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AFRICAN LAW IN COMPARATIVE LAW: DOES COMPARATIVISM HAVE WORTH?

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I. INTRODUCTION:

African law is one of the most understudied and under-utilized legal systems in the world. There is hardly any concerted scholarship on African law that is undertaken with deliberate purpose by either individual African scholars, or institutions, as is the case with the scholarship and study of South Asian law.² In discussing African law within the context of Comparative Law, several crucial questions must first be clarified. For example, it is often inaccurate to suggest there are as many distinct legal systems as there are countries in Africa; in fact, Africa has more applicable laws (though customary) than countries. Another vexing issue arises when we discuss African Law within Comparative Law—for the purpose of ascertaining either the goals or methodologies used; should we examine the legal system in each country on the continent? Such an endeavor may not only yield little fruit, but might also prove futile because of the diversity of laws, particularly Customary Law and traditions of each African country. Nigeria, for example, is the most populous black nation not only in Africa, but in the world;³ it has more than 250 ethnic groups, each with its peculiar Customary Laws. National laws prevail in towns, while Customary Law prevails in rural areas, especially in matters personal in nature.

Another nation on the African continent, Egypt, political designation remains a contentious question when Comparative Law scholars discuss African Law; is Egypt indeed an African, or a leading Arab State? In discussing African Law, we must reference the historical layering, in addition to the geographical splintering resulting from Colonialism. Historically, the Francophone vs. Anglophone African legal backgrounds attempt not only to address

² For example, Werner Menski, a Professor of South Asian Law at the School of Oriental and African Studies, University of London, has published widely in the area of South Asian Law.

³ It has almost become an incontrovertible saying or truism that four out of every six black persons in the world is a Nigerian.

globalization, but also to create Business and Securities Law. Often it is difficult to determine what models African nations have implemented. Many of the issues raised herein may become much clearer if we closely the legal systems of selected countries.

Indeed the African continent is a patchwork and combination of traditional, religious, western common law, and civil legal traditions. Many of these combinations do not stem from voluntary development of African legal systems; rather they are influenced by domineering colonial powers. The existing systems are delicately balanced, often consisting of conflicting laws, and requiring that we find balance and common ground between traditional systems, and the colonially imposed Western systems. By analyzing and understanding the genesis, background, and nature of these laws, will Comparative Law scholars better understand them? Perhaps, they will discover common ground in what are thought irreconcilable conflicts in traditional, religious, and Western systems of law.

While using Comparative Law in the United States or European countries may have both scientific goals, *e.g.*, understanding their own and other legal systems, as well as practical goals, *e.g.*, knowing how to interact legally with the greater global or regional whole, arguably, comparativism has worth in Africa; therefore, modern African nations should use it as a means to an end. The selected African countries for our examination, Nigeria, South Africa, Egypt and Morocco, use Comparative Law when deciding which historical legal system they should employ, and under what circumstances it should apply.

In the United States, using Comparative Law in the domestic judicial system is controversial; such use is often criticized.⁴ However, given the backgrounds of the selected African countries, it would be difficult, if not impossible, for them to function in the legal realm

⁴ Liptak, A., U.S. Court is Now Guiding Fewer Nations, N.Y. Times, September 17, 2008, online http://www.nytimes.com/2008/09/18/us/18legal.html?_r=1, accessed March 29, 2009.

had they not employed principles of Comparative Law, which they have used to synthesize their nation's own multi-faceted, post-colonial legal systems. Attempting to improve and systematize them, Comparative Law entails the comparative study of laws, as well as their refinement.

This article supports the relevance of Comparative Law; and as well, the importance of continued education and interaction, which is now lacking in Africa, among comparative scholars. Comparativism of African Law in the context of Comparative Law is indispensable. The article concludes, for many reasons, that in an increasingly globalized world, interaction and cross-influence of diverse legal systems and cultures will increase-as borders become less significant.

This article is organized into nine main sections followed by conclusions and recommendations. Section I is an exposé and clarification of controversial and debatable ideas and questions about Africa and its legal systems. Section II presents a short 'working' definition of Comparative Law. Section III discusses the purpose of Comparative Law in Africa. Section IV focuses on the Methodology of Studying Comparative Legal Systems. Sections V, VI, VII, and VIII, examine the specific legal systems of the chosen countries, and study the similarities and differences in their methodologies of Comparative Law. Section IX is the conclusion. This section eloquently emphasizes that Comparative Law is not merely an academic luxury suitable for Africa, but is an international necessity. Given the continent's history, Comparative Law can manage and integrate Africa's unique legal systems while easing the continent into globalization. I further submit that in an increasingly globalized world, the interdependence of global economies will intensify, leading to increased interaction among the peoples and nations of the world. Finally, this section contains recommendations intended to promote the importance of studying Comparative Law in Africa.

II. DEFINITION OF COMPARATIVE LAW

Comparative Law originated from legal reform activities in the nineteenth century,⁵ and Black's Law Dictionary defines it as "the scholarly study of the similarities and differences between the legal systems of different jurisdictions."⁶ While it can be studied for academic purposes, such as expanding personal knowledge, or better understanding one's own legal system, it has many practical uses, a number of which are relevant to Nigeria, Kenya, South Africa, Egypt and Morocco.⁷ As indicated *supra*, the article concludes that in an increasingly globalized world, the interaction and cross-influence of diverse legal systems and cultures will increase as national borders become less significant.

III. PURPOSE OF COMPARATIVE LAW IN AFRICA

The first step in analyzing Comparative Law in the selected African countries is understanding what purposes are fulfilled through the study of that law. Many comparative legal scholars agree that Comparative Law is the combination of studying legal history and jurisprudence, and the intellectual task of studying the relationships between systems of law.⁸ One common objective is informational maintenance of different rules of law relating to different States. This allows comparative legal scholars to track the development of regional laws and the development of systems of law. Moreover, this study enables International Law scholars to gauge African effectiveness in implementing both public and private International Law. "Cross-national studies have yielded important contributions to understanding, practice,

⁵ Glendon, M.A., Gordon, M., Carozza, P.G., *Comparative Legal Traditions* 2nd ed., West Group (1999), p. 5.

⁶ Black's Law Dictionary (8th ed. 2004), Westlaw online, accessed February 1, 2009.

⁷ *Id.* at 14.

⁸ Alan Watson, *Legal Transplants: An Approach to Comparative Law*, Page 7, The University of Georgia Press.

and reform of law in the last century.”⁹ It is the better understanding, and reform of laws that are cited as two of the major purposes of comparative legal studies. However, to study the legal history and development of African systems of law, the last part of this paper will present, as suggested above, case studies of selected African States.

Before analyzing the purpose of Comparative Law in Africa, however, one must define the nomenclature and system of study being used. It is easy to categorize a region such as the United States or Canada as a basis of comparative study. While these regions may have unique law in individual territories, the overall system of law is similar and uniform. Africa, however, is comprised of more than fifty-four governments having diverse and unique cultures and systems of law. It is both difficult and impractical, to take Africa as one region and compare it to the United States. Since Africa’s continental diversity is so great, making such a comparative analysis would be overly broad, and therefore, fruitless. With these caveats in mind, we proceed to the purposes served by a comparative legal analysis of African Law.

One commonly cited purpose for studying Comparative Law relates to creating, or reformulating the legal systems of a State.¹⁰ This development is not limited to economic or social development, but includes legal development. If there is an ideal and practical example of the purpose of Comparative Law in Africa, it is the story of Comparative Law jurist Judge Taslim Olawale Elias. Judge Elias of the Nigerian Supreme Court, and the International Court of Justice, was an exemplary scholar of Comparative Law. If a State desired to develop a more complete legal system, he emphasized developing the African State through legal reform,

⁹ Colin B. Picker, Mary Ann Glendon, Paolo G. Carozza, *Comparative Legal Traditions*, WEST GROUP (2006).

¹⁰ Colin B. Picker, Mary Ann Glendon, Paolo G. Carozza, *Comparative Legal Traditions*, WEST GROUP (2006).

¹¹examining different methods of law, and studying law and its purpose. He also led the way in modernizing and revising the many different laws of Nigeria.

However, it was not only to the development of the domestic legal system that Judge Elias contributed his comparative studies. Judge Elias thought comparative legal studies could enhance communication between people having fundamentally different methods of thinking about law and order.¹² Indeed, Judge Elias determined that only Africa can solve many of Africa's problems. One of his major points was that to develop themselves States African States must unite into cohesive groups. He helped draft the charter of the Organization of African Unity (O.A.U.), which has now been transformed into the African Union and its Protocol of Mediation, Conciliation, and Arbitration.

Certainly, we might agree that the only solution for developing the African States in any sphere of human need cannot be solely from, and dependent upon, international support. Rather, when African States begin to understand each other and learn how they can support each other economically, socially, and legally, they will prevail. It is through the study of Comparative Law that jurists like Judge Elias have been able to find acceptable common legal principles to create regional organizations within Africa. Unfortunately, a problem lies in categorizing Africa into African States.

African State boundaries have mostly been delineated by colonizing powers based on longitude lines without regard for cultural and tribal locations. Many Africans identify themselves first by their tribe or region of origin, and the State in which they are bordered,

¹¹ Some of Judge Taslim Olawale Elias' legal works are listed: *British Colonial Law-A Comparative Study* (1962), *Ghana and Sierra Leone: The Development of their Laws and Constitutions* (1962), *The Nigerian Legal System* (1963), *Africa and the Development of International Law* (1972), *Africa Before the World Court* (1981), and *The International Court of Justice and Some Contemporary Problems* (1983). Sadly there is no current biography about Judge Elias for reference.

¹² Colin B. Picker, Mary Ann Glendon, Paolo G. Carozza, *Comparative Legal Traditions*, WEST GROUP (2006).

second. There are many examples of State borders that cut through the middle of villages or tribes. Moreover, within the same State there are diverse communities with different systems of law. In fact, to express the traditional or tribal law of an African State would be to lump the different tribal and ethnic laws into one group for a study that would not make sense. For within each African State, are systems of tribal law whose functions are as diverse, and as innovative, as the legal system of any State. The dynamic possibilities for studying these tribal and traditional systems of law present a practical problem in the methodology of studying African systems of law.

Finally there is a practical teaching purpose in studying Comparative Law. By requiring students to study Comparative Law, they are exposed to a variety of legal systems and thinking methodologies.¹³ These exercises often encourage students to better understand the dynamics, strengths, weaknesses, and reforms taking place within their own legal systems. “Comparative Law creates the conditions for a confrontation of different discourse and for the cognitive disruption that can generate creativity. It forces us to articulate a different legal and normative framework, and thus opens a space for the recognition of ways in which our own framework is deficient or flawed. In doing so, it makes us aware of other possible understandings that better account for who we are and who we aspire to be.”¹⁴ In this manner the study of Comparative Law in Africa can fulfill its highest purpose. First, if students of the law, irrespective of where they live on the globe, are encouraged to understand alternative legal systems, they can possibly identify jurisprudential shortcomings in their domestic law, and seek its reformation. Alternatively, Comparative Law can provide practical solutions to the development of human rights and International Law. Overcoming the traditional Euro-centric approach to studying

¹³ *Id.*

¹⁴ *Id.*

Comparative Law and understanding traditional law systems, which are more effective in many States, would greatly benefit law students.¹⁵

The study of International Law and its enforcement in Africa is another possible branch of comparative study in Africa. Within Africa are States, like South Africa, whose entire legal system have been changed to comply with International Law. Further, there are States that are repeatedly cited for gross violations of International Law. These realities suggest that Comparative Law analysis is vitally important today as the growth and increasing vitality of international juridical, administrative and legislative institutions is placing demands on International Law not previously experienced.¹⁶

As stated in the introduction, the use of Comparative Law has not been optional in these countries, because that law applies to a critical goal as indicated by examples from Nigeria and Kenya; which is, selecting which of the various sources of laws in the country can apply. In addition, there are other practical goals of Comparative Law and, while this is not an exhaustive list, we will highlight some of the most important and useful goals.

a. Integrating multiple legal systems within a unified framework

Because of their respective indigenous and then colonial histories, when these countries became independent, they were left with multiple forms of law.¹⁷ As the famed British jurist, Lord Denning, noted, the laws of Africa were “a jumble of pieces, much like a jigsaw or a mosaic: All have to be fitted together to form a single whole, and developed so as to meet

¹⁵ MATHIAS REIMANN AND REINHARD ZIMMERMANN, THE OXFORD HANDBOOK OF COMPARATIVE LAW, 56 AMJCL 1075, American Journal of Comparative Law, Page 1081 (OXFORD UNIVERSITY PRESS, Fall 2008).

