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# Comparative Law in Africa: Methodologies and Concepts

Christian N. Okeke

Golden Gate University School of Law, [cokeke@ggu.edu](mailto:cokeke@ggu.edu)

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# Comparative Law in Africa: Methodologies and Concepts

**Salvatore Mancuso**  
University of Cape Town

**Charles M Fombad**  
University of Pretoria



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## Chapter Three

# Methodological Approaches to Comparative Legal Studies in Africa\*

Chris Nwachukwu Okeke† ‡

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† Professor of International & Comparative Law, Director, LLM & SJD Programs in International Legal Studies, and Director, The Sompong Sucharitkul Center for Advanced International Legal Studies, Golden Gate University School of Law, San Francisco, California; Pro Chancellor and Chairman of the Governing Council, Godfrey Okoye University, Enugu, Nigeria. I am indebted to Professor Michael Alsuel Kwame Ntumu for his helpful comments. All opinions and errors remain my own.

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## 1 INTRODUCTION

Comparative legal studies<sup>1</sup> is the art of comparing legal systems with a view to, among other things, investigating the historical and philosophical issues relating to law and establishing a better regime in international relations.<sup>2</sup> Methodology, which is the noun from which 'methodological' is derived, has been defined by the *American Heritage Dictionary* (4th edition) as the, 'set or system of methods, principles, and rules for regulating a given discipline'.<sup>3</sup>

From these definitions, it can be gleaned that the methodological approach to comparative legal studies entails the whole apparatus and procedure that is employed in the analysis, differentiation and assessment of legal systems. Discussions about the methodology of comparative law are fundamental to the study of law in general, since the process of comparison takes place in all facets of life and influences every form of human decision making.<sup>4</sup>

For purposes of this chapter, the methodological approach to comparative legal studies will be viewed as the theoretical tools, models and processes that are employed in the study of, and inquiry into, different legal systems. In the context of Africa, it means how this is undertaken by the African countries in the study of their legal systems and comparing them with other legal systems. Although no two legal systems are exactly the same, and it is a difficult task to find a common methodology of comparative legal studies,<sup>5</sup> there is much convergence in the approaches taken by African countries in the study of their laws, and these approaches may not be different from those of the other jurisdictions, such as America, Europe and Asia. Thus, while it is impractical to consider Africa (having many groupings) as one entity and compare it to a country that has some uniform system of law,<sup>6</sup> for instance, the United States, it does not necessarily imply that African countries and the United States do not have comparable methodological approaches to comparative legal studies.

<sup>1</sup> Although 'comparative legal studies' may be broader in scope than 'comparative law', for purposes of this chapter and to avoid distortions, both terms are used interchangeably, except where it is otherwise expressly stated. A discussion on the distinction between the two falls outside the scope of this chapter.

<sup>2</sup> See F Morosini 'Globalisation & Law: Beyond Traditional Methodology of Comparative Legal Studies and an Example from Private International Law' (2005) 13 *Cardozo Journal of International and Comparative Law* 541, 543. The process of comparative legal studies ensures that the problems that are identifiable in one jurisdiction are addressed in identical fashion in another jurisdiction. See A Sedillo Lopez 'A Comparative Analysis of Women's Issues: Toward a Contextualized Methodology' (1999) *Hastings Women's Law Journal* 347, 347–348.

<sup>3</sup> Quoted in CN Okeke 'African Law in Comparative Law: Does Comparativism Have Worth?' (2011) 16 *Roger Williams University Law Review* 1, 20.

<sup>4</sup> See VV Palmer 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology' (2005) 53 *American Journal of Comparative Law* 261, 261–262.

<sup>5</sup> See K Schadbach 'The Benefits of Comparative Law: A Continental European View' (1998) 16 *Boston University International Law Journal* 331, 378.

<sup>6</sup> See Okeke 'African Law in Comparative Law' (n 3) 5.

As an important academic discipline, comparative legal studies has not received the deserved attention, not only in Africa, but also in other parts of the world.<sup>7</sup> This is so even in the face of globalisation, which has made countries interdependent<sup>8</sup> and is thought to be a great moment for comparative legal studies.<sup>9</sup>

Much of the comparative legal scholarship has almost excluded Africa from the scheme of studies, except for South Africa, which has received some attention<sup>10</sup>. The vast majority of the academic programmes of African law faculties do not have a comparative law component. This unfortunate situation is reflected not unexpectedly in the judgments of the courts, which, as a rule, hardly advert to comparative law as a guide or tool for adjudication.<sup>11</sup> The fate suffered by comparative legal studies in Africa may not be unconnected with the diverse systems of law found in the African countries. Since African law is made up of different legal systems, including the common law, the civil law system and customary law systems, it may be difficult for authorities saddled with the enforcement and interpretation of legal rules to understand the nuances of these different systems and how they interact.<sup>12</sup>

This poses a challenge to African comparativists, as the successful comparison of two systems requires at least a fair grasp of how the systems operate. Moreover, the few works on comparative legal studies in Africa may not be seeing the light of day due to the non-representation of Africa in the processes of law creation.<sup>13</sup> If African legal systems comprise Africa's methodological approach to comparing legal studies, then the denial of the existence of African law as has been done in some quarters,<sup>14</sup> impacts comparative legal studies in Africa.

<sup>7</sup> For instance, Reimann described the teaching of comparative law in the United States as being in a sorry state. See M Reimann 'The End of Comparative Law as an Autonomous Subject' (1996) 11 *Tulane European & Civilian Law Forum* 49, 52.

<sup>8</sup> Eberle has noted that comparative law should assume a more important role given the developments that have made the world a global village. See EJ Eberle 'The Method and Role of Comparative Law' (2009) 8 *Washington University Global Studies Law Review* 451, 451–452.

<sup>9</sup> See UA Mattei et al *Schlesinger's Comparative Law* 7 ed (2009) 6 (observing that '... globalisation is to general comparative law what the fall of the Berlin wall was for Soviet legal studies').

<sup>10</sup> See ML Dudziak 'Who Cares about Courts? Creating a Constituency for Judicial Independence in Africa' (2003) 101 *Michigan Law Review* 1622, 1630–1631 (book review) (bemoaning the neglect of Africa as a field worth studying by American academia).

<sup>11</sup> The writer was part of an interview conducted in the southeast geo-political zone of Nigeria, wherein six High Court judges disclosed that they had no knowledge of comparative law.

<sup>12</sup> For instance, it is noted that in South Africa, magistrates' courts and the High Court are not grounded in the way customary law applies. See TW Bennett 'Legal Pluralism and the Family in South Africa: Lessons from Customary Law Reform' (2011) 25 *Emory International Law Review* 1029, 1036. This may not be peculiar to South Africa.

<sup>13</sup> Lowe has passionately argued that Africa is marginalised in several respects, among which are in the areas of international law study and the development of doctrine. See V Lowe 'The Marginalization of Africa' (2000) 94 *Proceedings of the American Society of International Law* 231, 231–232.

