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# Lawscapes

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**Abstract**
Comparative law is a subject always in motion. Scholarly discussion about its methodology is always vivid, in search of better tools to make the different possible comparative endeavors. The paper explores the concept of lawscape and its link with comparative legal methodology. The concept of lawscape will be linked with other relevant concepts in comparative law, like those of legal pluralism, legal transplants, legal formants and legal fluxes to make the necessary connections and find its space within the tools of comparative law.

**Keywords** Lawscape · Comparative law methodology · Legal formants · Legal transplants · Legal pluralism · Legal Fluxes

## 1 Introduction

Introducing the concept of "lawscape" involves touching upon some key concepts of the general theory of comparative law. Without anticipating too much the outcome of the present reflection, we can already say that lawscape is the product of a different way to consider how legal systems are composed which presupposes a pluralist approach to law free from any positivist conditioning. Considering law as the mere product of the legislator's activity would put aside a series of elements of normativity which do not share the same formalities of "Law" for their production but are an integral part of Western and non-Western legal systems, no matter to which legal tradition or family they belong. It is therefore necessary to cast a glance on some fundamental concepts of comparative law – like legal formants and legal transplant – which have been used to explain how a given legal system takes its shape. This will give the possibility to appreciate how – differently from the mere legal concepts coming

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from comparative law – the concept of "lawscape" gives the possibility to consider all those elements which concur to compose a given legal reality, including those which apparently may not appear as purely legal. All these elements circulate through the legal fluxes and are more evident in those realities – like most of the non-Western ones – where law is the result of the interaction between a series of factors the decomposition of which between those that are legal and those that are not very often makes no sense at all. In this respect, reference will be made to African law as an example of these non-Western legal realities where the "lawscape" is not limited to the state law and legal fluxes have sources the most diverse see more on this in [1].

However, the same concept of legal pluralism requires attention: the traditional approach to this concept does not help in dealing with the real functioning of a given legal system, since a positive consideration of the interaction of all elements of normativity is necessary in order to determine the concept of lawscape.

In line with the above, the following Section 2 of this article will touch upon the concept of legal pluralism, then Section 3 summarizes Rodolfo Sacco's theory of legal formants together with concept of legal fluxes, trying to highlight its difference with the legal formants. Section 4 will briefly consider the concept of legal transplants, and finally Section 5 will be dedicated to the concept of lawscape. A few conclusive remarks will conclude the article.

## 2 On Legal Pluralism

Bibliography on legal pluralism is extensive. It shows that legal pluralism itself could easily be the object of a monograph to discuss all different positions and facets of this phenomenon. Since this is not the objective of the present work, here only its fundamental elements, necessary to illustrate the main components of the African legal context, will be recalled.

There is a general consensus on the concept of legal pluralism, understood precisely as the coexistence of two or more normative orders within the same social context (or, if preferred, legal system). Such approach moves from the contraposition between state and non-state laws, and this both in the more rigid conception, where it is the state law that determines the limits within which legal pluralism can exist (weak legal pluralism), and in the more dynamic approach, in which the state is only one of the elements that give rise to a situation of legal pluralism (deep legal pluralism) [2], p. 289; [3, 4].

Legal pluralism is the legal aspect of the general cultural fragmentation which is a fundamental characteristic of most non-Western jurisdictions for an African example see [5], p. 605. Such elementary truth has been difficult to grasp for the Western jurist bound by the Western perspective, for which an ethnic group controls a territory and a given territory can only be at the origin monoethnic. Consequently, being ethnicity – as a cultural unit – and the territory – as a political unit – considered by the Europeans two aspects of the same reality, traditional non-Western normative orders have always been considered as ethnic by the Western jurist.

During colonial times, such a conceptual mistake brought the colonizers to lump everything together by considering all normative orders found in the colonized

territories as "customary", without making any further distinction. Thanks also to the profound ties of traditional African law with the supernatural, the result was that religious normative orders (like Islamic law) were viewed as being part of traditional law.[1]

The situation of legal pluralism is even more complicated than its usual perception since local authorities, chiefdoms of different origins and administrations of the independent state nowadays compete to apply rules that have become competing: state norms ("modern" law) impossible to apply as they are outside of reality, traditional rules "revised and corrected" by the "traditional chiefdom", jurisprudential interpretations, and even arbitrary decisions by despotic officials that distort – or are even contrary to – the official state law [9].

Definitely, the official state law applies. However, this official state law often reserves surprises: insofar as it is known to the authorities responsible for applying it, it may not the same for most of the population (in Africa, for example, official journals are not published regularly, do not always arrive "in the bush", and are not always read with due attention); furthermore, it is not uncommon for such law to contain contradictory provisions.

Legal positivism brought with it the tendency for uniform rules, influenced codification of traditional laws, and encouraged state judges to put aside unwritten forms of law in the name of the need for predetermined rules. The flexibility of rules has been negatively interpreted as a sign underdevelopment. In the process of incorporating informal laws in the official legal systems, courts do not apply informal law, they interpret it. The party who convinces the judge that his interpretation is correct, wins the case. This obviously leads to a distortion of the informal rules.

The above reflections indicate that legal pluralism can be better assessed if the variety of its phenomena of legal pluralism is considered.

