ems. In this regard it can be argued that law schools should not merely focus on eaching the law as it is, but should also try to anticipate and shape the law of the ıture by the imaginative design of their programmes. The ultimate goal is to rovide a platform for legal research and thinking which encourages African schol-rs, students and judges to develop the ability, mind-set and confidence in looking t the jurisprudence and laws of their neighbours for possible solutions to legal roblems in the country. At a time of rapid changes, increasing globalisation and egionalisation, a purely national perception of the law or legal education is no ınger sustainable. An Africanised programme that includes a course on African gal studies should aim to be contextually and globally relevant as well as being ufficiently innovative and flexible to address the urgent needs of our times. There is o longer any justification for continuing to follow programmes based almost xclusively on Western legal discourses when this will not only perpetuate the ıarginalisation of African legal developments, but will also alienate African stu-ents from the geographical, social, economic and cultural milieu in which they live ıd operate.

Chapter Two

Comparative Law in the African Context*

Salvatore Mancuso†

1 AFRICA IN COMPARATIVE LAW

Historically, African law has not had much room within the ambit of comparative law studies. Using a lot of simplification (or superficiality?), comparative law scholars have liquidated African legal systems by classifying them through simple reference to the system inherited during colonial times. From time to time, it is noteworthy that there has been reference to the Muslim legal tradition in those countries where Islam is predominant. Although the first thought goes immediately to the Muslim religion which represents the widest religious component in Africa as long as law and religion are concerned, the Judeo-Christian influences and the Coptic element from Ethiopia cannot be underestimated.

Having looked at the scope and definition of comparative legal research, comparative law scholars selected the normative orders to be compared based on their similarity. Studying African law with its peculiarities is definitely more challenging, since it requires a radical shift in thinking — it is not possible to deal with it using the traditional methods of legal research.[1]

African law is almost absent or relegated to a marginal role in the classical comparative law literature based on a Western-centred approach. In 1928, in Wigmore's *A Panorama of the World's Legal Systems*, the presentation of the African continent as one dominated by the civil law and the common law legal traditions with some insertions of Islamic law or customary law[2] was made. After the Second World War, the African political situation changed dramatically together with the orientations of comparative law, but such changes did not consider Africa and its law, which remained locked within the classic bipartition between civil law and

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† Chair, Comparative Law in Africa, University of Cape Town; Honorary Professor of African Law, Centre for African Laws and Society, Xiangtan University; Member of CREOP EA 4332-Université de Limoges (France).

1 TW Bennett 'African Customary Law' in *The Oxford Handbook of Comparative Law* (2006).

2 JH Wigmore *A Panorama of the World's Legal Systems* (1928).

ommon law.[3] The assumption was that the new developments of the African ontinent did not determine a rejection of the Western patterns; rather, that their ronger expansion, were that these laws were the backbone of the African legal ystems.[4] Consequently, the most distinctive characteristics of African law were elegated to a marginal position,[5] and the comparativist continued to consider the frican legal systems as expressions of legal families 'living' somewhere else.[6]

Those classifications were created in a historical period where comparative law as (and to some extent is still) dominated by an ethnocentric vision. Only a more cent — even pluralist — vision started to give to African law the same dignity as ne other legal families.[7] Increasingly, a renewed interest of China in Africa, accomanied by the opening of African law studies in China, certainly contributed to this ew vision on Africa and its legal features, even though legal research on African law China is still blossoming.

I believe that a preliminary clarification on what we are talking about is necessary correctly structure the debate on issues of African law within the comparative law ontext, and vice versa.

The expression 'African law' refers to a 'legal family'[8] that does not comprehenvely cover the African continent as a whole. The Sahara Desert divides Northern frica and Southern Africa not only geographically but also culturally. Historically, orthern Africa has had greater interaction with countries of the Middle East and ne Mediterranean than with the countries of Southern Africa, with the result that ne region's cultural structure, including its legal framework, has much more in ommon with Middle Eastern and Mediterranean jurisdictions and it can be studied ore as a part of the Middle East region than within African law.[9] South Africa, in rn, definitely shares most of the features of African legal systems (also in terms of evelopment), but at the same time it cannot be neglected how it underwent an tense Europeanisation process, which makes its experience a bit different from at of other countries in the (sub-Saharan) continent, and of which it is necessary

R David & C Jauffret-Spinosi Camille *Les grands systèmes de droit contemporains* 11 ed (2002); K Zweigert & H Kötz *An Introduction to Comparative Law* 3 ed (1998); P de Cruz *Comparative Law in a Changing World* 2 ed (1999). On a non-Western-centred approach, but without expressly mentioning the African experience is HP Glenn *Legal Traditions of the World: Sustainable Diversity in Law* 4 ed (2010).