<sup>14</sup> See W Menski *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*

## **2 OBJECTIVES AND IMPORTANCE OF COMPARATIVE LEGAL STUDIES**

A single chapter of this nature cannot capture all the objectives and importance of comparative legal studies. 'The range and eclecticism of its methods are matched by the wide variety of its aims and uses.'<sup>15</sup> Central to the objectives of comparative legal studies are the following:

- (1) better understanding of law;
- (2) law reform;<sup>16</sup>
- (3) international unification and harmonisation.<sup>17</sup>

These objectives are interconnected because it is when the operation of a particular law or legal system is understood that it can serve as a model to reform another legal system or be considered as constituting a part of a unified system of law. Even though the term 'comparative legal studies' is relatively new, a system for comparing legal rules has existed for many centuries.<sup>18</sup> In fact, the thought processes of humankind have always involved some form of comparison. For, as some sages have aptly observed, 'thinking without comparison is unthinkable . . .'.<sup>19</sup>

Understanding law or a legal system consists in laying bare the whole apparatus upon which that law or legal system thrives. Sometimes a knowledge of other disciplines may be quite helpful in this enterprise.<sup>20</sup> It also involves the tracking of both foreign and municipal changes in the law.<sup>21</sup> In the application of foreign law to domestic law: 'the comparative method is not just a requirement, but a necessity' in the resolution of conflict of laws.<sup>22</sup> Globalisation has thrust a challenge on comparativists who are required to keep abreast of foreign laws in order to be able to advise their clients on the legal requirements of transnational transactions.<sup>23</sup>

In the African context, an understanding of the various legal systems would help the people confront the different problems bedevilling them and enable the government to make better policy choices.<sup>24</sup> In understanding both one's own law and a foreign law, a comparativist acquires a broader perspective about the interaction

2 ed (2006) 380–492 (discussing the denial of the existence of African law (cited in SW Kang'ara 'Why Take Private Law Seriously in Africa?' (2011) 26 *American University International Law Review* 1125, 1127 fn 5).

<sup>15</sup> See MA Glendon et al *Comparative Legal Traditions* 3 ed (2007) 13.

<sup>16</sup> See Okeke (n 3) 5.

<sup>17</sup> See H E Chodosh 'Comparing Comparisons: In Search of Methodology' (1999) 84 *Iowa Law Review* 1025, 1068.

<sup>18</sup> See Mattei et al (n 9) 10 (arguing that comparative law is not entirely a creation of the Paris Congress).

<sup>19</sup> See Palmer 'From Leretholi to Lando' (n 4) 261 (quoting GE Swanson 'Frameworks for Comparative Research: Structural Anthropology and the Theory of Action' in I Vallier (ed) *Comparative Methods in Sociology* (1971) 141–202.

<sup>20</sup> See Eberle 'The Method and Role of Comparative Law' (n 8) 471.

<sup>21</sup> Chodosh 'Comparing Comparisons: In Search of Methodology' (n 17) 1069.

<sup>22</sup> See P De Cruz *Comparative Law in a Changing World* 2 ed (1999) 22.

<sup>23</sup> De Cruz (n 22) 22.

<sup>24</sup> See Okeke (n 3) 9.

of different legal systems and is better able to deal with complex legal issues and problems.<sup>25</sup>

Legal reform as an objective of comparative legal studies brings to the fore the way a legal system is impacted upon by another. Borrowing is a veritable tool for legal reform and cuts across virtually all legal systems.<sup>26</sup> The comparison of laws is a necessary tool for legal borrowing. In the process of borrowing, the pertinent issues that arise are (i) what factors should inform the decision to reform or improve upon a particular law or legal regime, and (ii) who should make that decision. For instance, can a reform be imposed upon a people simply because it would serve the interests of the agent of reform?

During the colonisation of African countries by the Western countries, customary law, which had to a large extent regulated the activities of the indigenous people, was almost made subordinate to the foreign law that was imposed on the people by the colonialists. In Nigeria, for instance, the repugnancy doctrine or test that became the standard for evaluating African customs<sup>27</sup> was easily applied to strike down any aspect of the customary law that did not meet the Western standard of 'natural justice, equity and good conscience'.<sup>28</sup> In such a case, would the repugnancy doctrine have been considered reformative?

The repugnancy doctrine also held sway in other African colonial states.<sup>29</sup> It is

<sup>25</sup> See Schadbach 'The Benefits of Comparative Law' (n 5) 344.

<sup>26</sup> See De Cruz (n 22) 20. Writing on the cases of legal borrowing, Grossfeld notes that '... the earliest legislation on companies was the French *Commercial Code* of 1807 which enacted the charter system, and formed the basis of the Prussian company law of 1843. The notion of income tax, which originated in England, was imitated by German legislators. The doctrine of proper allowances for dealings between connected enterprises, which has also been adopted in Germany, derives from the *Internal Revenue Code of the United States*... A number of ideas in the *German Civil Code* are derived from the Swiss Law of Obligations of 1881, and German civil procedure drew heavily from Austrian law. The anti-trust laws of Austria have also inspired German cartel law'. De Cruz (n 22) (citing B Grossfeld *The Strength and Weakness Of Comparative Law* (1990)).

<sup>27</sup> See U Ewelukwa 'Posthumous Children, Hegemonic Human Rights, and the Dilemma of Reform — Conversations Across Cultures' (2008) 19 *Hastings Women's Law Journal* 211, 221.

<sup>28</sup> See s 13(1) of the Mid-Western State High Court Law No 9 of 1964, which states that '[t]he High Court shall observe and enforce the observance of every customary law which is applicable and is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any written law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such customary law'. Although the repugnancy doctrine was the doctrine applied in cases such as *Edet v Essien* (1982) 2 NLR; *Mojekwu v Mojekwu* [1997] 7 NWLR 283.

<sup>29</sup> See s 19 Supreme Court Ordinance of Ghana 1876; s 76 Sierra Leone Local Courts Act 1965; s 3 ord 3 Gambia 1955 (rev) (cited in Ewelukwa (n 27) 221 fn 80). It is instructive to note that after attaining independence, Ghana, in 1960, enacted a constitution that removed the repugnancy clause. However, s 54 rule 6 of the Courts Act 1993 of Ghana mandates courts to give decisions that meet the requirements of justice, equity and good conscience. It is doubtful if there can be said to be a difference between the old repugnancy test and the task of the courts under this provision. See ES Nwauche 'The Constitutional Challenge of the Integration and Interaction of Customary and the



advocated that in order to fit into the comparative law goal of legal reform, any reform that is initiated in the legal systems of African countries must be based on sound and well-thought-out policies and must be a product of comparative research, and not merely emanate from the parochial considerations of the leaders. In Nigeria, during the administration of Olusegun Obasanjo as civilian President, Obasanjo sought to amend the 1999 Constitution of Nigeria by attempting to introduce a provision allowing for a third term for the Office of the President of Nigeria. This was to enable him to remain in office after his constitutional second term had expired. As can be seen from the foregoing, the motive for such amendment was purely selfish and not compatible with the spirit that informed the processes that culminated in the drafting and adoption of the anti-corruption law in Nigeria,<sup>30</sup> or the adoption of the 1996 Constitution of South Africa, which prohibited all forms of discrimination and brought the apartheid system to an end.<sup>31</sup> Fombad notes that in many (African) countries, one of the problems had been the way 'African leaders had rendered constitutions dysfunctional by regularly ignoring their provisions or arbitrarily amending them when it suited their convenience'.<sup>32</sup>

Reform involves comparison and sometimes there could be disagreements among reformists as to what is to be compared and what aspects of a legal system should be borrowed and transplanted to another legal system.<sup>33</sup> It is important that these disagreements be resolved. After all, it is the purpose of comparative legal studies 'to decide which solution of a problem is the best, to decide which of the possible solutions is most suitable and just'.<sup>34</sup>

Comparative legal studies is essential to the international harmonisation and unification of law.<sup>35</sup> Unification and harmonisation of law brings uniformity and certainty to legal systems. Although the origin of legal unification dates back to ancient history,<sup>36</sup> it was not until the nineteenth century — when national interest in comparative legal studies was given a boost — that unification occurred on a

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Received English Common Law in Nigeria and Ghana' (2010) 25 *Tulane European & Civil Law Forum* 37, 46.