First, it shall be determined if state law is a necessary element in a situation of legal pluralism. It is usually assumed that legal pluralism is characterized by the autonomous and simultaneous application of a state and at least one non-state legal system in the same territorial space [See, for example [10], p. 7]. However, the African experience suggests that a negative answer to the question is possible. Somalia has been a failed state for over twenty years, without a legislative body, without a judicial authority that applied any state law. Therefore, in practice Somalia had no state law. Yet, the law has lived. *Xeer* (traditional law) and *sharia* existed and applied.[2] The example is not unique: countries such as Central African Republic, Sierra Leone and Liberia have been in the same situation, albeit for much shorter periods not comparable with the Somali experience, but their experiences remain significant.[3]

[1] The British colonial legislation, for example, often included Islamic law in the wider category named "native law and custom". In France and Italy too, Islamic law was often considered as part of traditional law by the legislation and the colonial legal scholars. See more on this in [6, 7] and, also for a critique of such approach [8].

[2] I defined such phenomenon, where the state is not an actor of legal pluralism, as "atypical legal pluralism". It is more widely described in [11], p. 140.

[3] For Liberia and Sierra Leone, see the papers presented with reference to these countries at the Conference *Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies*, hosted by the United States Institute of Peace, George Washington University and the World Bank on November 17–18, 2009.

This does not mean denying the importance of state law in the analysis of legal pluralism. Ignoring its presence would result in a truncated and not very useful representation of the reality of legal pluralism. On the other hand, recognizing the exact role of non-state law seems essential to underline that normativity can also be present outside the State to the very point where, in certain cases considered, official state law can be relegated to the margin in the daily legal life of families and individuals.

As Rodolfo Sacco observed, law was born before the state and lived for a long time without needing a legislator or legal professionals, which are typical of the Western legal development. It cannot be neglected that the jurist was born in Rome and many non-Western legal realities did not have a jurist (and a technical legal language) before getting in touch with the Western world.[4]

Secondly, legal pluralism cannot be limited to the mere contraposition between state law and informal law, but it must be assessed considering all the components present in a given legal framework, since Western inspired laws are only one of such components, which increased the complexity of legal pluralism already present in many countries.[5]

The European model of the legalist state with its official and positive law introduced in many non-Western territories with colonization, conflicted with the spontaneous and informal laws of the local populations. Consequently, the vision of the state claiming the monopoly in the creation of law clashed with the existence of informal and unrecognized normative orders based on tradition (and having also links with the supernatural) or on religion. The static and formal state-made law was opposed to a dynamic and informal normative system of local origin, and this created the traditional opposition between state and traditional law, based exactly on the different characteristics of such normative orders [15].

The result has been the resistance of the local informal normative systems to laws produced by the state further to rigid law-making processes. All attempts to relegate the former to a residual level failed, while – on the contrary – it has been able to find several spaces for its application as an alternative to the official law. Different are the examples where the legislator succumbed and had to recognize the operation of informal laws.[6]

Most of the Western scholars tend to consider the characteristics of Western law as universally necessary to have law, and when the normative systems present in non-Western countries do not present such characteristics, they immediately brand them as legally inadequate. This is also because, from the Western perspective, a

[4] The theme is widely developed by Rodolfo Sacco, *Antropologia giuridica* [12]. For the African experience, see also Anthony N. Allott, "The Unity of African Law" [13], p. 72.

[5] This phenomenon is well exposed in [14], p. [15].

[6] Using again Africa as example, most of family laws there officially recognize traditional (often still named "customary") marriage. OHADA created the category of "*entreprenant*" to identify entrepreneurs operating in the informal sector to try to include them in the formal legal regime (see Article 30 of the OHADA Uniform Act on General Commercial Law). On the "*entreprenant*" see [16], p. 178. On the *entreprenant* see [17–20]. For the case of the survival of the traditional land tenure system in Eritrea, despite its formal repeal by the official state law, see [21].

country must have only one law that shall be in force, and that law must be observed by all. If some people do not observe it, this is considered as an "anarchical" refusal of the law that shall be combatted, rather than the option for a different normative system [22].

Certainly, the idea that the law present in a given territorial space is only positive, predetermined, imposed on the members of the community and uniquely produced by the state, which has the monopoly of the law-making process, does not work in many non-Western realities. As John Griffiths observed explaining the concept of legal pluralism, "[l]egal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion" [23], pp. [1–3]. In those non-Western realities, a network of informal (due to not being produced by the state and not formalized in tangible instruments) laws exists, and it has been widely demonstrated how informal laws live a life independent from the state law and fit into the gaps of the latter to the point of eroding its fields of application. This situation has determined the current conflictual relationship between state law and informal laws where one competes with the others, and the application of a legal order necessarily leads to the exclusion of the application of the others [24].

Recognizing legal pluralism means excluding a representation of the legal universe where each person is subject only to one normative system because it belongs only to a state with its own legal system. The individual actually belongs to a number of different social entities and is (at least) potentially subject to different normative orders [22–25].