David & Jauffret-Spinosi (n 3).

L Moccia *Lo studio dei diritti africani nella comparazione giuridica: brevi note*, in *Studi giuridici italo-ivoriani* (1992).

M Guadagni 'Il diritto dei Paesi africani nella letteratura' 1984 *Contemporanea*.

R Sacco *Sistemi giuridici comparati* 3 ed (2009); D Moura Vicente *Direito comparado* (2008); W Menski *Comparative Law in a Global Context* 2 ed (2006).

The issue of African law as a legal family will be analysed afterwards.

K M'Baye 'The African Conception of Law' in (1974) 2 *International Encyclopaedia of Comparative Law* 138–158.

A practical example is the Mediterranean Legal Hybridity project, launched by the Juris Diversitas group, aiming at investigating legal and normative diversity across the Mediterranean, and including African countries facing the Mediterranean Sea, on which see SP Donlan 'The Mediterranean Hybridity Project: Crossing the Boundaries of Law and Culture' (2011) 4 *Journal of Civil Law Studies* 355–396.

to take into account when studying it together with the other sub-Saharan African countries.

Therefore the area or space in Africa to be studied by the comparative lawyer is smaller than the actual geographical area commonly known as Africa or measured by the geographer.

The traditional approach towards African law also led comparativists to adopt the — almost pre-packed standard — methodology in dealing with the legal systems present in the African countries. This methodology revealed its inadequacy to appreciate the real peculiarities of African laws and their diversity. A different, stratigraphic, approach has therefore been developed to try to understand law in Africa and its dynamics better.[10]

This brings us to a first observation: comparing in Africa is definitely different from comparing in other places.

2 COMPARING IN AFRICA

What does this mean to compare in Africa? Comparing in Africa is not easy. There are different normative orders that co-exist within African law; they are characterised by contradictory elements too. It could be relatively easier to talk about single or distinct components of African law: authoritative law (either colonial or independent) is not very different from European law. Traditional law is present mainly in the areas of marriage and family institutions, land tenure regimes, and so on. But written African law is not the whole African law; in addition, African traditional law is not the whole of African law. We have to reconstruct the meaning and features of African law and put them in a general framework.

Accordingly, the activity of 'comparing' in Africa should first aim to reconstruct meaning and features of all African law elements and place them in their specific place in the ambit of the general framework.

Such elements were either born in or introduced into Africa at different times, even if, however, they appeared in all African countries approximately at the same time. Consequently, it is possible to consider African law as made out of superimposing layers, each one part of a complex reality.

The most ancient layer is that commonly called 'customary law', to use an unfortunate expression that does not render the exact characteristics and peculiarities of such an essential layer including very different legal displays that followed one another in the centuries without losing some elementary and constant charac-

[10] For the Italian doctrine see R Sacco *Introduzione al diritto privato somalo* (1973), idem *Le grandi linee del sistema giuridico somalo* (1985), idem *Il diritto africano* (1995); M Guadagni *Il diritto in Mozambico* (1989); idem *Il modello pluralista* (1996; idem *Xeerka Beeraha. Diritto fondiario somalo* (1981). Among the English-speaking authors adopting such approach are RB Seidman 'Law and Stratification: The African Case' (1979) 3 *Crime, Law and Social Change* 17; M Bogdan 'Legal Pluralism in the Comoros and Djibouti' (2000) 69 *Nordic Journal of International Law* 195–208. Among the French-speaking authors see C Ntampaka *Introduction aux systèmes juridiques africains* (2005); J Vanderlinden *Les systèmes juridiques africains* (1983), idem 'Villes africaines et pluralisme juridique' (1998) 42 *Journal of Legal Pluralism and Unofficial Law* 250.

eristics.[11] As already noted elsewhere,[12] the idea of 'customary law' is often eferred to as something static, thus stressing ancient origins and permanent eatures. However, in Africa such a view does not correspond to the reality of what ve could better call 'indigenous' or 'traditional' law in a given society at a given ime, it being a complex of elastic rules which are the recent product of an ongoing egal process that never stops. It is exactly through such comparative analysis that ve understand how law is like a river which is always there, but its running waters re never the same.