<sup>30</sup> For a detailed study on the anti-corruption legislation in Nigeria, see, generally, ON Ogbu 'Combating Corruption in Nigeria: A Critical Appraisal of the Laws, Institutions, and the Political Will' (2008) 14 *Annual Survey of International & Comparative Law* 99.

<sup>31</sup> See CM Fombad 'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) 59 *Buffalo Law Review* 1007, 1009. Referring to the legal transformation in South Africa in recent years, Bennett has observed that: '... the lawgivers, whether courts or Parliament, were determined to give maximum effect to fundamental human rights, and, in this regard, they were heavily influenced by international law, together with constitutional jurisprudence from the more mature democracies (notably, Canada, Germany, and the United States)'. See Bennett 'Legal Pluralism and the Family in South Africa' (n 12) *Lessons* 1055.

<sup>32</sup> Fombad 'Constitutional Reforms and Constitutionalism in Africa' (n 31) 1009.

<sup>33</sup> See Chodosh (n 17) 1076, 1077.

<sup>34</sup> See P Legrand 'Paradoxically, Derrida: For a Comparative Legal Studies' (2005) 27 *Cardozo Law Review* 631, 637.

<sup>35</sup> See Reimann 'The End of Comparative Law as an Autonomous Subject' (n 7) 56.

<sup>36</sup> See De Cruz (n 22) 23.

large scale.<sup>37</sup> This period produced the Hague Conventions on the Uniform Laws on International Sale of Goods<sup>38</sup> and the United Nations Commission on International Trade Law (UNCITRAL).<sup>39</sup> In a period when African countries are challenged by the same problems, such as human rights violations, poverty and corrupt leadership,<sup>40</sup> there is an urgent need for them to form a common front to tackle these problems and this is achievable through unification. In this regard, the European Union may provide a useful guide to Africa. However, the European unification is not without its problems, and thus cannot be considered a total success, especially considering the squabbles existing in the European Community.<sup>41</sup> The European Union reflects the conflict of laws and perhaps the giving up of some laws, inherent in legal unification.<sup>42</sup> On the whole, the European Community has brought some legal uniformity to the European soil, which is worth emulating.

Already, there are attempts at legal unification in some regions of Africa. For example, the Organization Pour L'harmonisation du Droit des Affaires en Afrique (OHADA) is geared towards harmonisation of trade laws among the member countries.<sup>43</sup> The East African Community (EAC) has similar objectives.<sup>44</sup>

Despite the appeal of unification, it appears that the unification argument sees legal pluralism as a phenomenon that must be checked. The extent to which comparative legal studies can be used to achieve international unification of laws is limited since, in reality, a watertight legal union is not possible.<sup>45</sup> Moreover, unification as a goal of comparative legal studies has to grapple with the challenges of conflict of laws. This conflict may be more pronounced when there are many jurisdictions involved as there will not only be conflict between customary law and statutory law but also between two (or more) legal systems.<sup>46</sup> In the determination of which law or combination of laws should be adopted as governing a group of states, say African states, there may be a neglect of the laws of a particular state, or more priority may be accorded to a particular legal system, a situation that may lead

<sup>37</sup> De Cruz (n 22) 23.

<sup>38</sup> Convention Relating to a Uniform Law on the International Sale of Goods 834 UNTS 107 (1972); and Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods 834 UNTS 169 (1972).

<sup>39</sup> See De Cruz (n 22) 23.

<sup>40</sup> See M Ndulo 'The Democratization Process and Structural Adjustment in Africa' (2003) 10 *Indiana Journal of Global Legal Studies* 315 (stating that 'Africa's problems are myriad and complex').

<sup>41</sup> Ndulo (n 40) 315.

<sup>42</sup> For instance, it has been observed that there is a 'decline of the doctrine of consideration in contract . . .', and that there is 'recent legislation that abolished the privity principle in order to bring English law in line with other jurisdictions of the European Union'. See VV Palmer 'Mixed Legal Systems . . . and the Myth of Pure Laws' (2007) 67 *Louisiana Law Review* 1205, 1209–1210 (citing H MacQueen 'Looking Forward to a Mixed Future: A Response to Professor Yiannopoulos' (2003) 78 *Tulane Law Review* 411, 412).

<sup>43</sup> See Okeke (n 3) 14.

<sup>44</sup> Okeke (n 3) 14.

<sup>45</sup> See Menski *Comparative Law in a Global Context* (n 14) 29.

<sup>46</sup> Chodosh provides a hypothetical case on how this conflict can occur. See Chodosh (n 17) 1078–1079

to the imposition of laws on states.<sup>47</sup> African states are not insulated from this challenge. Unification requires a good balancing of the interests of the states that seek harmonisation of their laws.

Hiram E Chodosh has further identified as an implicit purpose of comparative law, the preservation or increase of its status as an autonomous discipline.<sup>48</sup> However, this purpose is controversial as it is not settled as to whether or not comparative law is an autonomous subject.<sup>49</sup>

### **3 AFRICA'S MIXED LEGAL SYSTEMS AND COMPARATIVE LEGAL STUDIES: OBSTACLES AND OPPORTUNITIES**

A mixed legal system is considered as 'one in which two or more legal traditions, or parts thereof, are operating simultaneously within a single system'.<sup>50</sup> It is not clearly settled what actually constitutes a mixed legal system.<sup>51</sup> The legal systems of the world are made up of disparate sources of law<sup>52</sup> but for a system to be properly termed 'mixed', there must be a 'specificity of the mixture', and the 'mixture of common law and civil law' must be in such proportions that are capable of leaving a neutral observer with the impression that the mixture is obvious.<sup>53</sup> According to Evans-Jones, a mixed legal system is 'a legal system which, to an extensive degree, exhibits characteristics of both the civilian and the English common law traditions'.<sup>54</sup> There is an argument that a country or system would still qualify as a mixed system where its legal system consists of written law and customary law or religious law and secular law.<sup>55</sup> It is tempting to submit that the above position is to be met with some objection as it seeks to equate mixed legal systems to legal pluralism.

It is doubtful if these two concepts are coterminous. However, there is evidence that supports the argument by contending that mixed jurisdictions can arise when 'constituent legal traditions have become blended (like "a puree"), either because of legal-cultural affinity . . . or because a dominant colonial power or national elite eliminated local custom and replaced it with a compound legal system taken from another legal tradition . . .'.<sup>56</sup> Despite the disagreement on the meaning of a mixed

<sup>47</sup> Chodosh (n 17) 1078–1079.

<sup>48</sup> Chodosh (n 17) 1083.

<sup>49</sup> Chodosh (n 17) 1083.

<sup>50</sup> See Palmer 'Mixed Legal Systems' (n 42) 1206–1207.

<sup>51</sup> See K Kim 'Mixed Systems in Legal Origins Analysis' (2010) 83 *Southern California Law Review* 693, 704.