The next step could (and should) be the one where the conflictual relationship between the various normative orders is changed into a collaborative relationship, so that they can complement or, in any case at least not compete with, each other; and the living law suggests us examples that can indicate what could be the right direction see 1. In this sense see also [26]. Such hypothetical cooperation would bring the jurist to frame the informal normativity in the ambit of the sources of law. Here, a possibility that has been put forward is to resort to the general principles of law [27], p. 156]. Intended in a wide sense, as general principles of the legal culture of a given society, even if not arising from a written law, the concept could serve to also contemplate the elements of a non-Western legal culture when considering a given legal system.[7] This, however, always bearing in mind that the so-called "general principles of law" are variable and the related category subject to interpretation (they can be general or particular, universal or local) [28], p. 493; [29], p. 761, and – more importantly – that the interest of distinguishing, identifying, and hierarchizing the sources of law is a mere scholarly interest arising from the use of the Western approach to law.

In general, cooperation moves from recognizing and validating non-Western forms of normativity as legitimate, both by affirming the peculiarity of their being legal and the difficulty, or even the impossibility, of translating them into terms of Western law, since such non-Western forms of normativity and the state are not

[7] As an example, only the publicity of the assembly where matters concerning the community are discussed or of the judicial debate, are general and fundamental principles of the African legal culture.

necessarily talking about the same thing when they talk about "law". Should this legitimation really occur, all these forms of normativity could work together and complete each other whenever necessary. This would also give the possibility to abandon once and for all the idea that law is practiced only in social contexts functioning through the Western model: law exists in all societies and specific cultural values for which the applied normative system serves as a means of support are present at each level of social organization.

It is therefore an issue of managing legal pluralism, that is taking charge of the consequences for the system considered of the existence of one or more normative systems applying in the same territory, to the same persons, in relation to the same matters, finding each time the most suitable solution to avoid conflicts between these existing normative systems [30].

## 3 On Legal Formants and Fluxes

Rodolfo Sacco's seminal article in the American Journal of Comparative Law spread his theory on legal formants among the comparativists.[8]

The expression "legal formants" corresponds to a legal concept that has long been known in comparative law, which usually indicates the set of elements and propositions that are the basis of the solution to a problem or the discipline of an institute or a legal phenomenon, in a given system and in a specific historical moment. On the value to be attributed to the individual formants, the predominant thesis is that all the formants have equal importance and that it is up to the comparatist to ascertain the validity of the formants through a scientific methodology, for which he should not have any type of preference, both in entirety of the formant, as in the elements found within a given formant [32], p. 49. Legal formants within a single system may differ and may not be strictly legal, and within a given legal system with multiple legal formants there is no guarantee that they will be in harmony rather than in conflict [31], p. 23. When present, the disharmony between one legal formant and another in the same legal system may be greater or smaller, or less important. Furthermore, legal formants may diverge from one another [31], p. [33].

There is a close link between legal formants and legal transplants, since the latter largely benefit from the variety of legal formants present in a legal system [34], as they are sometimes due to the work of the lawmakers, while others are from the work of "other legal operators" (scholars, judges) who suggest a specific solution, which sometimes is presented as the best interpretation of the existing domestic norm, such being cases of "hidden transplants" [33].

By "legal flux" reference is made to any data of legal experience of a given system which, being specific to that system, is perceived in another and introduces an element of imbalance there. The perception of the data of legal experience becomes a flux when its relevance is felt in the receiving system, and it is in this moment

[8] Reference here is made to Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law", 39 (1991) *American Journal of Comparative Law* (1) 1 (Part I) and (2) 343 (Part II) [31].

that the context in which perception occurs enters a state of imbalance from which a mutation can result. In fact, the imbalance produced by the legal flux is directly related to the perception and quality of the flow thus produced, and the legal flow is ultimately either rejected or metabolized, since each system tends towards stability [35].

The same idea of metabolization implies that the restoration of the balance results from the interaction of the flux with all relevant elements of the receiving system and from the consequent transformation of both the flux and the receiving system further to such interaction. The outcome will be the result not only of the single transcription of the elements of the legal experience in the receiving system, but of the entire interaction of all elements composing the experience producing the flux (legal and non-legal) with the structure of the receiving system. More precisely, the balance is recomposed by passing from perception to action, that is, to the modification of the actual legal reality of the system in which the perception occurred. This means that the legal flux may produce effects on the receiving system, even if there is no evident reception of a specific norm.

Such approach has an obvious pluralist implication, which involves the inclusion of all elements that concur to compose a legal experience, including those which could appear not having a legal value at first sight.

Legal fluxes shall therefore be distinguished from legal formants, being the former a set of elements of a legal experience which interact with another system introducing there an element of imbalance or variation, while the latter are all those elements which contribute to determine how a given legal system works.

## 4 Diffusion and Legal Transplants

In general, diffusion is considered a mechanism that makes certain the spread of the world culture [36], p. 89. Sociologic studies focus more on the conditions of export and import of ideas and the channels of diffusion, with particular reference to social movements and the diffusion of innovations within and between social organizations [37], p. 218.