¹⁶ Colin B. Picker, INTERNATIONAL LAW'S MIXED HERITAGE: A COMMON/CIVIL LAW JURISDICTION, Vanderbilt Journal of Transnational Law, Page 1083 (October 2008).

¹⁷ GlobalLex-Nigeria; <http://www.nyulawglobal.org/globalex/nigeria.htm> accessed February 1, 2009; GlobalLex-Kenya, <http://www.nyulawglobal.org/globalex/Kenya.htm> accessed February 1, 2009.

modern conditions.”¹⁸ For their legal systems to function, it was imperative that these countries use Comparative Law to determine how their systems would integrate each body of law, if at all. Like putting together a puzzle, it is impossible to fit the pieces together without examining the contours and shapes of each piece. Comparative Law enabled the governments of these fledgling States to determine how they would adjudicate matters, what laws they would follow in different areas, and which court systems they would use. Comparative Law also represented the government’s value judgment and policy choices as indicated by the laws they chose to integrate.

On the African continent, it has been predominantly Family Law that retained elements of Customary Law, or Islamic law, or, specifically in the case of Kenya, Hindu law.¹⁹ Recently, in Nigeria, Islamic Law application has been broadened to include some criminal offenses, such as drinking or promiscuity.²⁰ Nevertheless, given the presence of Customary Law throughout these countries’ legal systems, where necessary, their courts needed to be equipped to deal effectively with these laws, since they would have to apply them, in particular at the appellate level.²¹ Kenya actually abolished their formal native courts altogether.²²

Attempts have been made to codify Customary Law, since it was traditionally unwritten. The Restatement of Africa Law Project (ALP) was a systemic examination and recording of the different Customary Laws used in African countries.²³ In order for the courts to apply the

¹⁸ Allott, A.N. (ed.), *Judicial and Legal Systems in Africa*, Butterworth’s, 2 ed. (1970), cited in *Comparative Law in Global Perspective, Law in Africa: Back to the Future?*, p.182.

¹⁹ *GlobaLex Nigeria*, <http://www.nyulawglobal.org/globalex/nigeria.htm> accessed February 1, 2009; *GlobaLex Kenya*, http://www.nyulawglobal.org/globalex/Kenya.htm#_Historical_Background accessed February 1, 2009.

²⁰ *GlobaLex Nigeria*, <http://www.nyulawglobal.org/globalex/nigeria.htm> accessed February 1, 2009; Coulson, N., *A History of Islamic Law*, Edinburgh University Press (1964) p. 130-1, cited in Merski, W, *Comparative Law in a Global Context, The Legal Systems of Asia and Africa*, (2nd ed.), p. 347.

²¹ Allott, A. *The Hunting of the Snark or the Quest for the Holy Grail? The Search for Customary Law*, *Comparative Law in Global Perspective*, Edge I. (ed.), Transnational (2006), p. 85.

²² Merski, W., *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2nd ed. (2006), p. 477.

²³ Allott, A *The Hunting of the Snark or the Quest for the Holy Grail? The Search for Customary Law*, *Comparative Law in Global Perspective*, I. Edge (ed.), Transnational (2006), p. 85-88.

Customary or Native Law, it was necessary to “codify” this unwritten law.²⁴ This was a complex and daunting task that had varying levels of success in the participating countries. In nations, such as Kenya, the documents became official and were cited by courts.²⁵ However, as noted by author Werner Menski, “[d]ifferent grades of myopia exist among African leaders about the extent to which their people have continued to follow traditional legal systems outside state-centered court structures.”²⁶ He cites author Ebo as reporting that in Nigeria, it is “an open secret that” citizens sometimes still follow traditional law outside of the official court system using village tribunals.²⁷

Kivutha Kibwana, of the Centre for Human Rights at University of Pretoria, South Africa, detailed suggestions for what the goals of Comparative Law *should be*.²⁸ Kibwana notes that African legal pedagogy is “preoccupy[ied]” with studying, researching, and teaching foreign or imported laws resulting, largely “as a function of [African] legal systems having been founded on imposed law[.]”²⁹

Kibwana notes that the majority of Comparative Law is focused on transferring law from the “Western world.”³⁰ However, Kibwana postulates that Western laws transplanted to Africa, to solve “local problems,” may not operate as expected and that Africa would “solve her legal

²⁴ *Id.* at 88.

²⁵ *Id.*

²⁶ Menski, W., *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge (2006), p. 477.

²⁷ Ebo, C., “Indigenous Law and Justice: Some Major Concepts and Practices,” in Woodman, G. and Obilade, A.O. Obilade (eds.) *African Law and Legal Theory*, Aldershot: Dartmouth, pp. 33—42, cited in Menski, W., *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge (2006), p. 478.

²⁸ Kivutha Kibwana, *Enhancing Co-Operation Among African Law Schools: Comparative Law Studies Within the African Context*, Centre for Human Rights at University of Pretoria: 1986—2006, http://www.chr.up.ac.za/centre_publications/occ_papers/occ4.html, accessed March 26, 2009.

²⁹ *Id.*

³⁰ *Id.*

problems better if the experiences of her countries are . . . used in fashioning common legal solutions.”³¹

Kibwana’s point is well-taken, as the comparison of legal systems in African countries, which are more “similarly suited in economic, cultural, social, and historical” circumstances, may prove to be of more practical value in solving Africa’s legal problems.³² At the time Kibwana authored his paper in 1996, he indicated that existing comparative legal studies amongst African nations tend to center on comparisons between neighboring countries or limited regions such as East Africa, rather than concentrate on a broader, systematic purview.³³ We agree with Kibwana that much as the study of comparative law studies based on comparisons between neighboring countries or regions may be a good start, it seems to us that focusing on a wider range is most advantageous particularly now that African Union has been promoting continental solidarity and interdependence in many areas of contemporary interest.

b. Legal education modification

Kibwana suggested prioritizing specific African comparative legal study on a continent wide basis. Kibwana’s recommendations included, among other ideas, studying the following: the efficacy of transplanted foreign laws in Africa; the efficacy, continued use, and evolution of the use of Customary Law in Africa’s modern day systems; and differences between legal systems of socialist oriented versus capitalist oriented countries.³⁴

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

Kibwana articulated concrete steps in developing the study of African Comparative Law.³⁵ In order to institutionalize this type of comparative study, Kibwana encouraged the formation of pan-African law teachers and student associations, leading to the ongoing exchange of publications, competitions, personnel, and regular efforts of legal inquiry on the topic.³⁶ Kibwana also recommended that African Comparative Law be a mandatory part of every African law school's curriculum.³⁷

A unique feature of African Comparative Law is the use of Customary Law, which is uniformly taught in Western law curricula. Author Menski notes that "promising models of teaching about Customary Laws exist in Namibia and some South African universities."³⁸

In the early days of independence, lawyers in Nigeria and Kenya were trained in the U.K.³⁹ However; it became obvious that, given the varied sources of law applicable in Nigeria and Kenya, British training was inadequate for effective practice of law in these countries.⁴⁰ In East Africa, including Kenya, advised by Lord Denning, African legal training was modified to include the study of necessary laws in addition to common law.⁴¹ Nigeria, in 1962, with the passage of the Legal Education Act, augmented the required training of lawyers with coursework that included local Customary Law, Muslim law and the Nigerian court system.⁴²

c. Legal Reform

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd Edition (2006), p. 73.

³⁹ International Centre for Nigerian Law website at <http://www.nigeria-law.org/Legal%20Education.htm>, accessed February 1, 2009.

⁴⁰ *Id.*

⁴¹ *The Hunting of the Snark or the Quest for the Holy Grail? Comparative Law in Global Perspective*, p. 86.

⁴² <http://www.nigeria-law.org/Legal%20Education.htm>.

There are many examples of using Comparative Law in these countries to effect legal reform. Kibwana avers that Africa can avoid the pitfalls the West encountered when reflecting on the comparative Western legal tradition.⁴³ South Africa abolished the law prohibiting mixed racial sexual relations in June 1985.⁴⁴ At a basic level, the evolution of the democratic principle—one person, one vote—and the lessons of the abolition movement, were a partial model for the long struggle for equality in South Africa.⁴⁵

Werner Menski states that visions of an “ideal society” and human rights are not a topic free of debate in post-apartheid South Africa.⁴⁶ “To survive as a rainbow nation,” it is apparent that South Africa has embraced the view that diversity and plurality are important to their people’s well-being and global uniformity would be ill-advised.⁴⁷ Menski notes that South African law, by incorporating the plurality inherent in their mixed legal system, is “not turning out as a carbon copy of Western legal systems.”⁴⁸

Driven both by internal considerations and the international influence that has arisen from globalization, Nigeria and Kenya have used Comparative Law to achieve legal reform.⁴⁹ One relevant example is anti-corruption laws. Nigeria has explored numerous avenues to eradicate

⁴³ Kivutha Kibwana, *Enhancing Co-Operation Among African Law Schools: Comparative Law Studies Within the African Context*, Centre for Human Rights at University of Pretoria: 1986—2006, http://www.chr.up.ac.za/centre_publications/occ_papers/occ4.html, accessed March 26, 2009.

⁴⁴ D.H. Sampson, *Modern Legal Systems Cyclopedia, The Legal Systems of South Africa In General*, Kenneth Robert Redden, ed. William S. Hein, Co., Inc. (1996), p. 6A.70.93.

⁴⁵ *See generally* George M. Frederickson, *Black Liberation: A Comparative History of Black Ideologies in the United States and South Africa*, Oxford University Press (1996), p. 14—56.

⁴⁶ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd Edition (2006), p. 13.

⁴⁷ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd Edition (2006), p. 14, citing J.C. Bekker, J.M. T. Labuschagne and L.P. Vorster, eds., *Introduction to Legal Pluralism in South Africa, Part I, Customary Law*, Durban, Butterworths (2002).

⁴⁸ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd Edition (2006), p. 22.

⁴⁹ Oko, Okechukwu, *Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus*, 34 N.Y.U. J. Int’l L. & Pol. 397 (2002); Gathii, J.T., *Corruption and Donor Reforms: Expanding the Promise and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 Conn. J. Int’l L. 407

corruption, consultations, public hearings, and visits to other countries such as Ethiopia, Zimbabwe, Zambia, and Hong Kong. This effort has resulted in identifying defects in anti-corruption legislation, unifying their anti-corruption laws and appointing an independent agency.⁵⁰

In 1997, the International Monetary Fund and various Nordic countries suspended aid to Kenya because of corruption violations.⁵¹ These donors required requisite reforms to be undertaken before they would resume their aid programs.⁵² This necessitated Kenya's review of their laws against other, more effective laws in areas of de-monopolization, deregulation, privatization, prosecution and governance of enhanced human rights, accountability, and clarification of rules.⁵³ Since some of the reforms failed to correct the problems, it was also necessary to review why a law may work in one country, but not in another.⁵⁴ This is another important goal of Comparative Law that is useful in the African context.

Author and judge, John Cantius Mubangizi, surveyed the Comparative Laws of four African countries in order to make recommendations on constitutional protections of socio-economic rights.⁵⁵ In his review, he found examples on the African continent to share with other countries in the region.⁵⁶ His article encourages the various African countries, especially since they are in transitional stages of development, to learn from one another.⁵⁷

⁵⁰ Oko, Okechukwu, *Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus*, 34 N.Y.U. J. Int'l L. & Pol. 397, 439, n217 (2002).

⁵¹ Gathii, J.T., *Corruption and Donor Reforms: Expanding the Promise and Possibilities of the Rule of Law as an anti-corruption Strategy in Kenya*, 14 Conn. J. Int'l L. 407, 408 (1999).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Gathii, J.T., *Corruption and Donor Reforms: Expanding the Promise and Possibilities of the Rule of Law as an anti-corruption Strategy in Kenya*, 14 Conn. J. Int'l L. 407, 412—416 (1999).

⁵⁵ John Cantius Mubangizi, *Constitutional Protection of Socio-Economic Rights*, 2 Afr. J. Legal Stud. 1 (2006).

⁵⁶ John Cantius Mubangizi, *Constitutional Protection of Socio-Economic Rights*, 2 Afr. J. Legal Stud. 1, 18—19 (2006).