<sup>52</sup> See D Visser 'Cultural Forces in the Making of Mixed Legal Systems' (2003) 78 *Tulane Law Review* 41, 46.

<sup>53</sup> Visser 'Cultural Forces in the Making of Mixed Legal Systems' (n 52) 47 (citing VV Palmer 'Introduction to the Mixed Jurisdictions' in VV Palmer (ed) *Mixed Jurisdictions Worldwide* (2001)).

<sup>54</sup> See A Levasseur & JM McCreary 'Mixed Jurisdictions Worldwide: The Third Legal Family' (2002) 63 *Louisiana Law Review* 69 (book review) (quoting R Evans-Jones (ed) *The Civil Law Tradition in Scotland* (1995)).

<sup>55</sup> Levasseur & McCreary 'Mixed Jurisdictions Worldwide' (n 54) 70.

<sup>56</sup> See Glendon *Comparative Legal Traditions* (n 15) 952.

legal system, it is widely accepted that elements of the common law and the civil law must be present in order for a legal system to be identified as 'mixed'.<sup>57</sup>

South Africa is often cited as an example of a mixed legal system,<sup>58</sup> and while it stands out in Africa's mixed jurisdictions, other countries such as Togo, Burundi, Rwanda, Tanzania, Botswana, Mauritius, Namibia and Zimbabwe have also been identified as mixed systems.<sup>59</sup> However, Cameroon has been considered more as a regional hybrid system than a mixed legal system. This is due to the fact that although the country has two major systems (namely civil law and common law), the two systems are distinct and apply to separate groups of people.<sup>60</sup> Like other mixed legal systems, the African jurisdictions that are mixed are prone to and in fact do suffer political and cultural tensions arising from the colonial imposition of law.<sup>61</sup> These mixed legal systems are products of successive colonial administrations that leave in their wake a 'mixed grill' form of law.<sup>62</sup>

The indigenous law of the people changes from its pure state to an impure state as it becomes 'contaminated' with colonial, foreign law.<sup>63</sup> Due to the operation of two or more systems, which sometimes have diametrical components, it becomes difficult to adopt a rule that would command a general acceptance. There could also be the problem of multiplicity of languages, such as exists in South Africa, which has eleven constitutionally recognised languages.<sup>64</sup> This is where harmonisation remains useful as a comparative law objective.

#### 4 THE IMPACT OF COLONIALISM ON COMPARATIVE LEGAL STUDIES IN AFRICA

Colonialism constitutes an important issue when discussing comparative legal studies in Africa. A prominent feature of pre-colonial African legal systems was the predominance of customary law regulating the indigenous people. Customary law went through unpleasant treatment from a combination of legal positivist bias and the colonial mentality that did not consider it proper law.<sup>65</sup> This was not surprising

<sup>57</sup> See Kim 'Mixed Systems in Legal Origins Analysis' (n 51) 702 (stating that 'most writers identify two main secular legal traditions: common law and civil law, and several sub traditions — French, German, Socialist, and Scandinavian — within civil law').

<sup>58</sup> See Visser (n 52) 50; Levasseur & McCreary (n 54) 70.

<sup>59</sup> See Kim (n 51) 701, 705.

<sup>60</sup> Kim (n 51) 706.

<sup>61</sup> See Glendon (n 15) 970. Visser writes that: '... the fabric of the South African legal system is woven out of two cross-cutting strands: the interface between European and indigenous law, and the interaction between principles rooted in different European traditions'. See F du Bois & D Visser 'The Influence of Foreign Law in South Africa' (2003) 13 *Transnational Law & Contemporary Problems* 593, 595.

<sup>62</sup> Visser writes that: '... the fabric of the South African legal system is woven out of two cross-cutting strands: the interface between European and indigenous law, and the interaction between principles rooted in different European traditions'. See F du Bois & D Visser 'The Influence of Foreign Law in South Africa' (2003) 13 *Transnational Law & Contemporary Problems* 593, 595.

<sup>63</sup> See Du Bois & Visser (n 61).

<sup>64</sup> Glendon (n 15) 972.

<sup>65</sup> See Menski (n 14) 380.

as the Europeans had declared Africans as well as their laws as uncivilized upon the arrival of the colonialists.<sup>66</sup> This affected Africa's participation in the comparative discipline. To compound issues, the various African entities had varying customs, making a possible comparative enterprise remote. Good comparative law exercises then would have meant a study of the entire gamut of the African setting. The repugnancy test employed by the colonialists would perhaps tend to be the only incidence of some form of comparative work done on Africa's indigenous laws by the Europeans with the purpose of diminishing those laws, but it has been earlier queried in this chapter, whether the repugnancy test/doctrine constitutes reform for purposes of comparative legal studies.

However, fortunately the desecration of Africa's customary law did not continue forever, and with the winning of independence by the African intelligentsia, Africa is not left out in comparative legal studies. Worthy African comparativists have continued to make Africa relevant in the comparative discipline and are advancing legal reforms in Africa.<sup>67</sup> But even after independence by the various African countries, the harm done to Africa's laws and their study does not seem to have been reversed, as it has been observed:

Such negative assumptions still underpin assumptions that post-colonial Africans really have no proper religious, cultural and legal traditions to fall back on and the only viable method is to modernize Africa and Africans along Western lines. While this eventually became 'politically incorrect' during the post-colonial era, a lot of damage had already been done, and some developments have become irreversible. The prevailing negative assumptions about African laws are strongly reflected in legal scholarship and old negative views have significantly influenced the study of African legal systems.<sup>68</sup>

## **5 METHODS OF COMPARATIVE LEGAL STUDIES**

In order for the methodologies to be properly ascertained and discussed, one has to have the skill<sup>69</sup> and competence to consider and evaluate law clearly. Such consideration or examination should not be from a narrow perspective, but from a very broad approach considering the multifarious make-up of law as a science of study. To carry out this function properly and satisfactorily requires objectivity and neutrality. Next is the need to examine the law exactly as it is rendered, whether written or

<sup>66</sup> Menski (n 14) 385.

<sup>67</sup> For example, James Thuo Gathi; Makau wa Mutua, Judge Elias (now late). See Okeke (n 3) 6.

<sup>68</sup> Menski (n 14) 387.

<sup>69</sup> It is not intended in this study to carry out any detailed discussion of the relevant skills that a comparativist ought to have to be able to do his or her job satisfactorily. What is most essential in our view is the necessity to develop critical reasoning abilities that should be applied in a very scientific and neutral manner. For more readings on this subject, see, for example, M Dogan & D Pelassy *How to Compare Nations: Strategies in Comparative Politics* (1984) 3–37. Besides, a comparativist should be open to the study of the history, traditions (whether religious or cultural), language, and so on, so as to be able to gather correct information about a foreign legal system directly and through an interpreter.

unwritten (for example, customary law). Then, it will be necessary, as a third step, to examine how the law functions and is used within a given society.

### **5.1 Historical method**

In order to properly understand comparative legal studies, knowledge of the law itself is required. Since the realm of comparative legal studies centres on comparison of laws or legal systems, it is logical that a survey of the history of the different laws to be compared should be carried out. This encompasses the tenet of the historical method or approach to comparative legal studies, for it has been observed that 'comparative law without the history of law is an impossible task'.<sup>70</sup> Such history is important because it explains why a particular legal system works for the country or groups of countries that adopt it. For example, the peculiar history of the English parliamentary system is responsible for why the monarchy has continued to thrive in England. Nigeria, a former British colony, practised the parliamentary system of government imposed on it by the colonisers. However, Nigeria discarded the parliamentary system of government in 1963 when it became a republic, adopting in its place a presidential, federal system of government more suited to its new status as a republic and its cultural and social history.