What connects the main body of social science literature with the study of diffusion of law is that they are both related to the spread and communication of ideas [38], p. 29 ff, since when legal scholars study diffusion of law, they are also talking about communication of ideas [37], p. 239. In the legal field, diffusion is seen as a widespread, continuing occurrence rather than a series of single, exceptional events [39], and can be defined as the processes by which legal orders and traditions are influenced by other legal orders and traditions [37], p. 229. In the last two decades there has been a very marked increase in explicit interest in diffusion of law, both in terms of scholarly attention and with reference to the different projects of legal unification or harmonization.[9]

[9] These developments are discussed in [40].

The discussion on diffusion of law brought William Twining to fix some key points [30], p. 34 ff, among which the followings are worth mentioning for our purposes:

1) relations between exporters and importers are not necessarily bipolar, involving only one exporter and one importer. The sources of a reception are often diverse;
2) diffusion may take place between many kinds of legal orders at and across different geographical levels, not just horizontally between municipal legal systems;
3) the pathways of diffusion may be complex and indirect, and influences may be reciprocal;
4) diffusion may take place through informal interaction without involving formal adoption or enactment;
5) legal rules and concepts are not the only or even the main objects of diffusion;
6) diffusion of law often involves movement from an imperial or other powerful center to a colonial, dependent or less developed periphery. But there are also other patterns;
7) the idea that transplants retain their identity without significant change is widely recognized to be outmoded.

Diffusion of law materializes in two fundamental concepts in comparative law: circulation of legal models and legal transplants. Both concepts have been (and are still) debated and engaged scholars considerably. Despite being two faces of the same coin, sociological discourses on diffusion and legal discussion about circulation of legal models and legal transplants generally pay scarce attention to each other [37].

Without plunging deeply into the debates related to these important issues in comparative law, we will try to outline the essential features of both concepts to provide a sensible link of them with the glocalization discourse.

The expression "legal model" (or "pattern") refers to the way of conceiving law, its functions and aims according to the characterizing elements common to the legal systems belonging to that given model, so that the diversity of legal systems is reduced to unity according to some fundamental types expressed by the legal models: "legally speaking, models represent for legal systems what, from the geographic point of view, continents represent for the countries"[10] [41], p. 387. See also: [42]. Identifying the legal models gives the possibility to organize the diversity and the multiplicity of legal systems in a series of groups represented by the models. Each model has its own nature, meaning and objective, different from the others; models offer the possibility to understand why, and for which reason some legal systems are grouped with some and differ with others [41, 43], p. 388. The discourse about the circulation analyzes the framework, reasons and ways through which each model expands its influence [44].

[10] (transl. from Italian by the Author).

Circulation of legal models – and therefore their imitation – is caused by two possible reasons: imposition and prestige. The strength of a given culture brings with it the imposition of the related models (not only legal): colonization offers an easy example of this phenomenon. Prestige relates to the fame that a given model built up during times (for example, Italy and France built up a prestige with reference to fashion or food) that brings other realities to try to imitate that prestigious model to try to get to the same achievements. Normally, the circulation will move from the prestigious model to the other [45]; p. 368; [46, 47]. More recently these two reasons tend to melt: we notice, for example, cases where the argument of prestige – that often implies that of efficiency – is used to disguise the imposition of a given model.[11]

We can hardly find a definition of legal transplants among the scholars who deal with this subject. A suitable one defines this way of creating legal norms as "a body of law or individual legal rule that was copied from a law or rule already in force in another country, rather than developed by the local legal community" [49], p. 887, footnote 1. Such definition gives the opportunity of not narrowing the field to state law but includes also the possibility to resort to other normative orders as source of the rule to be transplanted.

The scholarly debate on legal transplant started in the nineteen-seventies with the publication of the famous book on the subject by Alan Watson [50], and range from the extreme optimism of the same Alan Watson – based on the assumption that there are huge similarities between legal systems around the world, that imitation is the determining factor of these similarities, and that most law exists without any specific connection to the local social, economic, and cultural conditions – for whom transplanting is extremely common, the most fertile source of development, and socially easy because "legal rules are not peculiarly devised for a particular society in which they now operate" [50], p. 95 and ff] and then "[l]egal transplants are alive and well as they were in the time of Hammurabi" [51], to the extremely skeptic position of Pierre Legrand, for whom legal transplants are simply impossible [52].

With reference to this paper, casting a glance to these phenomena has merely definitional finalities and a discussion on legal transplants would be out of its focus, so we will not enter into the long-lasting debate on why legal transplants have very often been considered as unsuccessful and what are the conditions for and how to measure "success" of legal reforms based on the importation or imposition of foreign models on this subject: 37. See also [53, 54].

## 5 The Lawscapes

After having briefly described the relevant elements for the discussion about the lawscapes, it is time now to try to put all pieces of the mosaic in place.

[11] An easy example in this respect refers to the circulation of the U.S. legal model vehiculated through the channel of its efficiency and imposed through consultants and economic aid granted to less developed countries that accept to adopt it. On this phenomenon see more in [48].

It is clear that circulation of legal models and legal transplants, as well as the evident or hidden operativity of legal formants, they all produce legal fluxes, which result in a change in the receiving system(s) that will necessarily determine variations in the pre-existing legal situation. How to look at this phenomenon?