⁵⁷ *Id.*

d. Harmonization of Laws

Due to increasing globalization of trade, on both a regional and international scale, harmonization of trade laws is an important topic for these developing countries. For example, in evaluating the desirability of joining a treaty, such as OHADA (Organization Pour L'harmonisation du Droit des Affaires en Afrique), Nigeria must evaluate the effect of the treaty laws on national laws, choose the best legal result for its development, and identify any trade-offs.⁵⁸ While entry into such a treaty promises additional business prosperity, the requirements of law modernization, such as accepting arbitration rather than court adjudication for business law disputes, need to be evaluated and balanced with an eye to local legal context.⁵⁹

Kenya, as part of the East African Community (“EAC”), consisting of Kenya, Uganda, and Tanzania, used Comparative Law to enhance trading and economic development amongst its members.⁶⁰ The EAC was originally established in 1967 and dissolved temporarily in 1977.⁶¹ The regional economic development treaty required harmonization of laws between countries with differing historical backgrounds since Tanzania was a former German colony.⁶² A renewed EAC treaty went into force in 2000, and the original three countries have been joined by Rwanda and Burundi.⁶³

⁵⁸ Ndulu, M., Harmonization of Trade Laws in the African Economic Community, 42 Int'l & Comp. L.Q. 101, 103 (1993). NOTE: Nigeria has yet to join this treaty.

⁵⁹ *Id.*

⁶⁰ Mancuso, S., Trends on the Harmonization of Contract Law in Africa, 13 Ann. Surv. Int'l & Comp. L. 157, 163, n.19 (2007); East African Community website at <http://www.eac.int/> accessed February 1, 2009.

⁶¹ East African Community website at <http://www.eac.int/> accessed February 1, 2009.

⁶² Tanzania national website at <http://www.tanzania.go.tz/history.html> accessed February 1, 2009.

⁶³ East African Community website at <http://www.eac.int/> accessed February 1, 2009.

Since, as author James Read notes, “African legal systems are particularly dysfunctional in the field of Family Law, where African forms of social organization have resisted harmonization,” it is clear that a major goal of Comparative Law in African countries, is to resolve “[l]egal conflicts arising from the frequent combination of ‘customary’ forms of law with statutory laws,” for example, in marriage and succession laws.⁶⁴ For instance, in South Africa, Muslim marriages are not recognized because they may be polygamous.⁶⁵

Another area where Comparative Law is useful in these countries is when regional cooperation is necessary or desirable. When attacking environmental issues, it is natural that countries in the African region should assemble and harmonize applicable laws to ensure environmentally safe development.⁶⁶

e. Effective Problem Solving

Comparative Law can assist in finding novel solutions to legal problems.⁶⁷ In Kenya, after the turmoil of the contested 2007 Presidential elections, the country needed to find a solution to a dramatically splintered government in a unitary system. The resulting solution, an extra-constitutional power sharing agreement, which provided for a prime minister position and cabinet memberships for the opposition, was modeled after coalition governments established in

⁶⁴ James S. Read, *Law in Africa: Back to the Future? Comparative Law in Global Perspective: Essays in Celebration of the Fiftieth Anniversary of the Founding of the SOAS Law Department*, Ian Edge, ed., Transnational Publishers, Inc. (2000), p. 177.

⁶⁵ *Id.* at 197.

⁶⁶ *See e.g.*, *Treaties and Agreements, West and Central African States: Conference on Co-operation in the Protection and Development of the Marine and Coastal Environment of West and Central African Region. Resolution adopted by the Conference. (Held at Abidjan, March 16—23, 1981)*, 20 Int'l Legal Materials 729 (1981); *Namibia-South Africa: Agreement on the Establishment of a Permanent Water Commission*, 9done at Noordoewer, September 14, 1992), 32 I.L.M. 1147 (1993).

⁶⁷ Glendon, M.A., Gordon, M.W., Carozza, P.G., *Comparative Legal Traditions*, 2nd ed., St. Paul (1999), p. 7.

times of crisis, such as the coalition government in Britain during the Great Depression.⁶⁸ The Kenyan Parliament has committed to amending the constitution and to continuing legal reform.⁶⁹

Evaluation of in-country risks and the effect of supranational laws is another problem that can be approached using Comparative Law. In the case of *Wiwa v. Dutch Petroleum Co.*, 226 F.3d 88 (2nd Cir. 2000), Wiwa was an Ogoni leader that challenged the business and environmental practices of multi-national firms in Nigeria, in particular the practices of Shell Nigeria, a division of the Dutch company Royal Dutch Shell.⁷⁰ After the Ogoni leaders were executed by Nigerian's military government following a sham trial, the decedent's relatives filed suit under the Alien Tort Claims Act of the United States.⁷¹ The plaintiffs alleged that Nigerian Shell was complicit in the executions.⁷² After initially being dismissed for *forum non conveniens*, the Second Circuit Court of Appeals reversed, holding that the case should go forward in the U.S., in part because some of the plaintiffs were residents of the United States, but also because they found the "Act seems to reach claims for human rights abuses occurring abroad."⁷³ Without a Comparative Law view, countries and the companies operating within them lack a complete picture of how their conduct will be evaluated by supranational laws and how these laws can affect the risk inherent in activities within the country.

⁶⁸ Gettleman, J., Kenya Rivals Reach Peace Agreement, N.Y. Times, February 20, 2008, <http://www.nytimes.com/2008/02/29/world/africa/29kenya.html?pagewanted=2> accessed February 1, 2009; Hepburn, B., Coalition Government Still a Good Idea, The Star, January 29, 2009, <http://www.thestar.com/Worldwide/article/578796> accessed February 1, 2009.

⁶⁹ Gettleman, J. Kenya Rivals Reach Peace Agreement, N.Y. Times, February 20, 2008, <http://www.nytimes.com/2008/02/29/world/africa/29kenya.html?pagewanted=2> accessed February 1, 2009.

⁷⁰ Jagers, N.M.C.P., van der Heijden, M., Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands, 33 Brooklyn J. Int'l L. 833, 838--39 (2008).

⁷¹ Jagers, N.M.C.P., van der Heijden, M., Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands, 33 Brooklyn J. Int'l L. 833, 838--39 (2008); 28 U.S.C. § 1350 (1994) (providing original jurisdiction for the U.S. District Courts in tort claims by a civil plaintiff where a violation of the law of nations has occurred).

⁷² Jagers, N.M.C.P., van der Heijden, M., Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands, 33 Brooklyn J. Int'l L. 833, 838—39 (2008).

⁷³ *Wiwa v. Dutch Petroleum Co.*, 22 F.3d 88, 105.

There are several areas of South African legal evolution, for example, that indicate the influence of other legal systems.⁷⁴ First is consumer protection, which drew influence from the British.⁷⁵ The result was a shift from the traditional view that contracts were deemed “sacred,” to ensuring the consumer protection and equitable remedies in the case of unconscionable contract terms.⁷⁶ Another area is property ownership.⁷⁷ Difficulties in a number of traditional property ownership schemes led to a “full investigation of systems prevailing in other countries providing for the ownership of a section of a building.”⁷⁸ The result was new legislation that allows the holding and recording of “sectional titles.”⁷⁹ A further development has been the introduction of the *time share* concept and related legislation to support that market development.⁸⁰

Another area where the influence of precedent from other legal systems is apparent was the example of South Africa’s offer of amnesty to those on all sides of past conflicts who had violated human rights.⁸¹ As author Catherine Jenkins states, “South Africa is neither the first nor the last State to make use of amnesty . . . governments from Argentina to Zimbabwe have employed some form of amnesty in . . . attempted resolution of internal conflict[.]”⁸²

⁷⁴ Robert C. Barclay, *The Current Legal Status of the South African Homelands*, *Modern Legal Systems Cyclopedia*, Kenneth Robert Redden, ed., William S. Hein and Co., Inc. (1996), p. 6A.70.55.

⁷⁵ *Id.* at 6A.70.56.

⁷⁶ *Id.* at 6A.70.56—57.

⁷⁷ *Id.* at 6A.70.58

⁷⁸ *Id.* at 6A.90, 58.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Catherine Jenkins, *Amnesty for Gross Violations of Human Rights in South Africa: A Better Way of Dealing with the Past?*, *Comparative Law in Global Perspective: Essays in Celebration of the Fiftieth Anniversary of the SOAS Law Department*, Ian Edge, ed., Transnational Publishers, Inc. (2000), p. 345.

⁸² *Id.* Ms. Jenkins also notes that amnesty meets with varying degrees of acceptance and skepticism from other members of the international community; the trend is towards prosecution and punishment to deal with human rights violations, p. 347.

In South Africa, “detailed consideration of foreign solutions is a regular part of tax reform.”⁸³ The government has used comparative capital gains tax policy to achieve their national tax equalization goals.⁸⁴

One current development that is demanding the attention of all African countries is the recently issued International Criminal Court (“ICC”) arrest warrant for the Sudanese President.⁸⁵

⁸⁶ African leaders are looking around the continent at one another, and at situations where other leaders have been apprehended, to determine the appropriate course of action and response. It is clear from publication of some of the discussions ensuing from the issuance of the ICC warrant, that Comparative Law includes applying existing International Law. African Union commission chairman Jean Ping “complained that Africa was being selectively targeted by the court.”⁸⁷ Ping stated,

African Union’s position is that we support the fight against impunity; we cannot let crime perpetrators go unpunished. . . . But we say that peace and justice should not collide, that the need for justice should not override the need for peace. . . . Issues of peace are so important that justice must take them into account in Sudan *just as*

⁸³ William B. Barker, Expanding the Study of Comparative Tax Law to Promote Democratic Policy: The Example of the Move to Capital Gains Taxation in Post-Apartheid South Africa, 109 Penn St. L. Rev. 703 (2005); Portfolio and Select Committee on Finance, Briefing by the National Treasury's Tax Policy Chief Directorate 11 (S.A., January 24, 2001), available at <http://www.pmg.org.za/docs/2001/appendices/010123Treasury1.htm>, accessed March 26, 2009.

⁸⁴ Briefing by the National Treasury's Tax Policy Chief Directorate 11 (S.A., January 24, 2001), available at <http://www.pmg.org.za/docs/2001/appendices/010123Treasury1.htm>, accessed March 26, 2009.

⁸⁵ On March 4, 2009, the ICC issued an arrest warrant for Sudanese President Omar al-Bashir. The warrant was the first issued by the ICC for a sitting head of state. See Associated Press, International Warrant Issued for Sudan President, March 4, 2009, <http://www.foxnews.com/story/0,2933,504426,00.html>, accessed March 29, 2009.

⁸⁶ See e.g., Andrew N. Matjila, Opinion, Africa: Africa Where are You? March 27, 2009, <http://allafrica.com/stories/200903270803.html>, accessed March 30, 2009; Kabiru Danladi, Opinion, Sudan: Al-Bashir and the Politics of War Crimes, March 28, 2009, <http://allafrica.com/stories/200903290010.html>, accessed March 30, 2009.

⁸⁷ IslamOnline.net & News Agencies, Africa, Russia Blast Bashir Warrant, March 4, 2009, http://www.islamonline.net/servlet/Satellite?c=Article_C&cid=1235628862974&pagename=Zone-English-News/NWELayout, accessed March 29, 2009.

*elsewhere.What we see is that international justice seems to be applying its fight against impunity only to Africa as if nothing were happening elsewhere, [such as] in Iraq, Gaza, Colombia or in the Caucasus.(emphasis added).*⁸⁸

f. Differentiation

Watching global legal trends with a Comparative Law view occasionally results in differentiating national laws or adapting laws differently when a government deems legal trends will have a dissimilar effect in their home country. The rising trend of gay and lesbian rights and same sex marriage throughout the West has resulted in Nigeria's proposing what could be termed *preventative legislation*.⁸⁹ The Same Sex Marriage Prohibition Act was presented in 2006, and although it has not passed due to political instability surrounding the 2007 Presidential election, it could resurface at any time.⁹⁰ The Act makes Nigeria's law much more punitive for anyone participating in a same-sex marriage ceremony, and provides for a five-year sentence.⁹¹

An example of Comparative Law driving differentiation and adaptation in Africa are laws pertaining to National Parks. The United Kingdom, one of Africa's first legal role models, first established National Parks in the *National Parks and Access to the Countryside Act 1949*.⁹² People actually lived in the U.K.'s national parks, and, although the parks were managed by both centrally appointed and locally elected people, there was no suggestion that people would no longer live there or that their viewpoint would not be considered.⁹³

⁸⁸ *Id.*

⁸⁹ Middlestaedt, E., Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing Human Rights Obligations, 9 Chi. J. Int'l L. 353, 371 (2008).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² McAuslan, P. The Best Laid Schemes o' Mice an' Men: The Diaspora of Town and Country Planning Law in Africa and Asia, Comparative Law in Global Perspective, Edge, I. (ed.) Transnational (2000), p. 218.