Customary law has continued to form an important source of law in African countries, despite the attempts of the colonisers to discredit it.<sup>71</sup> This is not unrelated to the historical background of the African communities. African customary laws have normative foundations that are rooted in societal history.<sup>72</sup> The historical approach becomes of practical importance when a country seeks to borrow some legal aspects of another legal system, since what works for, say, Germany, may not work for Ghana because of the two countries' different histories. The historical approach is employed either to rediscover forgotten but still helpful ideas, or to investigate how a legal measure has affected behaviour. It is also useful in understanding and solving problems through the study of past and foreign concepts.<sup>73</sup>

### **5.2 Functional method or approach**

Today, we understand that when we compare rules, we must take a functional approach; that is, we must analyse not only what rules say but also what problems they solve in their respective legal systems.<sup>74</sup>

The functional approach to comparative legal studies is result-oriented, and serves a wide range of social purposes, and is not limited to solving the problems of

<sup>70</sup> See Glendon (n 15) 6.

<sup>71</sup> Jessup seems to have put up an argument that though the Europeans to a very large extent ignored Africa's indigenous laws due in part to their unwritten nature, those laws nevertheless regulated the conduct of the people who showed compliance to the law. The factual and psychological elements of which those laws are composed make them capable of ensuring continuity and qualify them as legal order. See G Jessup 'Symbiotic Relations: Clinical Methodology — Fostering New Paradigms in African Legal Education' (2002) 8 *Clinical Law Review* 377, 381–382.

<sup>72</sup> See Menski (n 14) 420.

<sup>73</sup> See Schadbach (n 5) 367 (1998).

<sup>74</sup> Glendon (n 15) 11.

a particular geographical entity.<sup>75</sup> The functional approach is identified as the dominant methodology of comparative legal studies.<sup>76</sup> Any comparative law question must be couched in comparative terms.<sup>77</sup> Functionalism thrives on the assumption that though there are different societies, they seem to have similar problems that can be solved through different means, though quite often with similar results for the benefit of all.<sup>78</sup>

Following this postulation, there may be attainment of a unity of legal systems of the world, when the common problems of the different states are resolved. Garbarino has shown how the functional approach can serve as a panacea to the tax problems of different countries.<sup>79</sup> The assumption that states face the same problems may have some objection attending it, for there may be some legal problems that are peculiar to a legal system or a group of legal systems. However, this objection does not affect the fact that the solution to such problems can still be found in another legal system, since 'only a fool would refuse quinine just because it didn't grow in his back garden'.<sup>80</sup> The functional method has a practical orientation and focuses on what legal rules can actually do, rather than what they say.<sup>81</sup> Another assumption of the functional school is that the resolution of practical problems by legal systems occurs the same way.<sup>82</sup> The pragmatic undertone of functionalism seems to stand out as a methodology of comparative legal studies. However, a lot of criticisms have been directed toward the functional approach.<sup>83</sup>

### **5.3 Legal harmonisation and unification**

Not only are harmonisation and unification an objective of comparative legal studies, they also seem to constitute its methodology. There are now attempts at adopting a uniform system of law or set of rules regulating people in a given region. Harmonisation and unification are mainly achieved by negotiating treaties, both

<sup>75</sup> See R Teitel 'Comparative Constitutional Law in a Global Age' (2004) 117 *Harvard Law Review* 2570, 2574 (book review).

<sup>76</sup> See T Ruskola 'Legal Orientalism' (2002) 101 *Michigan Law Review* 179, 188. It has been described as the backbone of serious comparative research. See C Garbarino 'An Evolutionary Approach to Comparative Taxation: Methods and Agenda for Research' (2009) 57 *American Journal of Comparative Law* 677, 681.

<sup>77</sup> See Legrand 'Paradoxically, Derrida: For a Comparative Legal Studies' (n 34) 638.

<sup>78</sup> See K Zweigert & H Kötz *An Introduction to Comparative Law* 3 ed (1998) 34 (cited in OY Marian 'The Discursive Failure of Tax Law' (2010) 58 *American Journal of Comparative Law* 415, 428; CJ Roederer 'Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa's Bills of Rights' (2009) 26 *Arizona Journal of International & Comparative Law* 427, 442.

<sup>79</sup> See, generally, Garbarino 'An Evolutionary Approach to Comparative Taxation' (n 76).

<sup>80</sup> See Teitel 'Comparative Constitutional Law in a Global Age' (n 75) 2575.

<sup>81</sup> See O Brand 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2007) 32 *Brooklyn Journal of International Law* 405, 409.

<sup>82</sup> Brand 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (n 81) 410.

<sup>83</sup> See, generally, Brand (n 81) 412-421.

bilateral and multilateral, with a view to reducing differences in the same legal fields, and producing identical laws in specific areas among the agreed countries.<sup>84</sup>

#### 5.4 Method of reviewing customary/natural law

Although customary law is recognised in the entities that make up Africa and in fact constitutes a bulk of their laws, the issues relating to customs in Africa are yet to be settled. Africa is made up of not less than fifty-four countries.<sup>85</sup> This may imply that there is about a similar number of customs across the African continent. Customary law, by its nature, is largely unwritten, and varies according to locality.<sup>86</sup> Moreover, it is susceptible to change.<sup>87</sup> While in some countries customary law is treated as a question of fact that has to be proved by evidence,<sup>88</sup> in others, it is considered a question of law.<sup>89</sup> This divergent treatment of customary law and other issues of customary law have a great implication for comparative legal studies in Africa, especially in the context of harmonisation and unification. Meaningful harmonisation of customary law in Africa may entail that various customary rules on the African continent be treated the same way: as a question of law. This call had been made by a distinguished African scholar, TO Elias, who has advocated that all independent Commonwealth African countries tread the Ghanaian path and regard customary law as a question of law.<sup>90</sup> However, this idea has been criticised for its tendency to push nationalism and patriotism to the extreme.<sup>91</sup> This cannot be achieved without a codification of the various customary law rules existing in African states. Not only does this appear a difficult task, if not an impossible one, it will affect the evolutionary nature of customary law.<sup>92</sup> Perhaps, this is one of the most visible ways in which legal pluralism inhibits harmonisation.

<sup>84</sup> See Schadbach (n 5) 393–394 (making some distinction between harmonisation and unification).

<sup>85</sup> See Okeke (n 3) 5.

<sup>86</sup> See RN Nwabueze 'The Dynamics and Genius of Nigeria's Indigenous Legal Order' (2002) 1 *Indigenous Law Journal* 153, 156.

<sup>87</sup> See *Barimah Balogun and Scottish Nigerian Mortgage and Trust Co Ltd v Saka Chief Oshodi* (1931) 10 NLR 36 at 51, 53–54; M Gluckman (ed) *Ideas and Procedures in African Customary Law* (1969) 9.

<sup>88</sup> In the Nigerian legal system, customary law is a question of fact, which can be proved by the calling of witnesses, and, in the case of a notorious custom, by judicial notice. See s 14(1) Evidence Act, Laws of the Federation of Nigeria, 1990, Cap 112 Vol VII; *Angu v Attah* [1921] Privy Council Judgment (1874–1928) 43.