If we change our visual angle we cannot forget that African state boundaries have nostly been mapped out by colonising powers on the papers using geographical nes without any consideration for cultural and group locations. It is well known hat many Africans still identify themselves firstly by their tribe or region of origin, ınd secondly by the state in which they are bordered, and that there are many :xamples of state borders that cut through the middle of villages or groups; while vithin the same state there are different communities with their own systems of egal rules. Therefore, grouping the different indigenous laws into one group to :xpress the traditional law of an African state would not make sense; such common :onsideration would otherwise be essential to understand the common features ınd peculiarities of African indigenous laws, and comparative law and its (African) nethodology would be essential for this kind of investigation.

The following layer is the colonial one, which normally marks the period from the ate 1880s to the end of the 1960s. It is worthwile mentioning the previous ɔresence of other colonial influences such as the Chinese and the Persian coming rom the Middle East which anyway did not leave any trace in the area of law.

Then, the layer of the post-independence law followed, where we can note the ıppearance of legal models inspired by those of the socialist countries, and the :mergence of a domestic law of the new states linked to that of the formal :olonising country with some links to the local specificities.[13]

It has been a long time since the attainment of independence for most if not all African countries. Successive stable African countries have reviewed, amended and n so doing updated their laws such that the colonial antecedents have now ɔecome the first layer of law. Most constitutions in Africa are now the absolute law ɔf the land from which other laws develop their legitimacy. The significance of this s that where provisions in other laws including customary laws are found to be nconsistent with those of the respective constitutions, such laws are null and void ınd the constitution's provisions will prevail. This pattern is now prevalent in Africa ɔaving the way for an African transnational law.

At the end of the last century the layer of the African transnational law emerged: legal integration is a must in Africa today.

[11] Surely more appropriate is the French expression 'droits originellement africains' created by J Vanderlinden *Systèmes juridiques africains* (n 10).

[12] Sacco *Introduzione* (n 10) 17; S Mancuso 'African Legal Hybridity: Interaction of Western, Islamic and Native Law in the Comorian Legal System' in E Cashin Ritaine, SP Donlan & M Sychold (eds) *Comparative Law and Hybrid Legal Traditions* (2010).

[13] Guadagni *Il diritto* (n 10) 8.R. Sacco 'The Sub-Saharan Legal Tradition' in M Bussani, U Mattei, *The Cambridge Companion to Comparative Law* (2012) 326.

The use of comparative methodology for Africa law(s) gives us the opportunity to research into the multi-layered nature of law conferred by the continent's history. Indeed it is only through the optimal application of comparative law that we can develop a discipline that lends itself to the integration of Africa's unique legal systems.

3 COMPARATIVE LAW IN THE AFRICAN CONTEXT

Currently the discipline of African comparative legal studies is quite weak. Most, if any of the experiences of comparative law works involving African law(s) tend to consider the local situation vis-à-vis the patterns imported during, and rooted after, the colonial period, as well as such local situations compared to those present in the former colonising power. Therefore, the direction has always been to compare Africa and the developed Western world. It can be safely said that almost nothing has been done in terms of comparison among African countries and their legal systems, even though using comparative law instead is essential for a variety of reasons.

Enhancing comparative law in the African context has instead several important consequences. First, in developing law in the African context, Africans should understand that the proper study of comparative law allows the understanding of alternative legal systems, allowing people to form an idea about the existence of a different, African, concept of law. This is important for African scholars, most of whom shy away from publicising African law. Such approach is also an instrument which leaves from the idea that the Western concept of law is the only possible one or the right one only because it comes from the Western world. In addition its gives equal dignity to concepts of laws different from the Western one simply because they are the product of human beings who — by definition — are all equal. Such acknowledgment will also allow many African scholars to consider their legal cultures and systems from a completely different perspective.