⁹³ *Id.* at 218.

In contrast, the central government manages Kenyan National Parks and it has mandates prohibiting human inhabitation within the parks.⁹⁴ African National parks are more likely to have been influenced by South Africa, which established Kruger National Park in 1898.⁹⁵ Despite the United Kingdom's influence on a large part of African law, a regional neighbor's version of this particular law is possibly better suited to the goals of African nations.

Sometimes the goals of Comparative Law are more specific to a given region. For example, there are some issues or practices that are more unique to one region than another. Female genital circumcision ("FGC") is an issue of that nature.⁹⁶ FGC is commonly practiced in the Middle Eastern region and on the continent of Africa, including, in the past, the Ivory Coast.⁹⁷ There are various laws, customary and more modern, regulating and, in some cases specifically outlawing the practice.⁹⁸ Since FGC is more common in the context of African countries than it is in the developed world, comparing laws between Africa and the West, in this case, would be less useful.

IV. METHODOLOGY OF STUDYING COMPARATIVE LEGAL SYSTEMS

Our working definition of *methodology* shall be "the set or system of methods, principles, and rules for regulating a given discipline."⁹⁹ Methodology can properly refer to the theoretical analysis of the methods appropriate to a field of study or to the body of methods and principles

⁹⁴ McAuslan, P. The Best Laid Schemes o' Mice an' Men: The Diaspora of Town and Country Planning Law in Africa and Asia, Comparative Law in Global Perspective, Edge, I. (ed.) Transnational (2000), p. 218; Africa Adventure Company website at <http://www.victoriasafaris.com/kenyatours/maasaimara.htm>, accessed February 1, 2009.

⁹⁵ *Id.*

⁹⁶ The Female Genital Cutting Education and Networking Project, <http://www.fgmnetwork.org/intro/fgmintro.html>, accessed March 29, 2009.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ The American Heritage Dictionary 4th Ed., Boston: Houghton Mifflin Company (2000).

particular to a branch of knowledge.¹⁰⁰ “The range and eclecticism of the methods of Comparative Law are matched by the wide variety of its aims and uses.”¹⁰¹ In addition to the many goals of Comparative Law, various methods apply to its use. While Comparative Law can result in comparison of like systems, at the same stage of legal, economic, and cultural development,¹⁰² this would ignore the aspirational aspect of Comparative Law—comparing and analyzing for reform and improvement.

Other methodologies of Comparative Law that are apparent in the legal development of these countries are: (1) functional approaches, such as “which institution in Country A performs the same function in Country B?”, and (2) the problem-solving approach, e.g., “how this legal problem is solved in Country A and would that approach work in Country B?”¹⁰³ These approaches assume a common need or problem in multiple systems, and the useful application of Comparative Law to answer that need or solve that problem.¹⁰⁴

Comparative Law can be based on a macro methodology that explores multiple legal systems within the context of the economic, social, or cultural stage of development surrounding the;¹⁰⁵ or it can focus on a micro element.¹⁰⁶ It is apparent from the goals and uses of Comparative Law evident in the selected countries, that their methodologies contain both macro and micro approaches. These countries had to take a macro approach when determining which

¹⁰⁰ *Id.*

¹⁰¹ Colin B. Picker, Mary Ann Glendon, Paolo G. Carozza, *Comparative Legal Traditions*, WEST GROUP (2006).

¹⁰² Orucu, A.E., *Methodology of Comparative Law*, Elgan Encyclopedia of Comparative Law, Smits, J.M. (ed.) Edward Elgan (2006), p. 442.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 443.

¹⁰⁶ *Id.*

elements of what body or source of law they would use in their integrated legal system in the context of their historical, political, economic, religious, and cultural reality.¹⁰⁷

Conversely, when attempting to solve particular problems, while the macro factors are still part of the solution, using Comparative Law does not always reflect the weight of the macro factors. For example, in the case of Kenya using the power-sharing solution to address their election crisis, Kenya's history, economic situation, and culture, became less important than solving a legal, political crisis and using a method that had worked in other, quite probably, very different situations.

A. E. Orucu suggests that the following steps can be followed in most Comparative Law research: (1) conceptualization; (2) observation; (3) identification; (4) explaining or describing; (5) measurement; and (6) confirmation and theory testing.¹⁰⁸ This must then lead to prescription, a plan of action, and a choice of what to do with the results.¹⁰⁹ The method will vary somewhat with the goal of the research and the required result.¹¹⁰ Evaluation of the method will be driven by the results.¹¹¹ Did the method achieve the desired results, e.g., reform, problem solving, harmonization, an integrated legal system? In these countries, the results of using Comparative Law will continue to be evaluated.

Andrew Harding discusses two types of Comparative Law: (1) *theoretical Comparative Law*, which he describes as interesting and “not necessarily very useful” and (2) *applied Comparative Law*, which he defines as “a practical method by which we can decide “legal

¹⁰⁷ *Id.* at 445.

¹⁰⁸ *Id.* at 447—50.

¹⁰⁹ *Id.* at 450.

¹¹⁰ *Id.* at 451.

¹¹¹ *Id.*

transplantation . . . development or reform.”¹¹² It is clear that of the two, Africa as a region would more likely employ the latter. Harding refers the practical application of Comparative Law as “the business end of the subject” although he notes that the former provides an “important and useful . . . indispensable foundation for the second.”¹¹³ As Charles Barker notes, to use Comparative Law to achieve these practical goals, it is important to study “the ideological purpose behind law and legislation.”¹¹⁴

The methodology of Comparative Law in African countries, such as South Africa and Namibia, is not limited to comparing laws of Western countries with those of African nations. For example, in his article in *African Journal of Legal Studies*, author and judge, John Cantius Mubangizi, compares the constitutional protection of socio-economic rights in the four African countries of South Africa, Namibia, Uganda, and Ghana.¹¹⁵

Werner Menski distinguishes between global uniformity and the legal pluralism that is often required to update the law in Africa.¹¹⁶ Menski notes that the constitutions of both South Africa and Namibia used “culture specific legal pluralism.”¹¹⁷ South Africa, for example, used both Indian constitutional law and customary South African law in developing of their post-apartheid law.¹¹⁸

¹¹² Andrew Harding, *Comparative Public Law: A Neglected Discipline?*, Essays in Celebration of the Fiftieth Anniversary of the Founding of the SOAS Law Department, Ian Edge, ed., Transnational Publishers, Inc. (2000), p. 103.

¹¹³ *Id.*

¹¹⁴ William B. Barker, *Expanding the Study of Comparative Tax Law to Promote Democratic Policy: The Example of the Move to Capital Gains Taxation in Post-Apartheid South Africa*, 109 *Penn St. L. Rev.* 703 (2005).

¹¹⁵ John Cantius Mubangizi, *Constitutional Protection of Socio-Economic Rights*, 2 *Afr. J. Legal Stud.* 1, 2 (2006).

¹¹⁶ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd Edition (2006), p. 4.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 54.

Menski further discloses important lessons for Comparative Law gleaned from Indian Hindu law in South Africa.¹¹⁹ Reflecting upon the development of Indian Hindu law highlights the need to look out for larger issues raised by governing “unimaginable numbers of people [.]”¹²⁰ “Human conduct can’t be totally regulated by . . . force or state-made laws.”¹²¹ Variations in law throughout Africa “illuminate the reasons for and the advantages of each system in its own environment.”¹²²

In Africa, due to Customary Law, in addition to the influence of Western systems, the methodology of law making is not only by the state, but also by social groups; this creates a debate: is law making by social groups legal?¹²³ Menski suggests a practical reason behind the influence of social groups on law making.¹²⁴ For example, South Africa has acknowledged that statutory reform concerning Muslim polygamy is likely to be ineffective if the community itself fails to “modify[y] its norms.”¹²⁵ The South African term, *ubuntu*, is a term for “an ethical framework that contains a range of indigenous rights,”¹²⁶ and is frequently used in discussions of the legal system development. The term has also been described in African case law as a “concept concerned with communality, social interlinkedness and interdependence of the

¹¹⁹ *Id.* at 203.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd Edition (2006), p. 383, citing Antony N. Allott, *African Law, Introduction to Legal Systems*, J.D.M. Derrett, ed., Sweet & Maxwell, London (1968), p. 131.

¹²³ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd ed., (2006), p. 54.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd ed., (2006), p. 489, citing T.W. Bennett, *A Sourcebook of African Customary Law for Southern Africa*, Juta, Capetown, (2004), p. 82.

members of the community.”¹²⁷ Namibia has legislatively formalized community development of laws through traditional leaders in the Community Courts Act of 2003.¹²⁸

In general, belief systems “had enormous implications for the internal organization of traditional African societies, including their legal structures.”¹²⁹ Okupa mentions the key term, *overta*, which is used amongst the Ovahimba of Namibia; it means, “the duty to do the right thing.”¹³⁰ The concept involves “a fine balancing between matrilineal and patriarchal principles.”¹³¹ Meanwhile, the Subia in Northern Namibia have a belief in a supreme being, heavens, earth, and sky, “holistically focused complex constructs developed and manipulated by humans all the time to link themselves to the wider order of Nature.”¹³²

In South Africa, the Xhosa herbalists (*ixhwele*) both dispense medicine and communicate with ancestors.¹³³ Similarly, in Namibia, within the Hambukushu and Bayeyi communities, shamans and herbalists (*nganga*) are viewed as being connected to the supernatural world.¹³⁴

The German view, in former colonies such as Namibia, was that codification of Customary Laws should rely on indigenous customs.¹³⁵ It is important to note that continued

¹²⁷ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd ed. (2006), p. 489, citing *S.V. Makwaneyane*, 1995 (3) SA 391.

¹²⁸ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd ed. (2006), p. 54.

¹²⁹ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd ed. (2006), p. 410—11, citing G.B.N. Ayittey, *Indigenous African Institutions*, Transnational, New York (1991), 11—12.

¹³⁰ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd ed. (2006), p. 410—11, citing Effa Okupa, *Ethno-jurisprudence of Children’s Right: A Study of the Himba of Namibia*, SOAS, London, (1996), unpublished PhD thesis.

¹³¹ *Id.*

¹³² Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd ed. (2006), p. 413, citing J.S. Malan, *People of Namibia*, Rhino Publishers, Wingate Park (1995), p. 28.

¹³³ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd ed. (2006) p. 417.

¹³⁴ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd ed. (2006) p. 417, citing Siyabona Africa, at http://www.namibia.safari.co.za/africa_bushmen.html, (2005 unable to access).

adherence to Customary Law in Africa does not necessarily indicate a lack of development, but “rather . . . a skillful survival-centered method of exploring sustainable legal arrangements [.]”¹³⁶

As far back as 1965, Menski notes that authors Kuper and Kuper emphasized the “continuing need for recognizing the ever-present dynamic ‘relative emphasis on imperium, tradition and divine relation in African laws.”¹³⁷ As we will examine below, some methods used to understand traditional law may differ greatly in studying African Law.

In studying the traditional or tribal laws of African regions, a major difficulty lies in understanding and studying these systems of law. Most of these systems are not incorporated into a written legal tradition. Some systems have been recorded through studies by cultural anthropologists in the African region, and very few have been formally codified as part of the laws of African States. However, the vast majority of these systems would require the scholar studying the system to journey to the region and speak with people about how their system of traditional law functions.

Indeed, the full understanding of the traditional system would also require a greater knowledge of the way the culture and social relations are conducted in the region. As stated by the prominent Comparativist, Ernst Rabel, understanding the paper institution provides little insight into the comparative study;¹³⁸ i.e., insight is derived through understanding how the legal system functions within their legal, economic and cultural contexts.¹³⁹ This alone may be a major reason why so few comparative studies have been done on traditional systems of law. In

¹³⁵ Werner Menski, *Comparative Law in a Global Context: The legal Systems of Asia and Africa*, Cambridge University Press, 2nd ed. (2006), p. 447.