Borrowing Appadurai's theory of the *-scapes* that focuses on the creation of different dimensions (ethnoscapes, technoscapes, financescapes, mediascapes and ideoscapes) as a result of what he calls the "global cultural fluxes"[55], we can identify as "lawscapes" those legal situations arising from the circulation of "legal fluxes", and their interaction with the different legal realities present in a given system, which obviously includes the circulation and diffusion of different legal models and/or resulting from legal transplants, but also all other element which are not properly legal but contribute both to the connotations of the legal flux and to the shape of the receiving system.

If, however, the discussion starts from the consideration that law is constituted by the set of rules that govern a specific community, regardless of its size and the level of economic and social progress it has achieved, and from the assumption that the claim of the State to the centrality and sovereignty over the power to make law cannot be accepted, then it will be easy to identify any set of said rules as law, without having regard to the institutional structure that the different communities present. In order to address the issue correctly, it is necessary to adopt an "extended" concept of law, as a system of rules that govern the life of a given society not necessarily produced by a State, especially since many of these normative orders have very similar characteristics to those of state legislation, with the exception of the mechanisms for producing rules.

The field of relations between law and society is then outlined as a space in which a multiplicity of normative orders competes [56], or, rather, different structural places of production of legality interpenetrate [57]. All this is part of the more general discussion on the phenomenon of legal pluralism, on its positive reconsideration, and on the questioning of the fundamentally monistic vocation of the state mechanism of law production, with a view to legitimizing alternative mechanisms of legal production that they do not require state recognition to enter the legal field.

All these elements of normativity circulate, generating legal fluxes that enter in contact with other elements of normativity present in a given legal reality, whose result is the lawscape.

Law becomes therefore a product of the culture of the society it regulates, an element of those cultural fluxes that produce *-scapes* according to Appadurai's theory. At the end, legal fluxes result in new, distinct lawscapes further to the interaction of all the elements composing the legal flux and the receiving system.

What does this mean in practical terms? Let us take again Africa as an example.

Today African scenarios see several new actors producing complex situations that generate different kinds of legal fluxes.

The former colonial powers, especially France, the United Kingdom and – to a much lesser extent – Portugal, try to maintain their spheres of influence by leveraging the historical, cultural, linguistic, and legal ties that connect them to their former colonies. France strenuously defends the application of its legal model in its former colonies, and indeed has used the instrument of legal harmonization in the field

of commercial law (through the Organization for the Harmonization of Business Law in Africa—OHADA) to broaden its sphere of influence on former Portuguese (Guinea-Bissau), Spanish (Equatorial Guinea) and Belgian (Democratic Republic of Congo) colonies and to attempt – but to date without any success – to include countries from the common law legal tradition. The defense of the model is so strenuous that when the aforementioned Organization promoted the preparation of a draft uniform act on contract law choosing the UNIDROIT principles as a reference model, the Civil Law Foundation (*Fondation pour le Droit Continental*) immediately promoted and financed a counter-project with the aim of maintaining a close link of the future OHADA uniform law on contracts with French contract law. Here France has substantially imposed its own model on the decision of the Organization itself which had a different point of view, that of using as model the UNIDROIT principles. The final result has been the abandonment of the harmonization project.

The former English colonies remain faithful in the application of common law. Here the possibility of joining the British Commonwealth (with the consequent benefits of not only economic nature) is the instrument used to try to interfere in the continental equilibria. Thus Mozambique, although not a former English colony and English-speaking country, joined it in 1995. A similar case is that of Rwanda, which adhered in 2009 as the result of a more general country policy aimed at severing ties with the *francophonie* and at moving to the English-speaking world, also thanks to the accession to the East African Community. Then, English became an official language of the country, which is migrating from the Romano-Germanic Belgian-based legal system inherited from the colonial period to a hybrid common law/mixed system to be more in line with the three main countries of the community (Kenya, Uganda and Tanzania) and to have a legal system that supports the goal of establishing Rwanda as the main commercial and economic hub of the region.[12]

The European Union continues to develop new cooperation strategies towards Africa. These strategies towards the African continent are based on some fundamental elements, namely regional integration in Africa; the integration of African states into the world economy; respect for human rights, democratic doctrines and institutions, good governance and the rule of law, the presence of civil society and their role in society, as well as migration and refugee issues; peacebuilding, conflict prevention and resolution; sustainable development, poverty eradication, fight against health and food safety problems as well as drug trafficking and consumption. This fundamental change is the result of the theory that regional trade agreements promote economies of scale and are better suited to international competition. Their purpose is not only to negotiate a general free trade system, but also to facilitate regional integration as a tool to facilitate integration into the global market. Here it is important to note the importance of the political and juridical conditionalities which have been imposed as conditions for the granting of economic aid; in particular, respect for human rights, the promotion of democracy and good governance

[12] See [58]. It should also be remembered that one of the reasons that directed Rwanda in this direction is also the breakdown of relations with France following the 1993 genocide, relations restored only in 2009.

[59]. See also: [60]. Furthermore, European countries are individually developing their own African policies inspired to an egalitarian partnership, which include legal assistance, training of jurists and public servants, cooperation at university level other than some of the elements already present at EU level.[13]

Despite the remarkable downsizing of their role in the African context, the United States nonetheless remains a key player always very active in legal cooperation projects and in the attempt to export the North American legal model. As it has been observed, spreading law – intended as a system – constitutes one of the main tools through which the United States exercises its influence in the global geopolitical scenario [61].