African law studies today are entering into a new stage based on the re-evaluation of the African legal culture(s). This re-evaluation is not only a mere scholarly exercise, but it is also a concern for legislators. Mozambique officially recognises the presence of different legal orders within its legal system,[14] the OHADA legislator feels the need to intervene on the Uniform Act on General Commercial Law to try to bring together the actors of the informal sector with the official law.[15]

Here the comparativist can call for the anthropologist's help when necessary, and use anthropology's research methods to handle the phenomenon of legal pluralism present in the legal systems of African countries.

This discourse opens the door to another comparative law issue in the African context: the research on African customary law(s).

The traditional unwritten nature of the African customary law defied many

[14] See art 4 of the Mozambican Constitution, 1990.

[15] Introduction of the *entreprenant* (small entrepreneur, similar to the Italian 'piccolo imprenditore') by the new art 30 of said Uniform Act. Here also comparative law is essential to understand an institution alien to French law.

ttempts to codify it, and even if 'a code is necessarily antithetical to customary w',[16] such kind of endeavours are still made.[17]

Here again the comparativist can call for the anthropologist's help for interdisciplinary research between comparativists and anthropologists. They show us that ne writing in itself does change the nature of its creation since African indigenous w is made by a spontaneous legal rule whose validity is in the factuality (it exists nce it is applied) and not since it is written in the paper. The problem arises when uthority is given to the text where the 'custom' has been reported without onsidering all those external circumstances that are important for the elaboration f a single rule, thereby giving the value to the text and depriving the 'custom' itself f the aforementioned adaptability and flexibility.[18] Spontaneous law is by nature ot linked to any hold and it can change whenever the circumstances render it ecessary; any written law, by its nature, cannot change until it is re-written.

It should be also taken into consideration that any attempt to verbalise the African ndigenous rule will be done with the use of a language whose terminology implies gal concepts in most of the cases extraneous to the indigenous African languages. n so doing, one runs the risk of misunderstanding its meaning. Yet, the traditional frican rule is brought to give significance to elements and factors that a Western urist will likely not consider as legally relevant. This is because the African society is naracterised by images or a vision of life where everything is linked: life and the upernatural, human behaviours and natural phenomena, law, power and that hich is sacred are linked. The application of the rule is traditionally not directly ntended to punish the guilty, but to consolidate the cohesion and to restore accord ithin the group.

TW Bennett & T Vermeulen 'Codification of Customary Law' (1980) 24 *Journal of African Law* 206–219, 219.

There is a wide doctrinal contribution on the issue of 'codification' of indigenous laws and the related problems. An important part of it can be found in the chapter titled 'The Ascertainment of Folk Law' in vol I of A Dundes Renteln & A Dundes (eds) *Folk Law: Essays in the Theory and Practice of Lex Non Scripta* (1995). See also Bennett & Vermeulen (n 16). The Restatement of Africa Law Project (ALP) was a systemic examination and recording of the different indigenous laws used in African countries; on which, see AN Allott (ed) *Integration of Customary and Modern Legal Systems in Africa* (1971). Today a project on codification of local customary laws is ongoing in Namibia; on which, see MO Hinz 'The ascertainment of customary law: What is ascertainment of customary law and what is it for? The experience of the Customary Law Ascertainment Project in Namibia' (2012) 2(7) *Oñati Socio-Legal Series* [online journal] 85–105. The Faculty of Law of the University of Bissau has also finished a collection of the traditional law of the main ethnic groups of the country, representing more than 80% of the country's population; on which, see F Loureiro Bastos *Relatório final do projecto de recolha e codificaçao do direito consuetudinário vigente na República da Guiné-Bissau* (2012).

R Sacco *Il diritto africano* (1995); LP Vorster 'Indigenous Law and Development' (1985) 1(2) *Development Southern Africa* 38–43; Bennett & Vermeulen (n 16). For the contrary, see H Lévy-Bruhl 'Introduction à l'étude du droit coutumier africain' (1956) 8(1) *Revue internationale de droit comparé* 67–77, 74; WL Twining *The Place of Customary Law in the National Legal Systems of East Africa* (1964).