¹³⁶ *Id.* at 466.

¹³⁷ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, 2nd ed. (2006) p. 485, citing Hilda Kuper and Leo Kuper (eds.), *African Law: Adaptation and Development*, University of California Press, Berkeley and Los Angeles (1965), p. 17.

¹³⁸ Colin B. Picker, Mary Ann Glendon, Paolo G. Carozza, *Comparative Legal Traditions*, WEST GROUP (2006).

¹³⁹ *Id.*

this way the practical methodology of studying African systems of law differs in the fundamental aspect that they are often unwritten systems and require far more effort than studying a series of constitutions or codes for effective analysis. However, as the methodology for studying these systems of law is different, so is the outcome and knowledge to be gained through studying these vastly different systems. In this way, the methodology relating to Comparative Law studies in Africa is unique to the regions with systems of unwritten law. In the examples of specific States discussed below, this becomes clear.

Meanwhile, the traditional categories used in first analyzing a system of law do not traditionally apply. African systems of law are often a combination of foundational traditional laws, sometimes religious laws, and often the western influence of previous colonial powers. One example is the system in Egypt, which is further, discussed in future sections. “[W]hen it comes to describing the legal systems of the Arab world, and particularly that of Egypt, Comparative Law scholarship has long suffered from a state of labeling inconsistency. On the one hand, comparatists generally find it reasonable to classify Arab legal systems as predominantly belonging to the civil law tradition, much like those of Latin America: both systems rely on codes of civilian origin transplanted during the colonial encounter with European powers, thereafter developing the distinct indigenous identity of other postcolonial regimes, but still keeping within the familiar contours of their European derivation. On the other hand, one finds a pronounced reluctance in Comparative Law scholarship to simply box Arab legal systems into the civil law tradition. After all, Arab states were governed by an Islamic legal system before the colonial encounter, and this Islamic heritage influences their normative structure today. The concern is that a blanket civil law label for Arab legal systems might flatten their hybrid postcolonial identity and risk discounting the continued relevance of Islamic law norms to

both contemporary judicial applications and debates over future legal reform across the region...So instead of comparing *between* civil and common law systems, I wanted to compare the various layers *within* a single legal system across a defined period of history”¹⁴⁰ Indeed this statement precisely defines the difficulties arising from Comparative Law studies of African States. A simple classification of common or civil legal system cannot be used to identify the fundamental basis of the legal system. Rather, the civil or common law legal tradition is often a layer that has been added on top of a previously existing traditional or religious legal system. The addition of this layer sometimes clashes with the previous system but was meant to address what were perceived as inadequacies within those legal systems.

V. BACKGROUND: LEGAL SYSTEM IN NIGERIA

a. Brief History

Nigeria, a former British colony, was originally the product of many ancient kingdoms. This series of kingdoms was followed by a number of reorganizations orchestrated by local rulers and the British government.¹⁴¹ Nigeria became the Federation of Nigeria and Lagos on October 1, 1954 and eventually. On October 1, 1960, it gained its independence. On October 1, 1963 it became a republic within the British Commonwealth.¹⁴²

After a military coup and some additions to the number of states, the country has, at present, thirty-six states in the federation, as well as the Federal Capital Territory of Abuja.¹⁴³ The country has had a succession of military governments that occasionally suspended the

¹⁴⁰ Amr Shalakany, THE CLOSETED COMPARATIVE LAWYER: ON HOW TO PASS FOR HUMAN RIGHTS MATERIAL, 20 Harv. Hum. Rts. J. 41, Page 44, Harvard Human Rights Journal (Spring 2007).

¹⁴¹ Reynolds, Thomas H. and Flores, Arturo A., Foreign Law: Current Sources of Codes and Legislation in Jurisdictions of the World, Volume III-B, William S. Hein & Co., Inc. (2006), p. III Nigeria 1.

¹⁴² *Id.* at III Nigeria 2—3.

¹⁴³ *Id.* at III Nigeria 2.

Constitution.¹⁴⁴ However, a new Constitution was promulgated in 1999 and the country has since transitioned to an elected government.¹⁴⁵ Following a protracted agitation by the people of Nigeria for a critical review of the present Constitution, in view of numerous national agitation like claims of marginalization, formula for sharing natural resources etc. by various segments of the country, the national assembly has set up a national committee made up of legislators from both the House of Assembly and Senate under the Chairmanship of the Deputy Senate President to address the assignment.

b. Government Framework

The government in the Federal Republic of Nigeria is modeled after the American system.¹⁴⁶ Similarly, Nigeria has three branches of government: Executive, Legislative, and Judiciary.¹⁴⁷ Like the U.S., Nigeria's Constitution is the Supreme Law of the land and all decisions by the Supreme Court are binding on all other courts, including state courts.¹⁴⁸

c. Legal System

Three factors have significantly influenced the development of Nigerian law: (1) the nation derives from native kingdoms with approximately 250 ethnic groups; (2) its status as a former British colony; and (3) its substantial Muslim population.¹⁴⁹ The confluence of these

¹⁴⁴ *Id.* at III Nigeria 3.

¹⁴⁵ Reynolds, Thomas H. and Flores, Arturo A., *Foreign Law: Current Sources of Codes and Legislation in Jurisdictions of the World*, Volume III-B, William S. Hein & Co., Inc. (2006).

¹⁴⁶ GlobaLex-Nigeria, <http://www.nyulawglobal.org/globalex/nigeria.htm>, accessed February 1, 2009.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Reynolds, Thomas H. and Flores, Arturo A., *Foreign Law: Current Sources of Codes and Legislation in Jurisdictions of the World*, Volume III-B, William S. Hein & Co., Inc. (2006), p. Nigeria 1--5; Nigeria's citizenship is 50% Muslim, generally occupying the North, and 40% Christian, while the remaining 10% practice indigenous beliefs (<http://www.cia.gov/library/publications/the-world-factbook/geos/ni.html#Intro>)

factors has resulted in a system that is comprised of English common law, Customary Law, and Islamic law, called Shari'a, which is prevalent in the Muslim North.¹⁵⁰

Nigerian federal law is based on English Common Law.¹⁵¹ This fact is reflected in the country's commercial, economic, criminal, and procedural law.¹⁵² However, Customary Law also plays a role, albeit a diminishing one, in Nigeria's legal scheme.¹⁵³ Customary law, which is categorized as ethnic/non-Muslim and Islamic Law/Shari'a,¹⁵⁴ still has an impact, mostly in civil, family, and personal relations.¹⁵⁵ Because of the continued presence of Customary Law, Nigeria has a dual system of courts.¹⁵⁶ In the South, Muslim law is administered as part of the customary system. However, in the North, Muslim law is accorded a completely separate Shari'a system.¹⁵⁷ Appellate decisions from the two court systems converge in the Supreme Court, which has appellate jurisdiction over both court systems.¹⁵⁸

d. Customary Law

Customary Law is indigenous law that applied to the various ethnic groups.¹⁵⁹ Mainly used in the area of family relations, such as dissolution of marriages, it is complex because it is unwritten and there are differences between the laws of the various ethnicities.¹⁶⁰ In many cases,

¹⁵⁰ Reynolds, Thomas H. and Flores, Arturo A., *Foreign Law: Current Sources of Codes and Legislation in Jurisdictions of the World*, Volume III-B, William S. Hein & Co., Inc. (2006), p. III Nigeria 6.

¹⁵¹ *Id.* at III Nigeria 5.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ GlobaLex-Nigerian Legal Information at <http://www.nyulawglobal.org/globalex/nigeria/htm>, accessed February 1, 2009.

¹⁵⁵ *Id.*

¹⁵⁶ Reynolds, Thomas H. and Flores, Arturo A., *Foreign Law: Current Sources of Codes and Legislation in Jurisdictions of the World*, Volume III-B, William S. Hein & Co., Inc. (2006), p. III Nigeria 6.

¹⁵⁷ GlobaLex-Nigerian Legal Information at <http://www.nyulawglobal.org/globalex/nigeria/htm>, accessed February 1, 2009.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

the Customary Courts are presided over by people that do not have legal training.¹⁶¹ In contrast, Shari'a is based on the Islamic religion and is in written form.¹⁶² As noted, in the South, Shari'a is treated as one aspect of Customary Law, whereas, in the North, Shari'a is a separate legal system since 1956.¹⁶³

When originally adopted, Shari'a was used only for civil matters.¹⁶⁴ However, in 1999, one of the Northern states, followed by other Northern states, extended Shari'a to apply to penal law matters.¹⁶⁵ Because some elements of Shari'a, e.g., stoning people to death to punish adultery, are not well-regarded by the international human rights community, this development has caused some concern both within and outside the country.¹⁶⁶ In theory, Shari'a is not supposed to apply to non-Muslims; nevertheless, many of the laws in the North reflect Shari'a principles, such as laws prohibiting the sale of alcohol and laws segregating the sexes at school or in hotels.¹⁶⁷

e. Courts

The Nigerian judicial system at the federal level includes the Supreme Court of Nigeria, the Federal Court of Appeal, and the Federal High Court.¹⁶⁸ There are also Customary Courts, which are called "Area Courts" in the North.¹⁶⁹

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Thagirisa, P., A Historical Perspective of the Shari'a Project & A Cross-Cultural and Self-Determination Approach to Resolving the Shari'a Project in Nigeria, 29 *Brook. J. Int'l L.* 459

¹⁶⁵ *Id.* at 459, 470.

¹⁶⁶ *Id.* at 459, 470-472.

¹⁶⁷ Johannes Harmischfeger, Shari'a and Control over Territory: Conflict between Settlers and Indigenes in Nigeria, *African Affairs*; Jul 2004; 103, 412; International Module p. 431

¹⁶⁸ Reynolds, Thomas H. and Flores, Arturo A., *Foreign Law: Current Sources of Codes and Legislation in Jurisdictions of the World*, Volume III-B, William S. Hein & Co., Inc. (2006), p. III Nigeria 6.

¹⁶⁹ *Id.*

The Supreme Court has original jurisdiction for cases involving the federation and any state, as well as, among the states.¹⁷⁰ The Supreme Court also has appellate jurisdiction for appeals from the High Court, and the Shari'a Courts of Appeals in the Northern states.¹⁷¹ The Federal Court of Appeal serves as a national appellate court.¹⁷² Federal High Courts are the courts of original jurisdiction for the federal system.¹⁷³ There is also federal court architecture for the Capital Region.¹⁷⁴ These courts generally apply British Common Law rather than Customary Law.¹⁷⁵ Recent legislation has indicated that non-Customary Law is to be supreme if there is incompatibility with Customary Law.¹⁷⁶

The Constitution also provides for the formation of state courts.¹⁷⁷ There is variation here, in particular between the predominantly Muslim Northern states and the rest of the country.¹⁷⁸ The state courts outside the North include the Magistrate's Court as basic civil and criminal courts.¹⁷⁹ Most states also have Customary Courts to hear family civil matters and misdemeanor criminal matters.¹⁸⁰ The North has Magistrate Courts with criminal jurisdiction and a Shari'a court system that includes Courts of Appeal.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 4.

¹⁷⁷ *Id.* at 6.

¹⁷⁸ *Id.* at 7.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

f. Legal Education

Anyone who wants to practice law in Nigeria must attend the Nigerian Law School.¹⁸¹ Prior to 1962, Nigerian lawyers were not required to know Customary or Shari'a Law, despite the role these systems had in the Nigerian legal system.¹⁸² This was remedied with the passage of the Legal Education Act, which created the national law school and developed a curriculum.¹⁸³ The course is now divided into two parts: Bar Part I and Bar Part II.¹⁸⁴ Bar Part I is for students who previously studied law in a foreign university, in a common law country, and it consists of Constitutional Law, Criminal Law, Nigeria Legal System and Nigerian Land Law.¹⁸⁵ Bar Part II is for all law students and includes Civil Procedure, Company Law and Commercial Practice, Criminal Procedure, Law of Evidence, Legal Drafting and Conveyancing, Professional Ethics, Legal Practitioner's Accounts, Law Office Management and General Paper.¹⁸⁶

g. Comparative Law in the Nigerian Judiciary

In furthering our study of the use, or non-use, of Comparative Law methodology by the Nigerian Judiciary, we interviewed high Court judges in the South East geo-political zone of Nigeria. The responses were as startling as they were insightful. Of the seven Judges I interviewed in Enugu, six were frank enough to confess their ignorance of Comparative Law. One of the judges was even intrepid enough to admit that while he was aware of the subject matter, in his view, it was a subject dealt with only in conferences, universities and academic journals.

