa after the dismantlement of apartheid and the end of the Cold War, favoured the transition of several states from authoritarian rule to democratic regimes; the adoption of new constitutions soon followed.[9] This also led to the revival of customary law and African legal systems. Their institutions and rules, which had been displaced by Western legal paradigms for decades, gained new ground; under African constitutionalism, 'living' customary law became the subject of renewed legislative and judicial actions.

10.2 The Biases of Comparative Law

The recognition of African law did not have any significant bearing on comparative legal research. The question whether African legal traditions constitute either a family or a group of legal systems remains unsettled; and scholars still locate African law at the margins of comparative legal studies.

Scholarly comparative law is genuinely interested in African legal systems: several handbooks dedicate chapters to them.[10] Such an interest, however, is affected by a methodological bias. Legal scholarship exhibits a colonial attitude towards non-Western conceptions of law, and this ethnocentric approach advocates the superiority of European legal paradigms. During colonialism, European powers shaped African legal cartography and superimposed their own spatiality of law onto the continent; peoples, communities, territories and collective legal wisdom still bear the consequences of colonial domination.

The consequences are threefold. Firstly, the methodological bias explains why, despite the increasing interest in customary law, comparative law still focuses on the similarities between former African colonies and Western legal systems. By emphasising legal-colonial links, scholars rank French, Spanish, Portuguese and

[8]Roberts (1979), Vanderlinden (1996), Eberhard and Vernicos (2006).

[9]See the articles published in the *Journal of African Law* (1991) 35 (1/2) issue on "Recent Constitutional Developments in Africa"; consider also Richard (1997), p. 363.

[10]See, among others, Kischel (2019), Ajani et al. (2018), Rambaud (2017), David et al. (2016); Sacco (2012), p. 313 et seq.; Gambaro and Sacco (2009), Bennett (2019), p. 652; Menski (2006), Ntampaka (2005). As for monographs see Vanderinden (1983), Sacco (2006).

Italian former colonies among the civil-law legal systems; former British colonies and protectorates are ascribed to the common-law legal tradition, whereas Southern African countries, Mauritius and the Seychelles join the mixed jurisdictions.[11]

Secondly, ethnocentrism entails that inferior systems do not have anything to teach superior systems; and this provides an explanation for the limited extension of chapters on African law in comparative-law handbooks. In some cases, manuals include references to African law; but these, which are limited in range and scope, are confined within either classifications of legal systems or micro-comparative analyses. The bias is apparent even when scholars suggest the adoption of new taxonomies. For example, Glenn advocates the establishment of the chtonic legal tradition, into which several pre-colonial legal traditions (i.e. African, Asian, Polynesian and Inuit) coalesce.[12] However, the legal descriptor does not account for the rich variety of 'non-Eurocentric conceptions of the law': within the chtonic milieu, African law loses its own legal-specific features.

Ethnocentrism also affects how comparative legal cartography is arranged in manuals: not only do these contain succinct outlines of African legal systems, but these outlines are also superficial and often inaccurate. Both Africa and its legal traditions are depicted as an indistinct whole: scholars usually refer to them as either 'The sub-Saharan legal tradition' or 'African law' or 'The African family of legal systems.'[13] There is only a clear precinct separating 'customary' African law from Northern Africa (and its Islamic legal tradition): the Sahel region marks the transition between Africa's tropical areas to the south from and the lands located to the north of the sand belt. The precinct is geographical rather than legal, and therefore its cultural and linguistic connotation is not applicable when demarcating African legal traditions. Nor are political yardsticks of any practical use: as almost all African states are members of the African Union (AU)—which replaced the Organisation of African Unity (OAU) in 2001–, the geopolitical alignment still leads scholars to conceive of Africa as an 'indistinct whole', thus drawing a veil over the varieties of its legal systems.

Thirdly, according to this legal-colonial attitude, 'superior' European systems had the duty to nurture changes in African 'inferior' law. European colonial law promoted 'social engineering', i.e. the economic development, modernisation and transformation of indigenous African societies.[14] For this purpose, colonial agents forged new institutions whereby African societies could be both governed and 'civilised': chiefs, tribes and customary courts are "invented traditions", which

[11]See Bamodu (1994), p. 127; Zimmermann and Visser (1996), pp. 7–8. On African mixed jurisdictions see Palmer (2012), p. 625; du Plessis (2019), p. 474.

[12]Glenn (2014), p. 60. However, Zweigert and Kötz (1996) and Valcke (2018) completely omit references to African law.

[13]See M'Baye (1976), p. 138; Allott (1968), p. 131 et seq.; Sacco (2012), p. 313 ss.; Fombad (2013), p. 48. On such inaccuracy see Vanderlinden (2006), p. 1187.

[14]Allott (1967), p. 55; Mar (1960), p. 447; Eisenstadt (1965), p. 453.