Moreover, it cannot be neglected that African state boundaries have mostly been delineated by colonising powers based on lines of longitude and latitude without regard for cultural and communities' locations, and that many Africans often identify themselves principally by their ethnic group or region of origin, and to a lesser extent as belonging to a state in which they are bordered. There are many examples of state borders that cut through the middle of villages or communities, and within the same state there are diverse communities with different systems of laws.[19] The potential for studying these traditional systems of law, as well as their interaction with the official state law, presents a practical problem in the methodology of studying African systems of law. Here comparative law is therefore essential to develop such kind of methodology. Comparative law is also an essential tool for legal integration in Africa.

It is commonly mentioned that one of the purposes of comparative law is the contribution it can bring to the development of a state legal system. If we move to the development of a legal system at a transnational level, two phases can be distinguished where comparative law can be of considerable help: (i) involving a reflection on the need for legal integration, and (ii) aimed at determining the best way to realise such legal integration.

At present comparative law here gives the opportunity to reveal the status of legal diversity first, that yet is an element that can be used in favour or against legal integration; then comparative law intervenes as a tool to evaluate the opportunity of legal integration, to verify if the legal diversity it contributed to individuate is the source of the problems that legal integration intends to solve, being legal diversity neither the only reason justifying legal integration, nor a value to be kept at any cost.[20]

Once the need for legal integration has been established, it is necessary to determine how to do it.[21] Here comparative law can play a decisive role in individuating the most suitable methods for the legal orders to be integrated in respect of their legal diversity, and this through the research of solutions common to the legal systems to be integrated that can be done using comparative studies.[22] Here comparative law can contribute to the coherence of legal integration, taking into account legal diversity, and preserving legal pluralism.

As mentioned above, the newest layer in African law is represented by transnational law produced through epiphanies of legal integration already in place (OHADA), or still to be initiated (SADC).

The OHADA experience — which is based on a mere transplant of the French pattern with small modifications — reminds us of the difficulty of its day-to-day application on the one hand owing to its complexity for the majority of the people,

CN Okeke 'African Law in Comparative Law: Does Comparativism Have Worth?'

V Robert & L Usunier 'Du bon usage du droit comparé' in M Delmas-Marty (dir) *Critique de l'intégration normative* (2004).

For an overview on the processes of legal integration see S Mancuso 'Trends on the Harmonization of Contract Law in Africa' (2007) 13 *Annual Survey of International & Comparative Law* 157–178.

Robert & Usunier 'Du bon usage' (n 20).

ıd on the other, due resistance to abandon the assumed French pattern whenever has been deemed necessary.[23] The need to take into account African specificity as, moreover, a concern present at the time of the preparation and discussion of ıe draft OHADA Uniform Act on Contract Law worked out by Professor Marcel ontaine, who observed that

> It is essential nevertheless to take into account of African specificities, in order to bring the necessary adaptations. Everyone agreed on that. However, my interlocutors then tested many difficulties of identifying specificities suitable for the contract law, which would be common to the area, if it is not the generally high degree of illiteracy.[24]

ıose two situations are clearly an example of the scarce use of comparative law hen dealing with African law issues. As it has been observed, the main concern of ıost of the African scholars is the studying and focusing of and researching in reign or imported laws, since African legal systems have been founded on ıposed law. Moreover legislators continue to use unfavourably foreign legal ılues, concepts, models and rules, and the issues of adapting borrowed law to the frican legal values or creating peculiarly local laws are usually hardly addressed.[25]

The result, then, is what we see in Africa today: a large number of laws copied om Western models which remained a dead letter application.[26] It is thanks to the se of comparative methodology that it has been possible to understand that Vestern laws transplanted to Africa to solve legal problems may not operate as xpected, and in the same way as in the country from where they have been ansplanted.

This is the case of the OHADA Common Court of Justice and Arbitration, which decides on the merits of the case too, breaking with the French *Cour de Cassation* model. The reason of such choice has been identified in the necessity to avoid the slowness in the final definition of the cases deriving from the necessity to carry out the dismissal judgments, and to prevent resistances in the application of OHADA law from domestic courts; on which, see FM Sawadogo 'Présentation de l'OHADA: les organes de l'OHADA et les Actes Uniformes' paper presented at the 'Afrique, art, intégration économique et juridique' conference organised by the Faculty of Law of the University of Cairo and by Club OHADA Egypt, 6 April 2006, at 4. Some authors objected to this abandonment of the French model in favour of the present one judged to be too similar to that of common law (see for example E Assepo Assi 'La Cour Commune de Justice et d'Arbitrage de l'OHADA: un troisième degree de jurisdiction?' (2005) 57(4) *Revue Internationale de Droit Comparé* 943–955).