One of the vehicles used for this dissemination is the well-known American Bar Association, which is strongly present with its support programs for legislative reform initiatives that are launched in non-Western countries, like Central and South-East Asia, the Middle East, Latin America and, clearly, Africa. In particular, with its Rule of Law Initiative, the American Bar Association is present in various countries (African and non-African) with the aim of "promote justice, economic opportunity and human dignity through the rule of law" in the areas of governance and justice system strengthening, transitions, conflict mitigation and peacebuilding, human rights and access to justice and inclusive and sustainable development.[14] This goal is pursued through the use of people belonging to the American Bar Association itself and consultants recruited ad hoc for each individual cooperation project, who operate on the basis of a draft prepared in advance by the same American Bar Association, whose real links with the complex targeted non-Western reality must all be verified.

Alongside the American Bar Association, there are institutions such as the USAID government agency (which acts on the basis of the indications of the American Secretary of State) or foundations such as the Ford Foundation or the Open Society Foundations, all committed to promoting and supporting, also (and above all) financially, initiatives that move in the wake of the promotion and maintenance of the rule of law, democracy and governance. To this the incessant action to promote the (American) common law legal model carried out through the activity of the large American law firms must be added. These law firms set up their offices (also using local correspondents) in countries of the African territory hub for commercial investments (e.g. Kenya, South Africa, Nigeria, Senegal, Rwanda) and carrying out consultancy activities in large investment transactions both for foreign investors and for the governments of African countries [62].[15] In the latter case is essential the support provided by the African Legal Support Facility, an organization created on the initiative of the African Development Bank with the aim of providing legal

[13] A recent example is the Italian "*Piano Mattei per l'Africa*" (Mattei's Plan for Africa), launched by the Italian government on 28-29 January 2024.

[14] See the website https://www.americanbar.org/advocacy/rule_of_law/, last accessed 28 January 2024.

[15] For a general overview on the large North American law firms present in Africa see the website https://www.lawcrossing.com/article/900044921/Law-Firms-with-Practices-in-African-Countries/, last accessed 14 January 2023.

advice and technical assistance to African countries in the negotiation of complex commercial transactions, litigation with creditors and other related sovereign transactions, which finances legal assistance by large law firms to African countries for the negotiation of investment contracts or in investment disputes.[16]

In the current context, the South-South cooperation model and the "win–win" strategy constitute the fundamental elements of the foreign policy of emerging presences in Africa, especially China and India.

The massive Chinese presence on the African continent is based on a model of cooperation with Africa with no-conditionalities, in which one of the fundamental elements consists in proposing the adoption of the Chinese economic, juridical, and cultural model as an alternative to the Western one, relying on the fact that the latter produced little results in Africa. Everywhere in Africa, China has opened Confucius Institutes for the promotion and teaching of Chinese language, law and culture, sending teachers in massive numbers to teach – among the others – courses of Chinese law activated in African universities. Apart from this, China is very active towards African countries in promoting fully fledged cooperation programs with the African legal world. The considerable number of scholarships granted to African students to study law in China (mainly master or doctorate) is accompanied by the ever-growing number of Chinese students sent to Africa to specialize in the law of African countries, the opening of research and study centers on Africa and its law, the holding of exchange meetings at all levels of the legal world (academic, judicial, forensic, or organizations for legal integration in Africa such as OHADA) carried out under the coordination of the China Law Society [63].

The existence of these vast areas of activity left unexplored by Western players, combined with the material impossibility for the Chinese giant to be materially on every opportunity, has given the opportunity to countries such as Turkey and India to occupy some of the spaces left empty, also developing their own model of cooperation with Africa.

Historically Turkey has had strong ties with the African continent. The Ottoman Empire had its provinces in Egypt, Libya, Algeria, Tunisia, Sudan, Eritrea, Somalia and maintained commercial relations with Niger and Chad. In 1998 the Turkish government issued a document entitled "Opening up to Africa policy", which inaugurated a new phase of Turkish foreign policy towards the African continent. Using soft power instruments – implementation of development projects, the opening of embassies, the construction of mosques – and by relying on the reference to a common past that unites the two populations, Turkey presents itself as a "brother" of the African continent, a benefactor. To legitimize its presence on the African continent, Turkey implements a win–win strategy to distance itself from the colonial policies used by Europeans to exploit the continent's resources. At the same time, it makes use of these strategies to obtain economic benefits and to mark its presence on the territory on the Turkish presence in Africa see [64, 65]. Turkey has been very active also in the legal sector by financing scholarship programs for African students (that reserved to

[16] See the website www.alsf.org.

Somali students is certainly the most significant) who intend to study in Turkish universities.

The neutral position and its non-alignment in international economic (and non) institutions, combined with historical ties with the countries of eastern and southern Africa (especially South Africa) constitute the main source of the Indian soft power. With specific reference to the African context, the policy promoted by India is based on support for African regional economic cooperation institutional structures (such as SADC, the East African Community, COMESA), and a constant presence of Indian contingents in African peacekeeping missions. More recently, India has supported African leaders on the implementation the Africa Continental Free Trade Area (AfCFTA) on the India-Africa relations see [66], p. 284.