"became in themselves realities through which a good deal of colonial encounter was expressed."[15]

Modernisation was also achieved by backing official customary law, the development of which required the 'unification' of native customary law, that is, the progressive amalgamation of its local variations. Its unification was achieved by fostering either 'codification' or 'restatement'. Whereas codification incorporates customary law and, at the same time, abolishes it in the fields it covers, restatement does not entail any legislative activity: it merely rearranges, in written form, the existing law, thus offering a "comprehensive account of a branch of the law which is unwritten or is scattered between a variety of sources."[16] The results are particularly interesting: in Madagascar (1957), Senegal and Tanganyika (1961), Kenya (1968–1969) and Malawi (1970–1971), restatement altered, i.e. modernised, 'native' customary law. This brought pervasive legal and cultural changes in native customary law, the aim of which was the preservation of both groups and their intrinsic social inequalities. Within the group, native customary law 'lawfully' discriminated against people on the grounds of rank and lineage (for accession to positions of power), status (low status people were excluded from enjoying some fundamental liberties), age and sex (older male members had more authority than the younger generations). Restatement mitigated the strictures of native customary law by infusing European values, such as individualism and liberalism, into the traditional systems, which favoured the relaxation of social inequalities of group-centered traditional societies.

Like social engineering, restatement of 'liberal' customary law is a legacy of the colonial era. The first attempts to modernise it date back to the early twentieth century: Germany started restating Tanganyikan family law in 1907—and the process was subsequently carried on by the United Kingdom in the 1940s.[17] The "School of Oriental and African Studies" (SOAS) of London fostered its own *Restatement of African Law Project* in 1959: this was a comprehensive pattern for the study and restatement of African customary law of 16 Anglophone countries in the fields of land tenure, succession, family law and status of women. The colonial legacy is apparent, because the project was delivered in London. In the aftermath of decolonisation, the task of modernising African law was resumed by the *Law and development* movement, whereby European and U.S. legal and economic assistance aimed to develop African countries by imposing their own legal paradigms.[18]

Africa is currently experiencing new forms of legal unification, which stem from supranational integration and trigger the creation of 'African transnational law'. Among them, there is the *Organisation for the Harmonisation in Africa of Business Law* (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*—

[15]Ranger (1983), pp. 211, 212.

[16]Prinsloo (1987), p. 411. For codification, see, among others, the Civil Code of Ethiopia (1960) and the 1964 Land Tenure Law (*Loi sur le Domain National*) (Senegal).

[17]Sippel (1998), p. 378.

[18]Merryman (1977), p. 457.

OHADA), a supranational union founded in 1993 by French-speaking countries which mimicks the EU. Like the OHADA, the *Common Market for Eastern and Southern Africa* (COMESA) is a process of supranational integration with economic and legal implications, among which the harmonisation of commercial law, in general, and contract law, in particular. Legal harmonisation is also the objective of several regional integration processes, such as the *East African Community* (EAC), the *Southern Africa Development Community* (SADC) and the *Economic Community Of West African States* (ECOWAS). Harmonisation entails the convergence of both state and customary laws in order to stimulate business and economic development.[19]

10.3 Ranking African Legal Systems

Together with unification and restatement, the modernisation of customary law may be attributed to the ethnocentric attitude which still saturates scholarly comparative research. However, the methodological bias is both procedural—i.e. it considers how comparative legal method is applied to African law—and substantive. To this extent, the study of African legal systems and institutions discloses a vast array of colonial underpinnings, which reflect the narratives of superiority and domination elaborated by European powers in the last few decades of the nineteenth century. As the processes of socio-legal engineering mentioned above uphold, domination and colonialism have common features: the latter is a species of the broader concept of domination, which endeavoured to impose 'superior' legal orders to the subordinate African legal systems. The changes in the law fostered by modernisation also account for how some scholars have answered the question whether African law constitutes a family of legal systems. Due to the relaxation of traditional societies triggered by liberalism and by the pervasiveness of Western legal paradigms, "the days of African customary law as a fully-fledged legal system are gone."[20]

The links between law and development also have a huge impact on classifications. How the varieties of legal systems are ranked depends, *inter alia*, on their performativity, which is in turn deep-rooted in their legal origins.[21] The Western legal tradition is dominant, and, within it, the common law prevails over the civil law because the latter is said to ensure elevated economic performances. Like Western societies, African societies might attain economic performativity provided that they evolve through various stages of development that are universal and lead to the same stage of superiority envisaged by European comparative legal traditions. What lies

[19]See Mancuso (2007), p. 165; Shumba (2015), p. 127.

[20]Oba (2010), p. 79.

[21]See Klerman and Mahoney (2007), p. 278; Siems (2016), p. 579; Grosswald Curran (2009), p. 863; Oto-Peralía and Romero-Ávila (2017), p. 121.

beneath such a predicament is the implicit assumption that the Western conception of law is a universal legal paradigm 'superior' to the African legal paradigms.

Such a narrative of superiority is apparent as regards both 'native' African systems and 'received', i.e. European, systems. Not only did mixed jurisdictions replace the customary law substrate in Southern Africa, Mauritius and the Seychelles, but these 'received' laws are also deemed to be inferior to European legal systems. Suffice it here to say that, in Africa, 'common law of the land' designates only the legal systems derived from the English common law, thus disregarding the fact that, "In South Africa, the term 'common law' [. . .] denotes the systems of Roman-Dutch and English law that were imported during the colonial period".[22] The same linguistic connotations of the legal systems evidently share the epistemologies and hierarchies underpinning the colonial attitude.