M Fontaine 'L'avant-projet d'Acte uniforme OHADA sur le droit des contrats: vue d'ensemble' (2008) 13 (1/2) *Revue de droit uniforme* 204.

K Kibwana 'Enhancing Co-Operation Among African Law Schools: Comparative Law Studies Within the African Context' (December 1993) Centre for Human Rights Occasional Papers, Paper 4.

Sacco *Il diritto africano* (n 10); J Mande Djapou 'L'état du droit civil en République Centrafricaine' in J Willbiro-Sako (ed) *Le rôle de la justice dans le développement de la R.C.A.* (1991); Bennett & Vermeulen (n 16); G Krzeczunowicz *The Ethiopian Law of Extra-Contractual Liability* (1970).

Legislation that claims to have been enacted to solve problems, but is not observed and enforced, is therefore a common situation in Africa. Most of the laws copied from the Western model did not adapt to the African legal culture because those patterns do not share the same values of the people where they have been transplanted, since the adoption of the Western pattern implies in Africa a revolutionary change. The abandonment of the community-centred approach in favour of a model based on individualism and centralisation of law has created a problem: that of adaptation and effectiveness for this transplanted and imposed law.[27]

Indeed, since African legal systems are particularly dysfunctional in those fields where African forms of social organisation have been resistant to external influences,[28] it is clear that a major goal of comparative law in African countries is to solve legal conflicts arising from the frequent combination of 'traditional' forms of law with statutory laws.

It is then clear that the comparison of legal systems in the (sub-Saharan) African countries, which are more similar with reference to the economic, cultural, social, and historical circumstances, is of more practical value in solving Africa's legal problems: since African countries are all in a transitional stage of legal development, they can learn from one another. The use of comparative legal methodology — aiming through the analysis of legal formants acting in each legal system at finding similarities and differences not only in the law in the books, but also in the law in action — will be here of incomparable help, in search of those common principles present in the different African legal systems and their different layers, representing the common core of African law,[29] principles that are essential to properly put in place legal integrations that might be accessible and understandable for the population involved.

Several directions have been traced for affirming the central role that comparative law can play with reference to the study and understanding of the legal phenomenon in Africa, among which are the following: the effectiveness of transplanted foreign laws in Africa; the effectiveness, presence and evolution of the use of traditional laws in today's African legal systems; the common principles of African traditional laws; and the research of the common core of African law.

4 AFRICAN COMPARATIVE LAW AND ITS METHODOLOGY

Reference has been made many times above to the 'methodology' proper to comparative law and its application in the African context. Some aspects have been

[27] On this point see V Kangulumba Mbambi 'Les droits originellement africains dans les récents mouvements de codification : le cas des pays d'Afrique francophone subsaharienne' (2005) 46(1–2) *Les Cahiers de droit* 315.

[28] JS Read 'Law in Africa: Back to the Future?' in I Edge (ed) *Comparative Law in Global Perspective: Essays in Celebration of the Fiftieth Anniversary of the Founding of the SOAS Law Department* (2000) 177.

[29] I proposed this approach with reference to the possible future legal harmonization of business law in the SADC region in my 'Legal Integration in the SADC Region: Some Methodological Reflexions' (2011) 6(1) *Journal of Comparative Law* 146–160.

utlined already: the analysis of the legal formants acting in the different legal ystems;[30] the stratigraphic approach to the study of African law.

It is time then to say a few words more on this issue.

The search for legal formants as those elements that make any given rule of law mong statutes, general propositions, particular definitions, reasons, holdings, etc, order to know what the law is, is of great importance in the African context, here in addition to the influence of Western systems, the methodology of law aking is not only by the state, but also by social groups. Identifying the legal rmants present in the African legal systems gives the possibility to take into ccount factors that are normally ignored by the Western jurist.

Such an approach will open the door for the understanding of a different concept f law against the (Western) positivist approach based on the state monopoly over ne law. Comparative law accompanied by a 'pluralist' vision is then essential to dentify the African concept of law and its peculiarities,[31] being social phenomena nat are undifferentiated in Africa, so that it is impossible — and even useless — to eparate what is juridical from what is religious, supernatural or economic.[32]

As seen above, the unique feature of comparative law in the African context is the nassive presence of 'traditional' law.