If the collapse of the Soviet Union represented the conclusion of the large-scale socialist experience in Africa with its legal model attached, today we are witnessing a return of the Russian presence in Africa. Russia's new strategy for Africa is primarily through economic, military and security cooperation that builds on a non-colonial past and promotes non-interference in other countries' internal affairs. Russia's other leverage for gaining credit is the energy sector (especially nuclear), crucial for the development of many African countries that still suffer from inadequate infrastructure and continuous blackouts or loadshedding. Furthermore, Russia is resuming its programs to support African students to study there.

The discourse on the Sino-Indian and Russian presence on the African continent inevitably leads us to briefly mention the BRICS variable. Created as an aggregation of the four main emerging countries (Brazil, Russia, India, and China), South Africa was added to it in December 2010, with the clear intention of opening an access route that would allow the presence of the four founding countries to be strengthened on the African continent. The BRICS decided to create a multilateral platform with all African countries that goes beyond bilateral agreements between states and favors the integration and development of the African continent. The recent accession of Egypt and Ethiopia to the BRICS testifies its increasing influence in the African continent. In this scenario, law could also play a significant role. For some years, in the context of the BRICS summits, the legal implications of the common strategies adopted and the possible convergence on some legal aspects that can support common economic policies have been discussed. In addition, the BRICS Legal Forum has been active since 2014, becoming the official forum of the BRICS program in 2018. The BRICS Legal Forum is a high-level dialogue platform to promote communication and cooperation between government officials, lawyers and businessmen from the BRICS countries, which aims to improve mutual understanding and communication between legal circles, promote legal cooperation and strengthen the rule of law in the BRICS countries, exercising legal diplomacy, increasing the decision-making power of developing countries, promoting the establishment of a more balanced international order and system and providing legal support for the political, economic and cultural development of the BRICS countries and the BRICS cooperation mechanism. The intention to move towards common legal approaches, in one to the fact that other African countries joined the BRICS group, allow us to

glimpse new political and legal scenarios to be explored, especially if we consider the next enlargement of the BRICS Legal Forum to the new adherent states.[17]

In the Horn of Africa, the Saudi-led coalition in the Middle East, which includes the United Arab Emirates, is trying to supplant the other axis led by Qatar and Turkey. The Emirates have been particularly aggressive in their activities in Somalia: in March 2018 the UAE company Dubai World reached an agreement with Somaliland and Ethiopia for the development of the port of Berbera, in the separatist region of Somaliland. The Somali government in Mogadishu declared the agreement null, arguing that the agreement violates "the territorial integrity of Somalia" and that the federal government was not consulted before signing.[18] This is because Mogadishu does not consider Somaliland an independent state, while Hargeisa does not recognize the central government authority, even though several countries and investors held already separate political negotiations and trade agreements with Mogadishu and Hargeisa on the implications of this deal see [67]. The following month (April 2018) the Emirates signed another direct agreement to finance the development of the multipurpose seaport of Bosaso, in the semi-autonomous region of Puntland, again not involving the Mogadishu government thanks also to the unclear separation of competences between the central government and the federal states in the Somali provisional federal constitution See more in[68]. Following its investment in the Port of Berbera, DP World launched, in November 2022, the Berbera Economic Zone, backed by a new special economic zone law and a new special economic zone companies' law passed by the Somaliland Parliament using a UAE model, with a view to offer companies operating in the zone a secure and stable business environment.[19] Furthermore, the recent agreement between Ethiopia and Somaliland on an unspecified management of a part of the latter's territory by the former (again strongly contested by the central government of Mogadishu), promises—if effectively implemented—to bring forward new legal fluxes as a consequence of said management on the agreement between Ethiopia and Somaliland see [69, 70].

In this last, complex game involving the Horn of Africa, the common religious denominator is a further variable, as it could lead to a different approach towards the Islamic law principles and their relationship with state law and the soft law of international trade in the countries concerned, depending on which side will prevail in this contraposition.

All the analyses made so far looked at exogenous factors, i.e. situations in which one of the actors in the discourse does not belong to the African continent. It is now necessary to briefly mention the endogenous contexts, i.e. situations in which the actors come from the African continent.

The discourse involves South Africa and Nigeria as the main players, with the latter – despite its internal problems – becoming the economically strongest country

[17] On the BRICS Legal Forum see the website https://bricslegalforum.org.

[18] See https://www.aljazeera.com/news/2018/4/22/somalia-warns-dubai-ports-world-against-violating-its-sovereignty, last accessed 15 January 2023.

[19] See "DP World launches Berbera economic zone in Somaliland" at https://logistafrica.com/en/2022/11/28/dp-world-launches-berbera-economic-zone-in-somaliland/, last accessed 15 January 2023.

on the continent. South Africa, on the other hand, has slowed down its growth significantly and, while maintaining a central importance on the chessboard of the continent and, especially, of southern Africa, is facing internal political problems that prevent it from playing that central role which until recently it had on a continental level and which led it to be included in the BRIC(S) group as an emerging economic power.