This ranking approach to legal systems is also applied within 'native' African law. According to the majority of comparative legal scholars, African law is a complex legal reality where several strata overlap and each layer is superimposed onto the others: these are the traditional (or pre-colonial) stratum, the religious stratum, the colonial and the post-colonial strata.[23]

Stratification entails that African law has progressively evolved through various stages with the Western legal paradigm as the natural end point. It should be argued, however, that the post-colonial or independence stratum—which stands above all other layers—does not only imitate European legal paradigms (such as constitutionalism, rule of law, enforcement of rights), but also embeds the revival of African traditional legal values. Such a revival also characterises supranational legal harmonisation: OHADA's Uniform Acts on Contract Law and on General Commercial Law refer to custom, which, within the African context, also styles customary law as a source of obligations.[24]

10.4 Stratification and Evolution of African Law

The interweaving of modern and traditional legal strata discloses other substantive effects of Ethnocentrism. Stratification makes it possible to discretely analyse the different strata and, within the pre-colonial layer, to study legal arrangements prior to the contact with other civilisations. This also makes it possible to detect commonalities among different pristine African legal systems. This is not to deny that African societies followed divergent politico-legal patterns: comparative scholars and legal anthropologists usually draw a distinction between acephalous societies, which lacked a centralised political power (such as the Pygmies and the Wala people in

[22]Bennett (2011), p. 710.

[23]See, among others, Seidman (1979), p. 17; Sacco (2012), p. 314; Oba (2010), p. 58.

[24]See Art 194 of OHADA Uniform Act on Contract Law and Arts 238–239 of OHADA Uniform Act on General Commercial Law.

Upper Ghana), and those communities (the Akan or the Birim-Volta, for example), whose societal arrangements were highly structured and possibly influenced by Northern African civilisations.[25] Legal anthropological research focuses on how supernatural and magico-religious beliefs forged socio-legal relationships in pre-colonial African law, thus playing a major role as far as laws relating to kinship, evidence and inheritance were concerned.[26] Supernatural entities also give a reason for the role ancestors were granted within family groups and settlements: they were (and still are) part of the community, and therefore actively engaged in both lawmaking and dispute resolution. Not only does it enhance the role of kinship, but it also emphasises the centrality of the group over individuals and explains the relevance of marriage settlements (e.g. the bride price) when it comes to constituting bonds between families—or among families, as far as polygamous marriages are concerned.[27]

The search for commonalities among the diverse African legal systems might be of practical help for didactic purposes; yet, it conceals the Ethnocentric attitude prevalent in scholarly comparative studies. African legal systems certainly share common features or unifying traits. However, scholars keep under wraps Africa's pluralistic mosaic and mask its diatopic variation. Despite the superimposition of homogeneous colonial and post-colonial strata, it is not an easy task to universalise legal concepts when it comes to African law: its variety entails "that there is almost an exception to any generalization somewhere."[28]

Like the tiles of a roof, then, the different strata are so imbricated that is impossible to disentangle—and therefore study—them as if they were in watertight compartments. Due to the interaction between customary law and European legal paradigms, the line between pristine customary laws and the colonial stratum is constantly blurred: in *Lewis v Bankole* [1909] NLR 100, for example, it was stated that courts must enforce "existing native law and custom and not that of bygone days."

The interweaving of the different strata is particularly apparent when it comes to considering statehood as the major legacy Europeans handed over to African communities. Boundaries were unfamiliar to African conceptions of the law; they were also incompatible with traditional societal organisation, which was primarily built upon family settlements and non-territorial arrangements. However, colonial policy disregarded borderless, communal arrangements: since they were divided among different states, communities were arbitrarily separated and subsequently merged with other groups with the aim of creating political entities based on

[25]"Screened by a tropical forest from the north and facing the Gulf of Guinea, the region remained isolated from external influences [...] creating specific systems of state law": Sinitsina (1994), p. 264.

[26]Elias (1955), pp. 228–238; Sacco (2012), p. 315.

[27]The role of individuals depends on their position in the group to which they belong: Rambaud (2017), p. 258; David et al. (2016), p. 483.

[28]Woodman (2010), p. 9.

territorial jurisdictions. Odd as it may seem, when the representatives of the newly independent African states met in Addis Ababa in 1963 in order to create the OAU, they immediately conformed to the status quo.

Contemporary African legal systems should be assessed, taking into consideration that their full understanding entails a full understanding of all the variables which may have some bearing on them. Hence, scholars must examine customary law by taking into account how it has evolved through interaction between the different strata.