In studying the traditional African laws a major difficulty lies in understanding and tudying those legal systems, since African cultures ignore the role of the jurist and frican languages do not have legal terminology,[33] most of these systems are not ncorporated into a written instrument, having been recorded through studies by nthropologists, and very few have been formally incorporated as part of the laws of frican countries. And even more, the full understanding of the traditional systems vould also require a greater knowledge of the way the culture and social relations re conducted in the region.[34]

Out of the issue of the uselessness of African traditional law 'codification' already iscussed before, the abovementioned difficulty can explain why so few compara- ve studies have been done on traditional systems of law in Africa.[35] In this way the ractical methodology of studying autochthonous African legal systems differs in ne fundamental aspect that they are often unwritten and require far more effort han studying written laws. However, as the methodology for studying these ystems of law is different, so the outcome and knowledge to be gained through tudying these systems of law is different too, making the methodology relating to omparative law studies in Africa unique.

[30] R Sacco's theory on the legal formants is described in his 'Legal Formants: a Dynamic Approach to Comparative Law' (1991) 39 *American Journal of Comparative Law* 1–34 (Part I), 343–401 (Part II).

[31] On the African concept of law see M'Baye 'The African Conception' (n 9).

[32] Lévy-Bruhl 'Introduction à l'étude du droit coutumier africain' (n 18) 67–77.

[33] See R Sacco *Antropologia giuridica* (2007) 196; JF Holleman *Issues in African Law* (1974) 13; AN Allott '*The Unity of African Law*' in *Essays in African Law* (1960) 59–71, 61.

[34] Okeke 'African Law' (n 19).

[35] For an example see R Sacco 'Di alcune singolari convergenze tra il diritto ancestrale dei Berberi e quello dei Somali' (1991) IV *Scritti in onore di Angelo Falzea* 395–429.

Indeed, the traditional categories used in first analysing a system of law do not traditionally apply. African systems of law are often a combination of the above-mentioned layers in a unique mixity that cannot be understood without ridding oneself of the Western approach to comparative analysis.

Here the comparativist shall be open to take on board the anthropologist and the linguist to conduct an effective comparative analysis of traditional systems of law in Africa, in order to discover that common core of the African legal cultures that could help the African transnational legislator in taking into account the African specificities when creating new laws.[36]

The application of comparative law is therefore not an academic luxury for Africa; given the continent's history, it is necessary for managing and integrating its unique legal systems.[37]

More generally, comparing in Africa with a proper methodology means rethinking African law. African law(s) has always been considered (also by most of the same African scholars who studied out of the continent) with the indulgence used by superior people towards those who are not considered to be at the same level. African laws have been considered negatively, since they do not have the precision, the predictability, the unity, the rationality, the transparency, and the publicity of Western written laws; they are reproached for being flexible, multiple, verbal, too mixed with moral and religious elements, and for this reason uncertain, unpredictable, irrational, and not proper legal instruments.

Many scholars simply ignored any legal instrument different from the Western pattern, others tried to reformulate, recompose, and reduce African law to Western classifications and taxonomies. But, as Jacques Vanderlinden observed,

> For many decades too many apprentice witches harmed Africa a lot in the area of law, so that we cannot [. . .] always hold our head high with our neo-colonial arrogance. Too many apprentice witches believed, and still believe, that patterns invented by the white man have universal value susceptible to be transplanted in other societies. The worst thing is maybe that we transmitted part of this boundless attitude to some of those which we invited to adapt to such pattern, by separating them from their people and encouraging them to apply these magic prescriptions which should have transformed their societies in the name of legal engineering.[38]

Rethinking African law(s) means considering the abovementioned features not as defects any more, but as peculiarities and values of the African culture, representing perhaps what has been defined as the 'African dimension of law'.[39] Applying

[36] An example in S Mancuso 'Le droit OHADA vers sa population. Y-a-t'il une place pour les droits originellement africains dans le processus d'harmonisation du droit des contrats en Afrique?' paper presented at the 'Les pratiques contractuelles d'affaires et les processus d'harmonisation dans les espaces régionaux' conference, Libreville, Gabon, 25–27 July 2011.