<sup>89</sup> For example, currently, Ghana treats customary law rules as questions of law. See s 55 Ghana Courts Act, 1993; JA Davies & DN Dagbanja 'The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective' (2009) 26 *Arizona Journal of International & Comparative Law* 303, 307.

<sup>90</sup> See TO Elias *The Judicial Process in Commonwealth Africa* (1977) (cited in Nwabueze 'The Dynamics and Genius of Nigeria's Indigenous Legal Order' (n 86) w73–74).

<sup>91</sup> Nwabueze (n 86) 173–174.

<sup>92</sup> Nwabueze (n 86) 161.



### **5.5 Economic analysis method or approach**

The economic approach, the development of which is attributed to Ugo Mattei, arose as a result of mounting dissatisfaction with the functional method.<sup>93</sup> Having a nexus with the functional approach, it is concerned with developing a paradigm for judging a proper legal solution, and identifies such paradigm to be 'efficiency'.<sup>94</sup> In order to properly analyse legal rules, an application of economic concepts is very vital, and notions of justice are de-emphasised.<sup>95</sup> An efficient legal system would be identified as one with '... lesser waste, lower transaction costs, better resource allocation, or greater freedom for individual to interact'.<sup>96</sup> The process of legal transplant involves competition among the legal systems, and in the end, only the efficient systems emerge victorious or, rather, dominant.<sup>97</sup> In principle, this would seem beneficial to the entire world, but with the asymmetry of economic power between developed countries, on the one side, and developing and underdeveloped countries, on the other side, it is evident that the latter may not fit into the competition. However, the economic approach may be helpful to African countries that are mainly developing in working out a uniform economic law that would govern their transactions. Building on an assumption that there is a competitive market for the supply of law,<sup>98</sup> the economic approach explores legal transplant, and the convergence and divergence of legal systems, as a function of this competition.<sup>99</sup> The economic approach focuses on the economic and practical efficiency of law and its rules.

### **5.6 Law and cultural method or approach**

While the functional approach to comparative legal studies espouses the view that legal systems have similar problems to grapple with, the cultural method ascribes uniqueness to every culture.<sup>100</sup> Thus, every system possesses specific legal traditions and cultures. To this extent, the cultural method emphasises differences in legal systems.<sup>101</sup> Laws are an expression of culture, and the cultural context of law should be considered when engaging in comparative exercises. It is this cultural undertone of comparative legal studies that is reflected in the call that a comparativist must use a technique of 'cultural immersion', which gets comparative law enmeshed in the 'political, historical, economic, and linguistic contexts that molded the legal system, and in which the legal system operates'.<sup>102</sup> Since the cultural approach recognises differences in cultures, and perhaps attempts to preserve them, it would

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<sup>93</sup> See Brand (n 81) 421.

<sup>94</sup> See Marian 'The Discursive Failure of Tax Law' (n 78) 432.

<sup>95</sup> See X Benavides 'Competition Among Laws' (2008) 77 *Revista Juridica Universidad de Puerto Rico* 373, 376.

<sup>96</sup> See Brand (n 81) 421–422.

<sup>97</sup> Marian (n 78) 432.

<sup>98</sup> Marian (n 78) 432.

<sup>99</sup> Brand (n 81) 423.

<sup>100</sup> See Marian (n 78) 432.

<sup>101</sup> Brand (n 81) 429.

<sup>102</sup> See Eberle (n 8) 458 (citing VG Curran 'Cultural Immersion, Difference and Categories in US Comparative Law' (1998) 46 *American Journal of Comparative Law* 43).

then follow that legal unification works against the preservation of these differences. In this regard, Legrand has observed that 'when the forces of unification threaten what gives a people its cultural identity, it is time we draw back and reconsider'.<sup>103</sup> The cultural method may not be reformative or normative since it is only employed to locate and describe cultural differences.<sup>104</sup> One of the problems associated with the cultural approach is the difficulty in ascertaining what really makes up legal culture.<sup>105</sup> An identification of the components of a legal culture is required for the cultural method to emerge as a successful enterprise.

### 5.7 Critical approach

Traditional comparative legal studies have contained a strong hegemonial-ideological flavour, and being Eurocentric, have sought to assimilate the non-Western world into the fold of the Western systems.<sup>106</sup> The critical approach to comparative legal studies is a movement to strip comparative law of its Eurocentric garment. Frankenberg, an apostle of the critical method, envisages the manner of its application to be a three-step process. The first step, he maintains, is to remove the multifaceted factual situations from their social context and place them in a legal framework. The second step requires the deconstruction of the process of making legal decisions in order to reveal the political interests underlying this process. The third step sees the restoration of the cultural context to the legal framework from which it had earlier been removed.<sup>107</sup> The critical approach seeks to include non-Western states, including African countries, as actors in comparative legal studies.

### 5.8 Convergence approach and the non convergence approach

The convergence approach sees legal systems as existing in different forms but sharing a common essence.<sup>108</sup> Advocates of this approach believe that legal systems share common features that may not be totally equivalent.<sup>109</sup>

Arguing that the world has enough differences, Markesinis advises that comparative legal studies should concentrate on the similarities that exist among different legal systems.<sup>110</sup> The functional approach is therefore a species of the convergence approach since it holds that the legal problems of all countries are similar, and that

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<sup>103</sup> See P Legrand 'John Henry Merryman and Comparative Legal Studies: A Dialogue' (1999) 47 *American Journal of Comparative Law* 3, 46 (cited in Marian (n 78) 433).

<sup>104</sup> Brand (n 81) 429.

<sup>105</sup> Marian (n 78) 434.

<sup>106</sup> See Marian (n 78) 435.

<sup>107</sup> See G Frankenberg 'Critical Comparisons: Rethinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411, 450–452 (cited in Marian (n 78) 436).

<sup>108</sup> See Morosini 'Globalisation & Law: Beyond Traditional Methodology of Comparative Legal Studies and an Example from Private International Law' (n 2) 545.

<sup>109</sup> See Chodosh (n 17) 1118

<sup>110</sup> Morosini (n 2) 545 (citing BS Markesinis *Foreign Law & Comparative Methodology: A Subject & A Thesis* (1997) 6).

every legal system deals with the same questions, irrespective of the differences existing in their social structures and stages of development.<sup>111</sup>

The non-convergence approach deviates from the convergence approach, and is concerned with the differences that exist between legal systems. To the comparativist of the non-convergence ideology, law is a living part of an overall culture; and to look for the similarities between legal systems is superficial since that would be overlooking the cultural specificity in legal systems.<sup>112</sup> The cultural approach uses the non-convergence model.

## **6 THE USE OF COMPARATIVE METHODOLOGY BY ADJUDICATORY BODIES IN AFRICAN STATES**

A discussion of the methodological approach to comparative legal studies in Africa would be incomplete without an inclusion of the ways the courts of some African countries apply comparative law analysis when arriving at decisions. In this regard, the judiciaries of three African countries, namely Ghana, Nigeria and South Africa, will be discussed here.