Interactions between traditional and colonial strata often cross the public-private divide. This is apparent as far as African land law is concerned: the African land tenure system was mainly communal and governed by both supernatural entities and the group; therefore, there was no room left for Western possessive individualism. The rise of trade pushed for its suppression—or, at least, reduction—, "because the land market could not fit with ideas regarding the communal nature of African land tenure."[29] In the aftermath of decolonisation, Western, i.e. individual, land titles were retained and colonial laws regarding customary lands were adapted to the African context: land acts transformed former communal lands into public lands, such as in Tanzania and Ghana. Like in England, Tanzanian legislation assigns the land to the Head of State (the President), who acts as trustee on behalf of all citizens: the latter "cannot own land, but they can own rights over the land," which "may be bought or sold, and inherited, and can thus be seen as (limited) decision-making rights." The 1992 Constitution of Ghana does the same: "All public lands in Ghana shall be vested in the President on behalf of, and in trust for, the people of Ghana;" whereas "stool lands," which the communal soul (the stool) granted to its own people, are vested "in the appropriate stool on behalf of, and in trust for, the subjects of the stool in accordance with customary law and usage."[30]

Supernatural entities and societal structures are also relevant when it comes to settling disputes or performing the most relevant legal deeds. Marriage, divorce, adoption, guardianship, inheritance, acknowledgment of either cession or acquisition of rights over the land, and other acts made or taken are considered legal, valid and binding provided that they are performed before the whole community. In Madagascar, for example, Malagasy law and custom (*fomba*) has always been part of its dualistic legal system together with French-derived law. In the wake of the revival of customary law, the Preamble to the 2010 Constitution enshrines both traditional law and the system of village councils (*Fokon'olona*), where men and women that are descendants of a single ancestor and live within the same territory (*Fokon'tany*) gather. Acting as a notary, the community embodies the local rule-making process (*Dina*) and secures the validity of the most relevant legal deeds;

[29] Joireman (2010), p. 298.

[30] ss 255(1) and 167(1) of the 1992 Constitution (Ghana); *Loi* no 034-2009/AN du 16 juin 2009 *portant régime foncier rural* (Burkina Faso); URT, *Land Act* (No. 4), sec. 7 and URT, *Village Land Act* (No. 5), sec. 8(1), 12(1) (Tanzania). For more on the three land classes in Tanzania ('General Land', 'Reserved Land' and 'Village Land') see Martina Locher (2016), pp. 395–396. On the supernatural see Hamer (1998), p. 311.

these thus become part of the collective legal wisdom and are handed down to future generations.[31]

Unlike continental customary laws, Malagasy law thus tolerates limited forms of women's participation in communal rule-making processes. We have already noticed that customary law tends to preserve social inequality by 'lawfully' discriminating against people on the grounds of sex. Indeed, African societies see women "as adjuncts to the group to which they belong, such as a clan or tribe, rather than equals."[32] This is evident when it comes to marriage, i.e. a communal engagement where economic aspects merge with societal considerations: due to the overwhelming importance of the group, it constitutes an agreement between families and clans rather than a spousal union. To this extent, modernisation has not favoured any improvement in women's antenuptial conditions: national legislation, which enables Africans to enter into a statutory marriage, usually does not prescribe any forms for the solemnisation of customary-law marriages. Nor does legislation set any age for such a solemnisation but leaves it to customary law. As polygamous marriages are allowed under customary law, national legislation merely presupposes their existence, the continuance of which impedes contracting any valid statutory marriage.[33]

African customary tort law and law of contract have a broader scope if compared to their civil-law and common-law counterparts. On the one hand, tort law protects individuals and groups, as well as their name, integrity and interests—such as familial unity and marital relationships—also from mere vulgar abuse. On the other hand, the law of contract, which also has knowledge of consideration and requires formalities for contractual performances, gives prominence to the group, thus curbing individuals' freedom of contract.[34]

10.5 From African Law to African Legal Traditions

The "subversive potential of comparative legal thinking"[35] has thus allowed us to detect how methodological biases affect the study of African law. When it comes to legal systems and institutions, traditional comparative research still displays noticeable colonial underpinnings. Furthermore, such a colonial attitude turns out to be a truly Ethnocentric approach, which is apparent in scholarly examination of the different legal strata. This approach is based on the assumption that African law

[31] Blanc-Jouvan (1964), p. 7; Molte (1967), p. 123.

[32] Ndulo (2011), p. 89.

[33] See s 34 *Marriage Act* 1963 (Zambia); s 1(2) *Marriages Act* 1964 (Eswatini). For example, Nigeria legislation does not set any age for such solemnisation: see the *Marriage Act* 1990 (Nigeria). Namibia, South Africa, Togo, Rwanda and Niger and few other coutries explitictly recognise customary marriages. See, among others, s 4(3)(b) Constitution of Namibia; *Recognition of Customary Marriages Act*, 1998 (Act No. 120 of 1998) (South Africa).

[34] See, respectively, Dagbanja (2015), p. 412; Mancuso (2007), p. 174.

[35] Fletcher (1998), p. 684. See also Muir Watt (2012), p. 270.

has progressively evolved through various stages with the Western legal paradigm as the natural end point.