¹⁸¹ International Center for Nigerian Law at, <http://www.nigeria-law.org/Legal%20Education.htm>, accessed February 1, 2009.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

In *Agbakoba v. The Director of SSS*,¹⁸⁷ the issue was whether the possession of a national passport or its withdrawal had any relevance to the constitutionally guaranteed right of freedom of movement, including the right to exit from Nigeria. Justice Emmanuel Ayoola JCA (as he then was) who was not only a former Chief Justice of the Gambia, but also President of the Court of Appeals of the Island of Seychelles, and later Chair and President of the Special Court of Sierra Leone, relied on comparative jurisprudence from the United States, the UK and India. In *Ogugu v. The State*,¹⁸⁸ extensive use was made of comparative case law from UK, Zimbabwe; India; U.S. and Jamaica.

Lakanmi and Anorther v. The Attorney General (West) and Others,¹⁸⁹ the Supreme Court of Nigeria examined the events surrounding the emergence of the Military in the body polity in Nigeria. In delivering judgment, the Nigerian Apex Court relied on the judgment of then Chief Justice of Uganda, Sir Udo Udoma in a similar case – *Uganda v Commissioner of Prisons exp. Matovu*.¹⁹⁰ Reference was made not only to the above Ugandan case, but also to cases from Australia, UK, Cyprus, United States, and Pakistan.

Our research overall revealed no consistent pattern or clear cut position on the question of the use or non-use of Comparative Law within the Nigerian judiciary. Perhaps much depends on the nature of the case, but more importantly, on the background, training, orientation and legal world view of the judges deciding such questions as happened in the cases cited above. One is disturbed by the fact that little is known about Comparative Law, and that little notice, if any, is taken of the need and use of Comparative Law in the country's judiciary as is the case in South

¹⁸⁷ (1994) 6 NWLR 475.

¹⁸⁸ (1994) 9 NWLR 1.

¹⁸⁹ (1974) 4 ECCLR 713.

¹⁹⁰ (1966) E.A.L.R. 514. Sir Udo Udoma obtained a Ph.D. in Comparative Constitutional law from the University of London.

Africa. This is particularly worrisome when one considers that the judiciary of every nation in the world is looked upon as the last hope of the ordinary citizen. Members of that arm of government represent the hard core of the legal elite of the society.

VI. BACKGROUND: LEGAL SYSTEM IN SOUTH AFRICA

a. Brief History

South Africa was first colonized by the British in a violent process.¹⁹¹ The British and the Afrikaners, descendants of 17th century Dutch settlers, fought over political power in the colony.¹⁹² The South African population is diverse; it is comprised of “whites,” mostly Afrikaners of European descent; “blacks,” from a variety of linguistic groups and tribes; mixed race, loosely described as “colored;” Bushmen and Hottentots who were indigenous to the area; and Muslim and Hindu Asians from India.¹⁹³ The Republic of South Africa was created on May 31, 1961, when the protectorate’s parliament severed the link with the British sovereign.¹⁹⁴

South Africa’s policy of government mandated racial segregation, called *apartheid*, caused years of international controversy.¹⁹⁵ This policy originated when the Afrikaner Nationalist Party came to power in 1948, advancing a course of “separate development.”¹⁹⁶ The manifesto deemed that an identified group of non-white citizens should be regarded as

¹⁹¹ D.H. Sampson, *Modern Legal Systems Cyclopedia*, The Legal System of South Africa, Kenneth Robert Redden, ed., William S. Hein and Co.Inc. (1996), p. 6A.70. 12—13.

¹⁹² *Id.* at 6A.70.12—15.

¹⁹³ *Id.* at 6A.70.15—19.

¹⁹⁴ *Id.* at 6A.70.27.

¹⁹⁵ *See, e.g.*, United Nations General Assembly Resolution 1761, XVII Session, Resolutions Adopted on the Reports of the Special Political Committee, Item 87, The Policies of Apartheid of the Republic of the Government of South Africa (November 6, 1962) <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/192/69/IMG/NR019269.pdf?OpenElement>, accessed March 25, 2009.

¹⁹⁶ Robert C. Barclay, *The Current Legal Status of the South African Homelands*, *Modern Legal Systems Cyclopedia*, Kenneth Robert Redden, ed., William S. Hein and Co., Inc. (1996), p. 6A.90, 7.

“migratory,” and not “entitled to political or social rights equal to those of Whites.”¹⁹⁷ A sustained revolt against apartheid began in 1976, when the schoolchildren of Soweto, a poor township, rebelled against apartheid education.¹⁹⁸ After years of resistance, struggle, and international protests, reform finally took hold.¹⁹⁹ In September of 1989, F.W. de Klerk was elected President and called for an end to apartheid.²⁰⁰ De Klerk ordered the release of political prisoners, among them the influential resistance leader, Nelson Mandela.²⁰¹ The African National Congress (“ANC”) was increasingly seen as a “government-in-waiting.”²⁰² In 1994, the ANC won 252 of 400 seats in South Africa’s first democratic elections, and Nelson Mandela, a prominent member of the ANC, became the first black President of South Africa.²⁰³

b. Government Framework

The South African government is comprised of three branches: the Executive, led by a President; a bi-cameral Legislative branch called Parliament, which is comprised of the National Assembly and National Council of Provinces; and the Judicial Branch.²⁰⁴ On September 28, 2008, President Thabo Mbeki resigned as a result of dissent within the ANC.²⁰⁵ Kgalema

¹⁹⁷ *Id.*

¹⁹⁸ History, The End of Apartheid, South African Government website, <http://www.info.gov.za/aboutsa/history.htm#end>, accessed March 26, 2009.

¹⁹⁹ *Id.*

²⁰⁰ F.W. de Klerk, Biography, Nobelprize.org, http://nobelprize.org/nobel_prizes/peace/laureates/1993/klerk-bio.html, accessed March 26, 2009.

²⁰¹ History, The End of Apartheid, South African Government website, <http://www.info.gov.za/aboutsa/history.htm#end>, accessed March 26, 2009.

²⁰² *Id.*

²⁰³ 1994: Mandela Becomes SA’s First Black President, On This Day: 1950-2005, BBC, May 10, 1994, http://news.bbc.co.uk/onthisday/hi/dates/stories/may/10/newsid_2661000/2661503.stm, accessed March 26, 2009.

²⁰⁴ Robert C. Barclay, The Current Legal Status of the South African Homelands, Modern Legal Systems Cyclopedia, Kenneth Robert Redden, ed., William S. Hein and Co., Inc. (1996), p. 6A.90.7.

²⁰⁵ *Id.*

Motlanthe, the ANC General Secretary, served the remainder of Mbeki's term, until elections were held in early 2009 that produced Jacob Zuma as the new President of South Africa.²⁰⁶

c. Legal System

South African law evolved from traditional or inherited law, legislation, judicial precedent, and custom.²⁰⁷ South African law was not founded on English common law; it is also not a purely civil law country.²⁰⁸ The major influence on modern South African law was the Roman-Dutch system, which was the law in force in Holland at the time of Dutch colonization.²⁰⁹ Roman law is distinctive in that historians "seem to agree that early classical Roman law was Customary Law, rather than enacted law."²¹⁰ Apparently, there was also a "noticeable absence of professional judges."²¹¹ When the British took over the area, they rejected replacing the existing law with English Common Law.²¹²

The Roman-Dutch system is characterized by law developed and recorded by Dutch jurists.²¹³ In this system, Latin is compulsory for a qualifying degree in law.²¹⁴ Interestingly, the Netherlands replaced Roman-Dutch law with the Napoleonic Code, and then with Dutch "Burgerlijk Wetboek" (Civil Code).²¹⁵ South Africa and Zimbabwe are the only countries left

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 6A.70.49.

²⁰⁸ *Id.* at 6A.90.49.

²⁰⁹ Robert C. Barclay, *The Current Legal Status of the South African Homelands*, *Modern Legal Systems Cyclopedia*, Kenneth Robert Redden, ed., William S. Hein and Co., Inc. (1996), p. 6A.90.49.

²¹⁰ Peter de Cruz, *Comparative Law in a Changing World*, 2nd ed. Cavendish Publishing Limited (1999) p 47.

²¹¹ *Id.*

²¹² *Id.*

²¹³ Robert C. Barclay, *The Current Legal Status of the South African Homelands*, *Modern Legal Systems Cyclopedia*, Kenneth Robert Redden, ed., William S. Hein and Co., Inc. (1996), p. 6A.90.7.

²¹⁴ *Id.* at 6A.70.50.

²¹⁵ Robert C. Barclay, *The Current Legal Status of the South African Homelands*, *Modern Legal Systems Cyclopedia*, Kenneth Robert Redden, ed., William S. Hein and Co., Inc. (1996), p. 6A.90.50; Gerrit Meijer and Sjoerd Y. Th. Meijer, *Influence of the Code Civil in the Netherlands*, *European Journal of Law and Economics*, Volume 14, Number 3, November 2002, link to abstract at <http://www.springerlink.com/content/p713p62u96454337/>, accessed March 26, 2009.

where Roman-Dutch Law prevails.²¹⁶ In the intervening years, Roman-Dutch law has been complemented by English case law.²¹⁷

Legislation is promulgated in the two official languages, English and Afrikaans.²¹⁸ Judicial precedent is also a source of law; however, *stare decisis* is not given the same deference as in the U.S., for example.²¹⁹ A former chief justice once commented, “It is a lesser evil for a court to override its own legal opinion, clearly shown to be wrong, than indefinitely to perpetuate its error.”²²⁰ However, because ancient customs were recognized in Holland, if they had “been recognized as law from time immemorial,”²²¹ South Africa recognizes long-established customs that are “reasonable, certain, and uniformly observed for over thirty years.”²²²

As a result of its historical development, South African law is a blend of Roman-Dutch Law, which displays many elements of civil laws, English case law as persuasive authority, and in some less frequent instances, American, Australian, or Canadian decisions.²²³ Also relevant is that South Africa has not accepted compulsory International Court of Justice (“ICJ”) jurisdiction.²²⁴

²¹⁶ Robert C. Barclay, The Current Legal Status of the South African Homelands, Modern Legal Systems Cyclopedia, Kenneth Robert Redden, ed., William S. Hein and Co., Inc. (1996), p. 6A.70.50.

²¹⁷ *Id.*

²¹⁸ Robert C. Barclay, The Current Legal Status of the South African Homelands, Modern Legal Systems Cyclopedia, Kenneth Robert Redden, ed., William S. Hein and Co., Inc. (1996), p. 6A.70.50.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 6A.70.51.

²²² *Id.*

²²³ *Id.* at 6A.70.54—55.

²²⁴ CIA World Factbook-South Africa, <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html#Issues>, accessed March 25, 2009.

d. Courts

The South African court system consists of the Constitutional Court, the Supreme Court of Appeals, High Courts and Magistrate Courts.²²⁵ The creation of the Constitutional Court of South Africa was a very important and historical component of South Africa's transformation from an apartheid parliamentary regime to a representative constitutional democracy. That court, along with all other courts and tribunals, was explicitly instructed by the Constitution that when interpreting the Bill of Rights, it "must consider International Law and it "may consider foreign law."²²⁶ The Constitutional Court has the final say on all constitutional matters and binds all other courts on any constitutional issue.²²⁷ The South African court has set forth in some of its judgments its appreciation that the Constitution encourages regard for foreign law. In a 2005 case, regarding whether the minister of police should be vicariously liable for the gross misconduct of three members of the Johannesburg police department, the court consulted certain decisions from the United Kingdom, Canada and the United States.²²⁸ In a unanimous decision written by Justice O'Regan, the youngest member of the court with experience as an International Law professor and scholar explained the reference to such foreign sources thus:

It is not only our law that has struggled to determine the proper ambit of the principles of vicarious liability and to apply them in a manner that is both consistent and fair. There can be no doubt that it will often be helpful for our courts to consider the approach of other jurisdictions to problems that may be similar to our own.²²⁹

²²⁵ *Id.*

²²⁶ Constitution of the Republic of South Africa, 1996, Section 39 (1) (b).