### **6.1 Ghana**

Ghana is a unitary state,<sup>113</sup> and operates the common law system, having been colonised by the British up till 1958, when it secured its independence.<sup>114</sup> It is situated between Cote d'Ivoire and Togo, and is made up of numerous ethnic groups and linguistic units.<sup>115</sup> Although Ghana is a dualist country,<sup>116</sup> the courts do consider international law in the adjudication of cases. International law, especially in the dualist context, is a system of law different from domestic law. That being the case, use of such international law by the courts has a comparative law dimension. In *Ghana Lotto Operators v National Lottery Authority*,<sup>117</sup> the court employed some dynamism reflective of modern practice to the interpretation of the Constitution of Ghana, and ruled in favour of a presumption of the justiciability of the Directive Principles of State Policy (Chapter 6 of the Ghanaian Constitution).

In *New Patriotic Party v Inspector General of Police*,<sup>118</sup> the Supreme Court of Ghana took cognizance of the provisions of an international instrument in arriving at its

<sup>111</sup> See Brand (n 81) 409–410.

<sup>112</sup> See Morosini (n 2) 546.

<sup>113</sup> See art 4(1) Constitution of Ghana, 1992.

<sup>114</sup> Ghana is reckoned to be the first south-Saharan country to have gained independence. See SO Manteaw 'Entering the Digital Marketplace: E-commerce and Jurisdiction in Ghana' (2003) 16 *Transnational Law* 345, 350; SO Gyandoh Jr 'Tinkering With the Criminal Justice System in Common Law Africa' (1989) 62 *Temple Law Review* 1131, 1141.

<sup>115</sup> *Ibid.*

<sup>116</sup> The dualist theory posits that international law and municipal law are two separate and distinct systems that can only interact with the consent of both. See UO Umozurike *Introduction To International Law* 3 ed (2005) 30.

<sup>117</sup> *Supreme Court of Ghana Law Reports* (2007–2008) 1088.

<sup>118</sup> (1993–1994) 2 *Ghana Law Reports* 459 (SC); (2001) *African Human Rights Law Reports* 138 (GhSC).

decision. Not only that, the court noted that the requirement of police permits before holding a peaceful protest in Ghana, which had its roots in colonialism, was no longer practised in England, and wondered why it should still be in practice in Ghana.<sup>119</sup>

Apart from their references to international law provisions in adjudication, the Ghanaian judiciary has recourse to foreign law, and draws inspiration from the laws of other jurisdictions. For example, in *New Patriotic Party v Inspector General of Police*,<sup>120</sup> the court, speaking through Hayfron-Benjamin JSC, observed that:

In rendering my opinion, I have considered and applied the views — both of the majority and the dissenting — contained in the judgments of the United States Supreme Court which show the principles and policy considerations involved. In my respectful opinion, they constitute useful guides to the interpretation of our Constitution, 1992 — particularly the charter on fundamental human and civil rights.

Similarly, in the cases of *Asare v Attorney-General*,<sup>121</sup> and *Adofo v Attorney-General & Anor*,<sup>122</sup> the courts placed reliance on the Australian case of *Theophanous v Herald Weekly Time Ltd*<sup>123</sup> and the American case of *Evans v Gore*,<sup>124</sup> respectively, in resolving constitutional issues. This tends to show that to some extent, Ghanaian courts embrace the comparative law discipline.

## 6.2 Nigeria

Like Ghana, Nigeria was a British colony. Independence was secured in 1960.<sup>125</sup> With over 250 ethnic groups,<sup>126</sup> Nigeria is a multi-cultural country, and is dominated by two major religions: Christianity and Islam. The relationship between adherents of the two religions has been far from cordial, and of recent, one of the greatest challenges facing Nigeria is the Boko Haram menace, which some believe has both religious and political dimensions.<sup>127</sup> Although international treaties do not have automatic application in Nigeria by virtue of Nigeria's dualist status and

<sup>119</sup> Chief Justice Archer had queried rhetorically: '... Police permits are colonial relics and have no place in Ghana in the last decade of the twentieth century ... Those who introduced police permits in this country do not require police permits in their own country to hold public meetings and processions. Why should we require them?' See J Stevens 'Colonial Relics I: The Requirement of a Permit to Hold a Peaceful Assembly' (1997) 41 *Journal of African Law* 118.

<sup>120</sup> (1993–1994) 2 *Ghana Law Reports* 459 (SC).

<sup>121</sup> (2003–2004) *Supreme Court of Ghana Law Reports* 823.

<sup>122</sup> (2005–2006) *Supreme Court of Ghana Law Reports* 42.

<sup>123</sup> (1994) 182 *Commonwealth Law Reports* 104.

<sup>124</sup> 253 US 25 (1920).

<sup>125</sup> Ahmadu Bello, the late Sardauna of Sokoto, asserted that 'God did not create Nigeria, the British did'. See E Orji 'Issues on Ethnicity and Governance in Nigeria: A Universal Human Rights Perspective' (2001) 25 *Fordham International Law Journal* 431, 436.

<sup>126</sup> See Okeke (n 3) 27.

<sup>127</sup> See, generally, JA Dada & B Ejue 'Boko Haram and Amnesty: A Philo-Legal Appraisal' *International Journal of Humanities and Social Science* (2012) Vol 2 No 4 [Special Issue] 231.

the provision of its constitution,<sup>128</sup> the courts have in a good number of cases utilised treaties in deciding cases.<sup>129</sup> The decisions of the courts of other jurisdictions have also been cited in a comparative context by Nigerian courts. In *Abacha v Fawehinmi*,<sup>130</sup> the Supreme Court held as applicable to Nigeria, the view expressed by the Privy Council in *Higgs & Anor v Minister of National Security & Ors*<sup>131</sup> that unincorporated treaties 'might have an indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government, in its act affecting them, would observe the terms of the treaty'.<sup>132</sup> In *Lakanmi v Attorney General (West Nigeria)*,<sup>133</sup> the court took pains in making reference to cases from Uganda, Australia, Cyprus, Pakistan, the United Kingdom, and the United States.<sup>134</sup> In *Agbakoba v Director State Security Services*,<sup>135</sup> in deciding the main issue of the case, which was whether the right to travel abroad necessarily implied the right to possess a Nigerian passport, which was a *sine qua non* of international travel, the Court of Appeal explored comparative jurisprudence from the United States, the United Kingdom and India, and came to the conclusion that the freedom of exit guaranteed by the 1979 Constitution of Nigeria, then in operation, 'cannot be exercised without a passport and that freedom enshrined in Section 38(1) of the Constitution carries with it a concomitant right of every citizen of Nigeria to a passport'.

It appears the use of comparative jurisprudence is not firmly established in the Nigerian courts, the result of which is that they still to a very great extent restrict themselves to the domestic legal system. This does not bode well for the advancement of the Nigerian legal system; especially in this era, where globalisation has come to mean much for the entire world. Comparative jurisprudence would give the Nigerian courts a rich fountain from which to draw legal principles and rules to adjudicate matters.

### 6.3 South Africa

South Africa is a mixed legal system, which derives from its colonial history. The history of South Africa would be incomplete without the mention of the apartheid

<sup>128</sup> See s 12(1) of the 1999 Constitution of Nigeria, as amended, the provision of which is that no treaty can have the force of law except if it is enacted as law.

'No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.'

<sup>129</sup> See, for example, *Oshevire v British Caledonian Airways Ltd* (1990) 7 NWLR (Pt 163) 507; *Ibidapo v Lufthansa Airlines* (1997) 4 NWLR (Pt 498) 124; *Chima Ubani v Director, SSS* (1999) 11 NWLR (Pt 625) 129; *Registered Trustees of Constitutional Rights Project v the President of the Federal Republic of Nigeria* Unreported Civil suit M/102/92 Judgment of 5 May 1992; and *Ogugu v the State* (1994) 9 NWLR (Pt 366) 1, 26–27.