The subversive potential of comparative law has its own strategy, which aims to revise the study of African law. Like post-colonial studies—which examine history through the lenses of the peripheries of the colonial empires—, comparative law gives voice to legal systems which have been traditionally disregarded by 'official', i.e. mainstream, comparative legal research. The re-examination of African law in the light of post-colonial legal studies is therefore relevant. We noticed above that African law is considered 'inferior' to Western law, and therefore has been set at the ostensible margins of comparative studies. Comparative law aims to overturn this perspective and unveils colonial methodological legacies; by adopting the point of view of 'marginalized' legal systems, it endorses Africa's "disengagement from the whole colonial syndrome."[36]

Hence, the aim is to subvert the established master-narrative, which shares the European perspective on African law and conceives of Africa as a peripheral 'family' of sundry legal systems. Furthermore, such a perspective challenges the assumption according to which, in legal cartographies, Africa might be depicted as an indistinct legal whole. Undoubtedly, scholars acknowledge that one of Africa's distinctive features is its intrinsic legal pluralism[37]; when it comes to enquiring into its legal institutions, however, they regularly point to the commonalities among systems rather than delve into a closer analysis of their specific constitutive traits.

Comparative law must critically examine the idea that African law is an indistinct whole, a miscellaneous 'family' into which heterogeneous legal systems coalesce. To put it differently: within post-colonial comparative legal research, the study of African law moves towards the examination of different 'African legal systems.' Scholars might recover Africa's legal pluralism provided that they take into account the variety of legal substrates, each of which is dominant in a specific area of the continent. The most relevant substrates are: Cape colonial law in Southern Africa; customary law in tropical Africa; Malagasy law in Madagascar. The Islamic legal tradition coexists with customary law in Somalia and in the Barbary states and is the 'traditional' substrate north of the Sahel region.[38]

Due to its insularity, it is easy to demarcate the Malagasy legal tradition. When it comes to African continental legal systems, however, the demarcation process must be complemented with several criteria. The Sahel region, which marks the transition from Northern Africa to tropical Africa, also denotes a linguistic transition (from Afroasiatic languages in the north to Nilo-Saharian and Niger-Kordofanian languages in the south) and an ethnic transition. Consequently, these criteria supplement the legal criterion, i.e. the boundaries between the countries situated north of the Sahel and those located south of it. Boundaries also mark the transition from

[36]Hulme (1995), p. 120.

[37]Rambaud (2017), pp. 257–258; David et al. (2016), p. 483 et seq.; Sacco (2009), Vanderlinden (2000), p. 279.

[38]On Islamic law as variety of customary law see Anderson (1962), p. 617.

tropical Africa and Southern Africa, whose legal substrate is the Cape colonial law, i.e., the jurisdiction stemming from the mixture of Roman-Dutch law and English common law which was applied in the Cape Colony in the nineteenth century. This explains, for example, why Zimbabwe and South Africa share a common legal substrate, but, at the same time, Zimbabwe has strong political ties with Zambia and Malawi, whose legal substrate complements customary law with common law. From 1953 to 1963, indeed, the former British colonies of Nyasaland (Malawi), Northern Rhodesia (Zambia) and Southern Rhodesia (Zimbabwe) joined the Federation of Rhodesia and Nyasaland, that is, a quasi federal-dominion created within the British Empire.

Not only does the variety of substrates reflect the pluralistic mosaic which embeds African legal traditions, but it also accounts for the different legal-historical narratives of Southern Africa, tropical Africa and Madagascar. With the disembarkment of the Dutch flotilla and the creation of a supply base in the Cape peninsula (1652), Roman-Dutch law became the common law of Southern Africa. After the British occupation (1795), the Dutch handed over the Cape colony to the United Kingdom (1806). The 1828 *First Charter of Justice* abolished the civil-law Court of Justice and established a judiciary styled after the English common-law courts: this favoured the blending of Roman-Dutch law and English common law, and Cape colonial law became the legal substrate of both the Boer Republics and Southern African colonies and protectorates.[39] Within the Cape legal tradition, Lesotho is unique in that its customary law was codified. British colonial authorities promoted a codification process which led to the promulgation of the *Laws of Lerotholi*: the code collects Basotho customary law and covers several subject matters, which range from public law to private law. In Lesotho, its status and authority are relevant, albeit subordinate to Western law.[40]

Like Lesotho, Madagascar experienced the restatement of Malagasy law, which was promoted by Queen Ranavalona I (1828–1861) before the French protectorate (1884) and colonisation (1895–1897).[41] The establishment of the Kingdom of Madagascar (1824) as a highly centralised independent state undoubtedly favoured

[39]See *De Grondwet* 1854 (Orange Free State); *Royal Charter of Natal* 1856 (Natal); *De Grondwet Der Zuid-afrikaansche Republiek*, alson known as The Thirty-Three Articles (*Drie en Dertig Artikelen*) of 1844–1849 (Transvaal). On Cape colonial law as the common law of Soutern African protectorates territories see: *Order in Council* 3 November 1871 and s 2 *General Law Proclamation 2B of 1884* (Basutoland-Lesotho); *Order in Council* 9 May 1891, *Proclamation* 10 June 1891 and *General Law Proclamation* 1909 (Bechuanaland-Botswana); *Order in Council* 20 October 1898 (Southern Rhodesia-Zimbabwe); *General Administration Act No. 11 of 1905* and *General Law and Administration Proclamation No. 4 of 1907* (Swaziland-Eswatini); *Proclamation No 21 of 1919* which granted the *Roman-Dutch law* "as existing and applied in the Province of the Cape of Good Hope" to South-West Africa-Namibia.