²²⁷ The Courts in South Africa (January 2003), http://www.capegateway.gov.za/afr/pubs/public_info/C/32303/E, accessed March 25, 2009.

²²⁸ *K v. Minister of Safety and Security*, 2005 (9) BCLR 835 (CC).

²²⁹ *Id.* at 34.

The learned Justice acknowledged that the dangers of shallow comparativism must be avoided, but to forbid any comparative review because of those risks would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions....”²³⁰

e. The Use of International Law

The South African Constitutional Court is required, by law, to consider International Law in interpreting the Bill of Rights. It appears, however, that the Court has not made much use of International Law in constitutional interpretation, whether in regard to the Bill of Rights or other contexts hence the criticism leveled against it in some scholarly writings.²³¹ A notable South African International Law scholar, John Dugard, lamented the minimal use of International Law in the Constitutional Court’s decision in AZAPO in which the constitutionality of the Promotion of National Unity and Reconciliation Act 34 of 1995 (SA) (granting amnesty from both criminal prosecutions and civil claims to members of the apartheid police responsible for killing anti-apartheid activists) was challenged. He stated as follows:

The Court considered only the question whether the provisions of the 1949 Geneva Conventions requiring prosecution for ‘grave breaches’ were applicable (which it held Were not applicable to the South African situation), but made no attempt to examine whether the Customary Law rules relating to genocide, torture, war crimes and particularly crimes against humanity required prosecution of offenders. As apartheid has been labeled as a crime against humanity by the General Assembly and

²³⁰ *Id.* at 35.

²³¹ Richard Blake, ‘The World’s Law in One Country: The South African Constitutional Court’s Use of Public International Law’ (1998) 115 South African Law Journal 668, 669, 684.

the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, and seems to fall squarely within the accepted definitions of this crime. It surprising that no attempt was made to address the question whether customary International law requires the prosecution of those who commit this crime, particularly in respect of systematic murder, torture and disappearances which were crimes under South African law before 1990.²³²

The Supreme Court is the highest court on all non-constitutional matters.²³³ The Court's decisions are binding on all lower courts; they were formerly called the Appellate Division, since their jurisdiction is appellate.²³⁴ The High Court, formerly called the Supreme Court, has jurisdiction over all matters in their geographic area.²³⁵ The High Court generally hears monetarily significant civil cases, major criminal cases, appeals from the magistrate courts in their region, and matters concerning personal status, such as solvency or adoption.²³⁶ Magistrate courts hear most matters generally.²³⁷ There are also circuit courts that sit in different geographies at fixed times during the year, and a variety of specialized courts for matters such as divorce or tax.²³⁸

²³² John Dugard, 'International Law and the South African Constitution' (1997) 8 *European Journal of International Law* 77, 90-1.

²³³The Courts in South Africa (January 2003), http://www.capegateway.gov.za/afr/pubs/public_info/C/32303/E, accessed March 25, 2009.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

f. Legal Education

In South Africa, the legal profession is comprised of two branches: advocates and attorneys.²³⁹ These are the legal equivalents of English barristers and solicitors, respectively.²⁴⁰ Generally, advocates are those who assist litigants by speaking on their behalf.²⁴¹ They enjoy the virtual monopoly of appearing in superior courts.²⁴² Advocates admitted in the British Isles and in Holland were automatically admitted to practice; eventually those with an LL.B. from University of Cape Town were also accepted.²⁴³

Attorneys are generalists, unlike advocates, although there are some limited specializations available, such as notary public, conveyance, or patent attorney.²⁴⁴ They interact directly with the public and brief the advocates for appearance in court.²⁴⁵ South African legal education evolved as a result of British administration in the early 19th Century.²⁴⁶ There are two degrees available: the LL.B.; which is available at a variety of South African universities that have a somewhat uniform core of law subjects;²⁴⁷ and the B. Proc. Degree, applicable to attorneys, is overseen by a board for the Recognition of Law Examinations.²⁴⁸

²³⁹ Robert C. Barclay, *The Current Legal Status of the South African Homelands*, *Modern Legal Systems Cyclopedia*, Kenneth Robert Redden, ed., William S. Hein and Co., Inc. (1996), p. 6A.70.65.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* at 6A.70.67—68.

²⁴⁵ *Id.* at 6A.70.69.

²⁴⁶ *Id.* at 6A.70.73.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 6A.70.73.

VII. BACKGROUND: LEGAL SYSTEM IN EGYPT

a. Ancient Egyptian Law

While the topic of Ancient Egyptian Law is greatly fascinating and has been the subject of many expert careers, the modern day law of Egypt retains very few remnants of the Ancient Egyptian Legal system. As a comparative scholar, this greatly decreases the present utility of studying the Ancient Egyptian Legal system for application in current African issues.

b. Contemporary Legal Structure in Egypt

Egypt's highest court, the Supreme Constitutional Court, reviews the constitutionality of laws and regulations, resolves jurisdictional conflicts, settles disputes in cases where lower courts have made conflicting judgments, and interprets the government's laws and decrees.²⁴⁹ Below this court are courts of general jurisdiction and administrative courts. Courts of general jurisdiction include the Court of Cassation, the courts of appeal, the tribunals of first instance, and the district tribunals.²⁵⁰ The Court of Cassation, the only one in its category, was established in 1931 and is based in Cairo. The Court of Cassation has final jurisdiction in criminal and civil cases.²⁵¹ The courts of appeal have jurisdiction over one or more of Egypt's governorates, or administrative divisions, and hear appeals of decisions made by lower courts.²⁵² The tribunals of first instance are the courts that hear major criminal and civil cases. The district tribunals have jurisdiction over minor criminal and civil cases.²⁵³ The Public Prosecution, headed by an attorney general, serves at all levels of courts of general jurisdiction in all criminal and some

²⁴⁹ "Egypt," Microsoft Encarta Encyclopedia (2008).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

civil cases.²⁵⁴ The administrative courts have jurisdiction over cases involving the government or any of its agencies and may investigate administrative crimes committed by officials or civil servants.²⁵⁵ Other judicial bodies include the Council of State, which settles administrative disputes and deals with disciplinary cases within the judicial system, and the Supreme Judicial Council, which ensures the judiciary's independence from outside interference and helps regulate other judicial bodies.²⁵⁶ There are also courts of limited jurisdiction for geographical disputes, family courts for addressing family law divorce and child custody issues, and an administrative judiciary.

Egypt's legal system is closely patterned on that of France.²⁵⁷ A panel of judges, as opposed to a jury, reaches verdicts. Religious courts once operated, with separate systems for Muslims, Christians, and Jews, but they were abolished in 1956.²⁵⁸ Many Muslims argue that Islamic law, or the Shari'a, should be the sole basis for all Egyptian legislation.²⁵⁹ A constitutional amendment adopted in 1980 recognized the Shari'a as a principal source of Egypt's laws, but the legal system is secular.²⁶⁰ Another example of a prominent comparative scholar who influenced the development of Egyptian Law is the lawyer 'Abd al-Razz-aq al-Sanh-ur-i, who was trained in France and Egypt. He was instrumental in formulating hybrid codes for Egypt, Iraq and Kuwait.²⁶¹

A rigid comparative analysis of Egyptian Law is important for several reasons. Egyptian Civil Code has been the source of law and inspiration for other Middle Eastern jurisdictions,

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Intisar A. Rabb, "WE THE JURISTS": ISLAMIC CONSTITUTIONALISM IN IRAQ, 10 UPAJCL 527, University of Pennsylvania Journal of Constitutional Law (March, 2008)

including the pre-dictatorship kingdoms of Libya, Jordan and Iraq, Bahrain (2001), as well as Qatar (1971), and the commercial code of Kuwait. The Egyptian system is an important source of law for understanding legal systems and the development of other systems that were based on the Egyptian system. In examining the Egyptian legal system, one finds a practical source for combining the notions of Common and Islamic Law. As an additional benefit, examination reveals aspects of both legal and cultural understanding where these two systems are compatible. “After reminding us of the importance of legal anthropology in Comparative Law, the author insists on the necessary compromise between the old Customary Law and other legal cultures, notably Islamic or European.”²⁶² From a practical standpoint, comparative analysis is useful in creating International Contracts between Common Law and Islamic Law States for compatibility of binding terms on both State parties. Most important are binding terms for investment in foreign firms as well as arbitration clauses enforceable in domestic court systems.²⁶³

By understanding the foundation and history of development of these mixed systems of Western and Islamic law, we come to a new understanding of where many similarities and compatibilities lie in these systems of law. Through the study of the development of the Egyptian system, we see the development of the mixed Islamic and Common Law systems and their eventual conflicts played out through cases in the State. The Egyptian Constitution, indeed, recognizes Shari’a Islamic Law as a source of its law.²⁶⁴ This combination of the two systems creates a wonderfully exciting situation for studying the relationship of the two systems of law within the same state. Egypt was one of the first nations to develop such a system and is,

²⁶² MATHIAS REIMANN AND REINHARD ZIMMERMANN, THE OXFORD HANDBOOK OF COMPARATIVE LAW, 56 AMJCL 1075, American Journal of Comparative Law, Page 1081 (OXFORD UNIVERSITY PRESS, Fall 2008).

²⁶³ Andrea K. Bjorklund, MANDATORY RULES OF LAW AND INVESTMENT ARBITRATION, 18 Am. Rev. Int’l Arb. 175, American Review of International Arbitration (2007).

²⁶⁴ "Egypt," Microsoft Encarta Encyclopedia (2008).

therefore, a prime example for comparative study. “In a world where national and cultural difference is often seen as posing a formidable challenge, comparatists hold up a view of diversity as neither an impenetrable barrier to comparison nor an aberration to be ignored or reduced, but instead as an invitation, an opportunity, and a crucible of creativity and dynamism.”²⁶⁵

VIII. BACKGROUND: LEGAL SYSTEM IN MOROCCO

a. Judicial Structure

Morocco has a four-level Court or Judicial setup. It has twenty-seven *sadad* courts, thirty *regional* Courts, nine Courts of Appeal and a Supreme Court in Rabat.²⁶⁶ *Sadad* and regional courts divided into four sections: shari’a; rabbinical; civil, commercial and administrative; and penal.²⁶⁷ *Sadad* courts are courts of first instance for Muslim and Jewish personal law.²⁶⁸ Shari’a sections of regional courts also hear personal status cases on appeal.²⁶⁹

b. Legal Structure

The laws of Morocco are similar to other African nations in that they are developed through a struggle of balancing a previously imposed colonial legal system with the traditional and religious requirements of the Moroccan people. However, Morocco deserves special attention because while it has shared the African regions struggle with human rights violations and weakness of the rule of law, it has begun developing and implementing new laws and

²⁶⁵ Vivian Grosswald Curran, Cultural Immersion, Difference and Categories in U.S. Comparative Law, 46 Am. J. Comp. L. 43 (1998).

²⁶⁶ Morocco, Islamic Family Law: Possibilities of Reform Through Internal Initiatives, Emory Law School (available at <http://www.law.emory.edu/ifl/legal/morocco.htm>).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

successfully tackling the challenges of eliminating human rights violations within its government and legal system. The Moroccan Constitution was adopted on March 10th, 1972.²⁷⁰ Article 6 of the Constitution declares Islam the official state religion and guarantees freedom of worship for all citizens.²⁷¹ The development of Moroccan law is tied to three critical political movement periods. The first is 1912 to 1956 during the French colonization.²⁷² The second is from 1957 to 1958 where the immediate post independence period saw a promulgation of a national body of legislation.²⁷³ The third stage of Moroccan legal development is the recent liberalization reforms which began in 2004.²⁷⁴

During the French occupation colonial periods from 1912 to 1956, the French attempted to develop a uniform system of law for Morocco. The Treaty of Fez, signed on March 30, 1912, made Morocco a protectorate of France.²⁷⁵ The French largely left the substance of Family Law untouched in part because they feared violent reactions to any alteration of established norms.²⁷⁶ Polygamy is legal within Morocco on the basis of Islamic tradition. Many of the regions were left to create their own versions and local variations of laws.²⁷⁷ Many of these systems were based upon principles of Islamic Law, but improperly carried out. Most importantly, there was no single source of uniform laws for either foreigners or Morocco's own citizens for reference.