Regarding law, however, South Africa can easily play on both "legal fronts" as a mixed legal system. South African law is the basis on which the legal systems of neighboring countries (Zimbabwe, Botswana, Namibia, Lesotho, Swaziland) have developed, and South African precedents are one of the most important references to which local courts turn to for the drafting of their judgments. South African legal materials are often used in the universities of these countries. South African companies have significantly increased their investments in the continent, especially in the mining sector traditionally familiar to South African companies. The main South African law firms have begun a policy of continental expansion by starting to open offices (including representative offices) in the main investment locations of South African companies.

Nigeria, for its part, while grappling with its internal problems deriving from the economic and social imbalance between the north (poorer) with a Muslim majority and the south (richer) with a Christian majority, has by now established itself as the driving force behind the continent from an economic point of view thanks to the revenues deriving from the extraction of oil and related activities. From a legal point of view, Nigerian jurists are actively present not only in the West African region, but also in Southern Africa and South Africa, where there is also a massive influx of Nigerian students.

## 6 Conclusion

As it has been shown, an increasing number of legal fluxes are present for different reasons and from different sources in Africa (and beyond it). They are not produced only by the usual elements such as legal transplants or the borrowing of norms from other jurisdictions. They result by a number of factors which are often not strictly legal from a western point of view, but with which are so strictly intertwined that separating them becomes a non-sense.

Contaminations between transplanted patterns, religious and autochthonous normative orders, political factors, economic influences, produce an indefinite number of new combinations and interactions often flowing into new hybrids resulting in unpredictable changes in the resulting lawscapes. All these insertions determine different consequences in different legal realities, and the resulting lawscapes are characterized both by the local peculiarities and by elements of the legal fluxes operating there.

The combined effect of legal fluxes and local normative elements subverts the classic approach to normative orders and their hierarchic order and perfectly represents the changes we face today about the same concept of law in present times. Territoriality entailed a solid character of the legal systems, which made the various

legal hierarchies easily detectable; but, with the presence in the lawscapes of countless mixes between global and local elements, legal systems began to lose their fundamental characteristics due to this dialectical dimension determining increasingly nebulous hierarchical structures.

The (Western) jurist is used to consider the law-making process as one of the possible ways of expressing the sovereignty of the state, a sovereignty that is exercised on a certain part of the earth's surface, the territory, which measures the scope of expansion of sovereignty – also legal – of the state. Law, thus, assumes a spatial dimension which corresponds to that of the state. If law with a legislative matrix is a law with a territorial dimension, limited by national borders, with the presence of legal fluxes that easily circulate thanks to the effects of globalization (among which the increased circulation of people around the world, which implies circulation of cultures too), law tends to lose its territorial connotation to take on new forms dictated by different types of relations and legal instruments involving different places and subjects in the global space. Legal spaces thus become variable and no longer coincide with the state territory, determining different lawscapes, and it is the daily practice that determines the field of application of the single normative order [48, 71].

With the advent of globalization and the rise of the economy on a global basis and the tools made available by the network – all elements that know no boundaries (indeed they reject them), have no places of belonging, can spread, and take root everywhere – the concept of a fixed and determined space dematerializes. Boundaries are crossed in a soft way, without affecting the territorial boundaries but such "trespasses" are so continuous and relevant as to redesign the world economic, political, and legal coordinates the theme is developed in [72].

As a result, countless lawscapes can be observed through a careful consideration of legal realities. Moving from the acknowledgement that globalization is inevitable also in the legal field, and that the process of dematerialization of legal boundaries is depriving territorial states a considerable part of their role with reference to law (states still manage to preserve a central role in legal matters concerning public administration, crimes, personal status, family and inheritance), through glocalism the State tries to save its position in the process of legal development today.

Legal fluxes do not stay within their geographic boundaries but invade other jurisdictions. The resulting lawscapes are determined by the interaction between the fluxes and the local normative elements. However, these relationships are played not only within the more limited field of the law by using the prestige of the legal system, but they are part of a wider game involving economic, political, and cultural dimensions, so that law has become just one of the different circulating fluxes. Observing lawscapes will therefore offer a clearer and more complete pictures of the legal dynamics acting in a given area.

Furthermore, legal fluxes and the resulting lawscapes are a clear sign of the present de-territorialization and spatiality of law. The jurist (at least in the Western approach) is used to consider the production of law as one of the possible ways of expressing the sovereignty of the State, sovereignty which is exercised over a specific part of the earth's surface, the territory, which measures the scope of expansion of the sovereignty – including the legal – of the State. The law thus takes on a

spatial dimension that corresponds to that of the state, a dimension that identifies the "where" the legal norm is applied, and which is combined with the "when", i.e. the period of validity of the norm itself. The legal norm thus becomes a norm in a given place and at a given time. State law today finds itself facing the continuous advance of a law with a global vocation which could be defined in a paradoxical way, as a law "without", being it characterized by some illustrious absences, of which at least two are relevant for such "global" law: that of legislation, with its "authors" easily identifiable and politically connoted, and that of a territory of reference see again broadly [71, 72].

Taking into consideration the African case study described above, it looks like that the trend is for a further increased circulation of legal fluxes with continuous mutations of the lawscapes, at least in the next future, considering also that law today is not only the mirror of the society, but also of economy and serves both. Only a proper balance among all elements involved would prevent all these interactions to have effects more disruptive than those already happened.

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