[40]See, among others, Juma (2011), p. 92.

[41]The first code was promulgated by Queen Ranavalona in 1828; Queen Radama II enacted a second code in 1862. Queen Rasoherina promulgated two codes in 1863; Queen Ranavalona II issued a Malagasy-law criminal code in 1869. Two more codes where enacted in 1868 and 1881.

the adoption of these pre-colonial collections, which restate pre-colonial customary law in written form.

Finally, in tropical Africa the legal substrate consists of customary law, which coexists alongside 'received' European, i.e. mainly French- and English-derived, legal systems.

10.6 Pluralism in African Legal Systems

Within the variety of African legal traditions, customary-law substrate is a *per se* pluralistic mosaic: it combines manifold legal arrangements, which are usually inseparable from their societal contexts. National constitutions and legislation also entrench customary law. In so doing, not only do they reflect the variety of native laws, but they also provide them with a flexible legal frame within which 'official', i.e. restated, customary law might be revitalised by local and communal variations of 'living' customary law.

Constitutional and statutory provisions on customary law operate as conflict of law rules whereby lawyers and judges might determine the law applicable to a specific community or ethnic group. Between contrasting norms, indeed, conflict of law rules make a renvoi not only to official customary law, but also to living customary laws enacted by the collective legal wisdom. This allows native law to flourish and vary throughout African communities; it also fits the requirements set by the 'superior' Eurocentric legal framework, because customary law, when applicable, is considered as if it were the law of a different legal system. This also accounts for the transnational character of customary law, which is inherent to African legal systems. Seldom does it reflect colonial borders; as "it grows and evolves for and with that [specific] group," it does not reflect a specific territory, but "the group that obeys it."[42]

Throughout the whole of Africa, judicial dispute resolution plays a meaningful role in allowing 'living' customary law to prosper. This is particularly apparent when we consider how constitutions and primary legislation accommodate the interweaving of the different legal strata. Firstly, customary courts are often integrated into the European-oriented judicial system, in order to "preserve as much of the traditional customary laws principles as possible, whilst extending the perceived benefits of the received laws." Secondly, European-oriented judicial systems usually act as

[42]See, *inter alia*, Art. 162 of the 2018 Chad Constitution; Art. 211 of the 1996 South African Constitution; Art. 11(3) 1992 Ghana Constitution (customary law comprises "rules of law which by custom are applicable to particular communities in Ghana"); s 68 *Courts (Amendment) Act* 1967 (Malawi) (conflict of law rule for determining the applicable customary); s 2(b) *Customary Law and Local Courts Act* 1990 (Zimbabwe) ("customary law" means the customary law of the people of Zimbabwe, or of any section or community of such people"); s 258(1) *Evidence Act* 2011 (Nigeria) ("Custom" is a rule which, in a particular district, has, from long usage, obtained the force of law"). On the inherent transnational character of customary law see Mancuso (2007), p. 176.

reflective judiciaries, and therefore resort to 'indigenous reasonable test' which reflect community standards and rules.[43] Thirdly, the proof of living customary law is usually a matter of fact. When, however, a court takes judicial notice of a custom, customary law ceases to be considered as a matter of fact: it is noticed as a matter of law and therefore acts as a binding precedent.

Finally, judicial proceedings consent to expand the scope of customary law. Suffice it to consider s 20(2) of South Africa's *Black Administration Act* 1927, according to which "The procedure at any trial ... shall ... be in accordance with Black law and custom." This also allows state law to be infused with traditional communal African socio-legal conceptions; among them, *ubuntu*, which comprises traditional key values, such as 'restorative justice', 'reconciliation', and 'humaneness'.[44]

When it comes to African law, "So great is the ascendency" of procedural law "that substantive law has at first the look of being gradually secreted in the interstices of procedure," as Henry Sumner Maine stated in his *Dissertations on Early Law and Custom* (1883) with regard to English law. Not only do 'native' legal proceedings make living customary law flourish,[45] but Sumner Maine's predicament also allows us to draw up an intriguing equation between the 'superior' English legal system and the 'inferior' African customary law. In England, the forms of actions played a pivotal role in the development of the legal system. With a hint of irony, like 'superior' English law, native law and custom also adapts through judicial application and enforcement. To put it another way: both systems, irrespective of their ranking, evolve through the depositaries of their respective collective legal wisdom, which is "effectively made [by] both legislators and adjudicators" in common law and in African legal systems.[46]

References

Ajani G et al (2018) Diritto comparato. Lezioni e materiali, Turin
Allott AN (1967) Law in the New Africa. Afr Aff 66(262):55
Allott AN (1968) African law. In: Derrett JDM (ed) An introduction to legal systems, London, p 131 et seq

[43]On the integration of customary courts into the received legal system see Fombad (2013), p. 113. See also *Common Law and Customary Laws Act* 1969 (Botswana). For Swaziland see Whelpton (2005), p. 348. On indigenous standards see Oba (2010), pp. 76–78.