Following national sovereignty in 1956, Morocco equipped itself with a national body of legislation called the *Mudawwana* or *Code of Personal Status*, promulgated and implemented in

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Charrad, Dr. Mounira Maya, Family Law in Morocco - A Brief History, (available at <http://www.imow.org/wpp/stories/viewStory?storyid=124>).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ "Morocco." The New Encyclopedia Britannica: Macropaedia. 15th ed. 1987.

²⁷⁶ Charrad, Dr. Mounira Maya, Family Law in Morocco - A Brief History, (available at <http://www.imow.org/wpp/stories/viewStory?storyid=124>).

²⁷⁷ *Id.*

1957-58.²⁷⁸ The Code of Personal Status stayed true to the Islamic tradition while clearly defining family and other related laws. There were two major differences between the colonial system of law and the Code of Personal Status. For the first time, Morocco had a family law that applied to the population as a whole.²⁷⁹ The regional differences that had existed previously were no longer recognized.²⁸⁰ This meant that some women now had less freedom and some more, but all Moroccan women were subject to the same law.²⁸¹ The other difference with the colonial period was that the Mudawwana presented in a concise and codified manner what had been previously a set of interpretations dictated by legal scholars or a set of customs.²⁸² Moroccan law began its transformation and updating from traditional legal systems. Indeed, the reason this update was so effective was because for over forty years, the traditional legal system was allowed to develop and interact with very little interference from a Western system of law. After the traditional and religious systems of law had developed into well established precedents and interpretations known to most legal scholars, they were codified into a uniform set of binding laws.

Growing U.S. and European interest in the region as well as the motivation of the Moroccan Monarch, King Mohammad VI, has put national and legal reform at the forefront of the national agenda.²⁸³ It has been King Mohammad VI's goal to lead his country forward in political, social, economic, legal development and modernization. While there have been many economic and social consequences from the reforms, the legal developments I will focus on are the issues of Women's Rights and Human Rights violations.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ Haim Malka and John Alterman, Arab Reform and Foreign Aid: Lessons from Morocco, Center for Strategic and International Studies, (available at <http://www.csis.org/media/csis/pubs/malkamoroccobook4webuse.pdf>).

c. Women's Rights in Morocco

The Muslim woman in Morocco is considered an adult when it comes to managing her own patrimony or exercising her civil rights.²⁸⁴ Yet she remains a minor under the law for other civil acts: concluding her marriage, for instance, or managing her children's estate.²⁸⁵ While this seems discriminatory, many steps are being taken to change women's rights in Morocco and update the legal system to address women's rights issues.

Morocco has tried to reconcile the law of the Koran with the universal human rights laid down in the country's constitution.²⁸⁶ The most remarkable reforms of 2004 concerned the age for marriage, divorce and polygamy.²⁸⁷ In brief, they set the age of marriage for women at eighteen, established the right to divorce by mutual consent, thus, giving women the right to divorce on the same grounds as men.²⁸⁸ They placed polygamy and unilateral repudiation by the husband under judicial control and restricted the conditions under which a judge would grant them, thus, making them quite difficult for a man to obtain.²⁸⁹ They also eliminated the requirement of a matrimonial guardian for a woman to marry.²⁹⁰

Africa has always suffered from inadequate protection of women's rights. The Moroccan systems of law may provide the first foundation for a legal system to address one of the major problems of women's rights. If these reforms are successful in improving women's rights within Morocco, there is a possibility that neighboring African States might borrow elements of the legal reform and apply them to their own legal systems.

²⁸⁴ Sebti, Fadela, Rights of the Muslim women in Morocco, (available at http://www.mediterraneas.org/article.php3?id_article=10).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ Charrad, Dr. Mounira Maya, Family Law in Morocco - A Brief History, (available at <http://www.imow.org/wpp/stories/viewStory?storyid=124>).

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

d. Human Rights violations in Morocco

The first set of reforms in Morocco dealt with relations of the individual and human right issues. In the previous section we focused the analysis on the issue of women's rights. The second set of reforms were aimed at categorically correcting problems with the structure and functioning of the government itself. The reforms include economic reform, revision of press laws, parliamentary reform, and judiciary reform.²⁹¹

One of the first things that King Mohammad VI did was recognize that traditional democracy was not how his government functioned nor was it what his people wanted or expected of their government. The system of what he calls *political pluralism* within a democracy is how he went about reforming the government and was able to adjust his reforms according to the people's expectations.²⁹² Finally, the King ordered the creation of a Human Rights Council to investigate government abuse of its citizens. The Council reported over 1500 pages of human rights violations inflicted upon Moroccan citizens by State actors.²⁹³ Bringing these acts into the open has exposed the agencies and prompted guidelines for preventing future violations.

To address terrorism, the King has incorporated the Islamist party into the government.²⁹⁴ By this bold move, he has given the party a political voice, but has risked legitimizing fundamentalist rhetoric. However, with the voice comes the responsibility to refrain and possible accountability for future acts of terrorism.

²⁹¹ Haim Malka and John Alterman, Arab Reform and Foreign Aid: Lessons from Morocco, Center for Strategic and International Studies, Page 45 (available at <http://www.csis.org/media/isis/pubs/malkamorocobook4webuse.pdf>).

²⁹² *Id.* at 47 (available at <http://www.csis.org/media/isis/pubs/malkamorocobook4webuse.pdf>).

²⁹³ *Id.*

²⁹⁴ *Id.*

As Comparative Legal Analysts, we must examine and determine the reasons for the great success in the modernization, implementation, and development of the Moroccan legal system. This has applications not only for the Moroccan legal system, but the methods and reasons behind the successful legal developments could be used and implemented in other parts of Africa as well as Middle Eastern States. Indeed, many Western States may be able to implement some of the legal reforms to update their legal systems.

We see a leader who understands his people. Instead of just following the blanket assumption erroneously made by many Western scholars, he discovered the people did not want a simple democracy. Indeed the system of government that was developed, and finally implemented, more closely resembles the people's expectation and not what Western legal scholars would consider a traditional democracy. Perhaps if such inquiries were made prior to government building in places such as Iraq and Afghanistan, the powers attempting to form a government would have realized the people have no desire or use for a Western system of democracy as their form of government.

At the same time, the government recognized issues important to the protection of the people and made changes to protect those people. Female citizens may have not have had a strong voice in the Moroccan legal system, and yet the government and leaders were willing to take any political consequences of supporting reforms in order to protect, increase, and promote women's rights. The government has also created a new body for regulating itself to prevent future human rights violations. Additionally, instead of taking a hard line against fundamentalists and religious groups, incorporating them into the government to help combat terrorism seems like an opportunity to reduce that type of violence.

IX. SIMILARITIES AND DIFFERENCES IN COMPARATIVE LAW METHODOLOGIES

Overall, the four selected countries display similar methodologies in using Comparative Law. This is apparent in that they all used an applied, practical approach to Comparative Law to enable their modern legal systems to function. They also employed both macro and micro methodologies. For example, in using Comparative Law to develop their respective constitutions, a macro approach was necessary since it was imperative to examine the economic, social, and cultural context of the legal comparison. However, the methodology of solving particular legal problems required a micro approach.

One consideration in whether a country can use a structured methodology, including confirmation and theory testing, effectively, is the level of political and economic stability in the country. It is unlikely that it would be possible for a country to systematically monitor and tweak legal reforms if the government or political leaders are in a state of flux, which has been the case recently in Kenya²⁹⁵ and South Africa.²⁹⁶

X. CONCLUSION AND RECOMMENDATIONS

Africa is fast emerging as an important continent with great potential in terms of economic and strategic importance more than ever before. Many more industrialized and newly economically emerging nations of the world that played no role in colonization in Africa, such as the United States of America and China, have joined in the aggressive exploitation of the economic resources of the enormous deposits of oil, natural gas and other mineral resources. Most actively involved in this new economic venture are many major multinational corporations

²⁹⁵ Jeffrey Gettleman, Kenya Rivals Reach Peace Agreement, The New York Times, February 29, 2008 at <http://www.nytimes.com/2008/02/29/world/africa/29kenya.html>, accessed February 1, 2009.

²⁹⁶ Robert C. Barclay, The Current Legal Status of the South African Homelands, Modern Legal Systems Cyclopedia, Kenneth Robert Redden, ed., William S. Hein and Co., Inc. (1996), p. 6A.90.7.

from Western countries. Unfortunately, the huge profit derived from the massive economic activities undertaken by these actors does not reach the people. This raises the inevitable question which we and other scholars have addressed in other papers, which is whether the people's God-given wealth has become a curse instead of a blessing?²⁹⁷ I have proposed and vigorously argued elsewhere, that the people's right to exercise permanent sovereignty over their wealth and natural resources has risen to the level of International Customary Law.²⁹⁸ There is urgent need for the reformation of African judiciaries to be more accessible to individuals and groups seeking to enforce fundamental rights.

The application of Comparative Law is not an academic luxury for Africa; given the continent's history, that law necessary to managing and integrating its unique legal systems and to enable its entry into globalization. It is true that these countries share common goals and methodologies in employing Comparative Law. Nevertheless, their Comparative Law goals and methodologies are calibrated to their individual countries' requirements, political environment, history, and aspirations. In addition, because many of the countries in Africa, such as South Africa and Namibia, formed their constitutions relatively recently, they had a wide selection of laws and experiences to draw upon. By using Comparative Law, these countries have incorporated a wide variety of legal concepts, both from the developed world as well as from other countries within the region.

In an increasingly globalized world, the interaction and cross-influence of diverse legal systems and cultures is only going to increase – as borders become less visible. This

²⁹⁷ For a detailed general discussion of this situation and other related issues by the present writer and other scholars, See Chris Nwachukwu Okeke, *The Second Scramble for Africa's Oil and Mineral Resources: Blessing or Curse?* *The International Lawyer*, Spring 2008, Volume 42, Number 1, at 193 – 209; See Chris N. Okeke, *The Debt Burden: An African Perspective*, *The International Lawyer*, Volume 35 No.4, Winter 2001; Emeka Duruigbo, *The Global Energy Challenge and Nigeria's Emergence as a Major Gas Power: Promise, Peril or Paradox of Plenty*, *Georgetown International Environmental Law Review*, 2009.

²⁹⁸ See *infra* note 297.

development speaks to the continued relevance of the discipline of Comparative Law and the importance of continued education and interaction among comparative scholars. Because of the inter-connectedness, engendered partly by globalization, the era of hostility toward “foreign” legal systems and cultures is essentially over. Perhaps the strongest argument for drawing from other societies is the inefficiency of re-inventing the wheel. To address their present situations, societies should adapt what they have seen work in other societies. Africa would particularly benefit from this course of action.

Adoption, however, should not be wholesale. Sensitivity to peculiarities of a given society should be taken into account. For instance, the Moroccan example discussed *supra* is exemplary in its innovation. In the past, through law and development, and currently through The Rule of Law Programs of the World Bank and other international institutions, there have been attempts to re-make Africa and the developing world in the image of the developed world. History, not surprisingly, suggests that such efforts have little chance to succeed. The admonition of the South African scholar referenced herein is quite instructive. On the other hand, sensitivity or peculiarity should not be used as smokescreens to rationalize oppression and subjugation of citizens.

Adoption, adaptation, and borrowing should not necessarily be uni-dimensional, with Africa and the Rest drawing from the West. Western societies can learn a thing or two from Africa in dealing with pressing issues, especially in the areas of Family Law and Alternative Dispute Resolution. In Africa, we aim for justice that benefits everyone, unlike the winner-takes-all practice in the West that only breeds animosity and further conflict. The Kenyan example illustrated herein, which was borrowed from Britain, shows that the West understands

this concept very well; only that it seems to apply it mainly to political conflicts; it should be extended to other areas, and Africa can help.

Finally, the application of Public International Law is certainly an important factor in the debate and current developments in Comparative Law. However, to what extent it should form part of domestic legal structure remains controversial and unresolved. Should other African countries and the West copy the South African example of making PIL a part of their constitutions? What are the pros, cons and constraints?

In my considered opinion, the example of South Africa, in terms of her constitutional recognition of the importance of international in their legal system, should be considered and adopted by other African countries. Considering the importance of International Law in contemporary times, we advocate that its teaching and study should be compulsory in national law schools of all nations.²⁹⁹ We have not yet had any reason to retreat from this position.

²⁹⁹ See Chris Nwachukwu Okeke, *The Theory and Practice of International Law in Nigeria*, Fourth Dimension Publishers, 1986.