<sup>130</sup> (2001) *African Human Rights Law Reports* 172 (NgSC 2000).

<sup>131</sup> [2000] 2 *Weekly Law Reports* 1368.

<sup>132</sup> [n 131] at 1375; *Abacha v Fawehinmi* (2001) *African Human Rights Law Reports* 172 (NgSC 2000) at 172–173.

<sup>133</sup> (1970) 6 NSCC 143.

<sup>134</sup> See Okeke (n 3) 31.

<sup>135</sup> (1994) 6 *Nigerian Weekly Law Reports* (Pt 351).

policy, which consisted in the segregation of, and discrimination against, the non-white population in South Africa.<sup>136</sup> Although the policy is now over, it is doubtful if its scars have disappeared from the South African socio-political landscape.

A remarkable aspect of the South African legal system is the constitutional provision that mandates courts or tribunals to consider international law in interpreting the Bill of Rights.<sup>137</sup> Such courts or tribunals may also consider foreign law and are enjoined to give interpretations that are consistent with international law. This provision and similar provisions in the constitutions of some other African countries have been applauded as a sign that 'African countries are becoming open to and receptive to outside normative influences'.<sup>138</sup> However, it is not evident that the courts in South Africa have utilised this provision.<sup>139</sup> It is argued that in the South African case of *Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa*,<sup>140</sup> the Constitutional Court merely dwelt on whether the provisions of the Geneva Conventions, allowing prosecution for 'grave breaches', applied to South Africa, without considering the customary law rules on genocide, torture, and war crimes.<sup>141</sup>

The facts, as reported, were that:

The applicants applied to the Constitutional Court for an order declaring section 20(7) of the *Promotion of National Unity and Reconciliation Act* unconstitutional. Section 20(7) permits the committee on amnesty established by the Act to grant amnesty in respect to any act, omission or offence provided that the applicant concerned has made a full disclosure of all relevant facts, and provided further that the relevant act, omission or offence was associated with a political objective and committed prior to 6 December 1993. As a result of the granting of amnesty, the perpetrator is relieved from criminal or civil liability. The State or any other body, organisation or person that would ordinarily have been vicariously liable is also relieved from liability.<sup>142</sup>

However, it is instructive to know that the court, in upholding the constitutionality of section 20(7), made reference to the amnesty laws and practices of other jurisdictions. In the words of the Constitutional Court:

South Africa is not alone in being confronted with a historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating

<sup>136</sup> See Okeke (n 3) 33.

<sup>137</sup> See s 39(1) of the Constitution of the Republic of South Africa, 1996.

<sup>138</sup> See RF Oppong 'Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa' (2007) 30 *Fordham International Law Journal* 296, 325.

<sup>139</sup> See Okeke (n 3) 36, 37.

<sup>140</sup> CCT17/96 (1996) ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996) (hereinafter AZAPO case).

<sup>141</sup> See Okeke (n 3) 36, 37 (citing J Dugard 'International Law and the South African Constitution' (1997) 8 *European Journal of International Law* 77, 90–91).

<sup>142</sup> See the AZAPO case (n 142).

the transition to, and consolidation of, an overtaking democratic order. Chile, Argentina and El Salvador are among the countries which have in modern times been confronted with a similar need. Although the mechanisms adopted to facilitate that process have differed from country to country and from time to time, the principle that amnesty should, in appropriate circumstances, be accorded to violators of human rights in order to facilitate the consolidation of new democracies was accepted in all these countries and truth commissions were also established in such countries. The Argentinean truth commission was created by Executive Decree 187 of 15 December 1983 . . . The Chilean Commission on Truth and Reconciliation was established on 25 April 1990. The Commission on the Truth for El Salvador was established . . . in 1992 . . . In many cases amnesties followed in all these countries.<sup>143</sup>

It is evident from the foregoing that the Constitutional Court did more than merely consider the 1949 Geneva Conventions in reaching its decision. It was engaged in a form of comparative jurisprudence, exploring what had been obtained in other jurisdictions, in amnesty cases.

## **7 CONCLUDING REMARKS**

Undoubtedly, comparative legal studies in Africa have a potentially great future. Whether this potentiality is transformed into something 'real' or meaningful depends on the role played by those African legal scholars engaged in the teaching and dissemination of comparative legal studies. Provided these scholars have the will to develop the discipline of comparative legal studies, the more likelihood there is that its future will indeed be great. There is, however, one critical problem that needs to be resolved in order for this to happen: African academia needs to overcome its reliance on, and in some instances slavish devotion to, the legal models and systems of the former colonial powers. Deferring to foreign perspectives of studying and teaching law betrays an unfortunate colonial mentality that has left African scholars with an ingrained inferiority complex regarding their own capabilities.

The reasons for this undesirable state of affairs are not hard to find. The leading academics and scholars in charge of developing the syllabi at the existing faculties of law at the time (that is, in the immediate post-colonial years) had themselves been trained according to Western notions of what constituted valid legal systems and norms. According to this ideology, African views on matters of law did not merit consideration, which consequentially meant that the African academics charged with developing the syllabi of the law faculties continued to downplay or ignore the significance of African customary or traditional law. Even the practitioners and policy makers were not more exposed or sophisticated. In fact, the majority of the leading lawyers in all cadres of the legal systems, including the judiciary, seemed to be myopic and parochial in their attitudes to law and legal education. The negative attitude against considering how legal issues are handled in other legal systems — through comparative legal systems ('CLS') — persisted until the

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<sup>143</sup> AZAPO case (n 142).

mid-1980s, when legal scholars trained in other non-common law countries managed with great difficulty to break through the formidable barrier preventing them from participating in the development of their national legal systems.<sup>144</sup>

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<sup>144</sup> This writer's career as a teacher of law began in Nigeria's premier faculty of law — The University of Nigeria, Faculty of Law, Enugu Campus (1974–1985). The Law Faculty at that time was heavily populated by individuals who had been educated at English or American universities and who therefore were familiar with, and aligned to, Western attitudes regarding law. Thereafter, between 1985 and 1995, I pioneered the establishment of two new faculties of law in my capacity as Pioneer Dean and Professor of Law; a career development that opened up a great many opportunities. The two accredited teaching and learning institutions where I worked were the Anambra State University Faculty of Law (ASUTECH), (now the Nnamdi Azikiwe University), Awka, for the years 1985 to 1991, and the Enugu State University of Science and Technology (ESUT), Enugu, Nigeria, from 1991 to 1995. In establishing those two faculties, I had the singular opportunity to offer a variety of new law subjects and practical clinical programmes in a law syllabus that was more progressive than the syllabi of other, more traditional faculties of law in the Nigerian tertiary education system. The interdisciplinary courses of Comparative Legal Systems and Law in Society were prominent among the new subjects that I introduced. My rationale for including these courses was based on the great benefit I had gained from being exposed early to such vital comparative law subjects in my legal education in the then Soviet Socialist Republics. For a more detailed discussion of comparisons in legal education, see C Okeke 'Re-Assessing Soviet Union Contribution to the Legal Training of Third World Lawyers in the Twentieth Century: A Critical Appraisal of Socialist Legal Education' (published in the Ukrainian, Russian and English Languages) *International Law* No 1 / 2012.