[44]Jordaan (2017), p. 402. And see Himonga et al. (2013), p. 369; Oko Elechi et al. (2010), p. 73; Louw (2006), p. 161.

[45]See van der Waal (2004), p. 113: "Benefits [...] include the fact that the customary courts are more open ('like democracy') because all adults can participate in them, they are public and they keep traditions alive. A lawyer is not needed since the system is not professionally driven and the fines are not high. The emphasis is on social outcomes rather than on individualizing outcomes."

[46]See Himonga and Nhapo (2014), pp. 253–254.

Anderson JND (1962) The future of Islamic law in British commonwealth territories in Africa. Law Contemp Probl 27(4):617
Bamodu G (1994) Transnational law, unification and harmonization of international commercial law in Africa. J Afr Law 38(2):127
Bennett TW (2011) An African doctrine of equity in South African public law. Loyola Law Rev 57 (4):710
Bennett TW (2019) Comparative law and African customary law. In: Reimann M, Zimmermann R (eds) The Oxford handbook of comparative law, 2nd edn, Oxford, p 652
Blanc-Jouvan X (1964) Development of a new law code in Madagascar. Afr Today 11:7
Dagbanja DN (2015) Customary Tort law in Sub-Saharan Africa. In: Bussani M, Sebok AJ (eds) Comparative Tort law. Global perspectives, Cheltenham, p 412
David R et al (2016) Les grands systèmes de droit contemporains, 12th edn, Paris
du Plessis J (2019) Comparative law and the study of mixed legal systems. In: Reimann M, Zimmermann R (eds) The Oxford handbook of comparative law, 2nd edn, Oxford, p 474
Eberhard C, Vernicos G (eds) (2006) La Quête Anthropologique du Droit: Autour de la Démarche d'Étienne le Roy, Paris
Eisenstadt SN (1965) Social change and modernization in African societies South of the Sahara. Cahiers d'études africaines 5(19):453
Elias O (1955) The nature of African customary law, Manchester, pp 228–238
Fletcher GP (1998) Comparative law as a subversive discipline. Am J Comp Law 46(4):684
Fombad CM (2013) The Botswana legal system, Durban, p 48
Frederick D (1922) Lugard's seminal book The Dual Mandate in British Tropical Africa, Edinburgh, pp 192–213
Gambaro A, Sacco R (2009) Sistemi guridici comparati, 2nd edn. Turin, UTET
Glenn HP (2014) Legal traditions of the world: sustainable diversity in law, 5th edn. Oxford University Press, Oxford, p 60
Grant E (2006) Human rights, cultural diversity and customary law in South Africa. J Afr Law 50 (1):13
Grosswald Curran V (2009) Comparative law and the legal origins thesis: '[N]on scholae sed vitae discimus'". Am J Comp Law 57(4):863
Hamer M (1998) 'Stool rights' and modern land law in Ghana: a geographical perspective on the transformation of tradition. Afr Spectrum 33(3):311
Harris J (1912) Dawn in darkest Africa, London, p 97
Himonga C, Nhapo T (eds) (2014) African customary law in South Africa. Post-apartheid living law perspectives. Oxford University Press Southern Africa, Cape Town, pp 9–13
Himonga C et al (2013) Reflections on judicial views of Ubuntu. Potchefstroomse Elektronies Regsblad 16(5):369
Hulme P (1995) Including America. ARIEL A Rev Int English Lit 26(1):120
Joireman SF (2010) Entrapment or freedom: enforcing customary property rights regimes in common-law Africa. In: Fenrich JM et al (eds) The future of African customary law, Cambridge, p 298
Jordaan DW (2017) The open society: what does it really mean? De Jure 50(2):402
Juma L (2011) The laws of Lerotholi: role and status of codified rules of custom in the Kingdom of Lesotho. Pace Int Law Rev 23(1):92
Kischel U (2019) Comparative law. Oxford University Press, Oxford
Klerman D, Mahoney PG (2007) Legal origin. J Comp Econ 35:278
Leman P (2009) Singing the law: Okot p'Bitek's legal imagination and the poetics of traditional justice. Res Afr Liter 40:109
Louw DJ (2006) The African concept of Ubuntu and restorative justice. In: Sullivan D, Tifft L (eds) Handbook of restorative justice. A global perspective, Abingdon, p 161
M'Baye K (1976) The African conception of the law. In: David R (chied editor) International Encyclopedia of comparative law, volume II, the legal systems of the world. Their comparison and unification (Tübingen et al.), p 138

Mancuso S (2007) Trends on the harmonisation of contract law in Africa. Ann Surv Int Comp Law 13(1):174
Mann G (2009) What was the "Indigénat"? The 'empire of law' in French West Africa. J Afr Hist 50 (3):336
Mann K, Roberts R (eds) (1991) Law in colonial Africa. Heinemann/James Currey, Portsmouth/London, p 20
Mar LP (1960) Social change in Africa. Int Aff 36(4):447
Martina Locher T (2016) How come others are selling our land?' Customary land rights and the complex process of land acquisition in Tanzania. J East Afr Stud 10(3):395–396
Menski WF (2006) Comparative law in a global context: the legal systems of Asia and Africa. Cambridge University Press, Cambridge
Merryman JH (1977) Comparative law and social change: on the origins, style, decline and revival of the law and development movement. Am J Comp Law 25(3):457
Molte L (1967) Sources et Tendances du Droit Moderne à Madagascar. Can J Afr Stud/Revue Canadienne des Études Africaines 1(2):123
Muir Watt H (2012) Further terrains for subversive comparison: the field of global governance and the public/private divide. In: Monateri PG (ed) Methods of comparative law, Cheltenham, p 270
Ndulo M (2011) African customary law, customs, and women's rights. Indiana J Glob Legal Stud 18(1):89
Ntampaka C (2005) Introduction aux systèmes juridiques africains. Namur
Oba AA (2010) The future of customary law in Africa. In: Fenrich JM et al (eds) The future of African customary law, Cambridge, p 79
Oko Elechi O et al (2010) Restoring Justice (Ubuntu): an African perspective. Int Crim Just Rev 20 (1):73
Oto-Peralía D, Romero-Ávila D (2017) Legal traditions, legal reforms and economic performance. Theory and evidence, Wien, p 85
Palmer VV (ed) (2012) Mixed jurisdictions worldwide, 2nd edn. Cambridge University Press, Cambridge, p 625
Prinsloo MW (1987) Restatement of indigenous law. Comp Int Law J South Afr 20(3):411
Rambaud T (2017) Introduction au droit comparé, 2nd edn. Presses Unversitaires de Frances, Paris
Ranger T (1983) The invention of tradition in colonial Africa. In: Hobsbawm E, Ranger T (eds) The invention of tradition, Cambridge, p 211, 212
Richard J (1997) Democratization in Africa after 1989: comparative and theoretical perspectives. Comp Polit 29(3):363
Roberts S (1979) Order and dispute: an introduction to legal anthropology. Penguin, London
Sacco R (2006) Il diritto africano. Turin
Sacco R (2009) Le droit africain: anthropologie et droit positif. Dalloz-Sirey, Paris
Sacco R (2012) The sub-Saharan legal tradition. In: Bussani M, Mattei U (eds) The Cambridge companion to comparative law, Cambridge, p 313 et seq
Seidman RB (1979) Law and stratification: the African Case. Contemp Crises 3:17
Sharkey HJ (2013) African colonial states. In: Reid R, Parker J (eds) The Oxford handbook of modern African history, Oxford, pp 153–154
Shumba T (2015) Revising legal harmonisation under the Southern African development community treaty: the need to amend the treaty. Law Democracy Dev 19:127
Siems M (2016) Varieties of legal systems: towards a new global taxonomy? J Inst Econ 12:579
Sinitsina I (1994) African legal tradition: J. M. Sarbah, J. B. Danquah, N. A. Ollennu. In: Dundes Renteln A (ed) Folk law: essays in the theory and practice of Lex Non Scripta, vol 1, Madison, p 264
Sippel H (1998) Customary family law in colonial Tanganyika: a study of change and continuity. Comp Int Law J South Afr 31(3):378
Ubink J (2010) The quest for customary law in African State Courts. In: Fenrich JM et al (eds) The future of African customary law, Cambridge, p 96

Valcke C (2018) Comparing law. Comparative law as reconstruction of collective commitments. Cambridge University Press, Cambridge
van der Waal KCS (2004) Formal and informal dispute resolution in the Limpopo Province, South Africa. Anthropol South Afr 27(3–4):113
Vanderinden J (1983) Les Systèmes juridiques africains, Paris
Vanderlinden J (1996) Anthropologique juridique. Dalloz, Paris
Vanderlinden J (2000) Les droits africains entre positivisme et pluralisme. Bulletin de séances de l'Académie royale de sciences d'Oute-Mer 46:279
Vanderlinden J (2006) Ex Africa Semper. Revue internationale de droit comparé 58(4):1187
Whelpton FR (2005) The Indigenous Swazi law of court procedure: a restatement. J South Afr Law/Tydskrif vir die Suid-Afrikaanse Reg 2:348
Woodman G (2010) A survey of customary laws in Africa in search of lesson for the future. In: Fenrich JM et al (eds) The future of African customary law, Cambridge, p 9
Zimmermann R, Visser D (1996) Introduction. South African law as a mixed legal system. In: Zimmermann R, Visser D (eds) Southern cross: civil law and common law in South Africa, Oxford, pp 7–8
Zweigert K, Kötz H (1996) Einführung in die Rechtsvergleichung, 3rd edn. Tübingen