[37] Okeke (n 19).

[38] J Vanderlinden 'Quo vaditis iura Africana?' (1997) 8 *Jahrbuch für afrikanisches Recht* 161–177, 176.

[39] Vanderlinden 'Quo vaditis' (n 38) 163.

omparative methodology and studying African laws comparatively is an essential ep in this direction.

AFRICAN LAW AS A COMPARATIVE LAW MODEL?

he remarks made above prove again — if there is still any need — how the simple assification of common or civil legal system cannot be used to identify the African gal systems; the civil or common law legal tradition being a layer that has been dded on top of a previously existing traditional and/or religious legal system.

The last issue dealt with in this chapter — if African law can be seen as a omparative law model — presupposes first to determine if African law (seen in its ntirety, including official and unofficial African legal systems and their specific ynamics of functioning and interaction) can be considered a 'legal family'.

There is a general consensus among comparative law scholars in not admitting frican law to the narrow circle of the legal families of the world, opinion clearly nfluenced by the traditional (Westernised) approach to the study of African law.

'Legal family' has been traditionally used to identify a group of legal systems haring the same determining elements, following the classification proposed by ené David.[40] His approach was immediately successful, since all scholars convened n the necessity of presenting legal systems grouping them by families, but David's ivision also received the most (and different) critics.[41] Today the distinction that is nore in fashion is based on the concept of legal tradition proposed by H Patrick lenn,[42] and intended as a large quantity of normative information that may athered over a very long period of time, which can be considered as a living legal adition when it continues to be operative over time.[43]

Using Glenn's taxonomical approach, the reflections previously made concern- ng the methodological specificities necessary to deal with the African legal systems, s well as the originality of the dynamics of functioning and interaction of the ifferent legal orders present within the legal systems of the African countries, nould be elements for considering African legal systems as having a legal structure 'ith specific peculiarities and differences from the legal traditions in the rest of the 'orld.[44] Definitely, the kind of interaction among the different legal orders present the African legal systems and the kind of 'mixity' that is the outcome of such nteraction is something unique that we can find only in Africa.

R David *Les grands systèmes de droit contemporains* (1964), of which 11 editions (the latest in 2002 with Camille Jauffret-Spinosi) have been published.

This is not the place to examine in detail those critics; on which, see A Gambaro & R Sacco *Sistemi giuridici comparati* (1996) 14.

See Glenn *Legal Traditions* (n 3).

HP Glenn 'A Concept of Legal Tradition' (2008) 34 *Queen's Law Journal* 427–445.

See Gambaro & Sacco *Sistemi* (n 41); U Mattei 'Verso una tripartizione non eurocentrica dei sistemi giuridici' (1994) 1 *Studi in memoria di Gino Gorla* 775–798; and, with particular reference to African law and its characteristics, Sacco *Il diritto africano* (n 10); M Guadagni *Il modello pluralista* (1996); A Badara Fall *Il diritto africano ha una sua collocazione nel diritto comparato?* (2007).

Anyway, it would be wrong to rely too much on classifications. This is primarily because the elements on which the taxonomical analyses may be based can be largely different.

The second — and even more important — element to consider is the variability of legal systems. Quoting Rodolfo Sacco, 'Legal systems never lie. They continuously grow':[45] this is the reason that brought some authors to construct a 'dynamic' classification of legal systems.[46]

It is then possible to talk about an 'African legal tradition' using Glenn's taxonomical criteria,[47] and having in mind Sacco's warnings about the reliability of legal taxonomies, it becomes possible to speak about an African legal model having its own features and characteristics.

Such a model also presents elements that could be considered out of the pure African reality: the 'holistic' approach of the African dispute resolution system with its mediatory characteristics not forced within rigid rules of procedure, the communitarian approach taking into consideration a definitely larger number of interests than in the individualist Western formulation are elements that could be interesting even out of Africa,[48] especially considering the present situation where law is a tool to be used to facilitate economic development, and that it should be therefore as flexible as possible. Apart from this, the OHADA model has been chosen for a project of legal harmonisation of business law in the Caribbean area,[49] it being the first experience where Africa is not importing law, but exporting its law.

But this is another story.

[45] Rodolfo Sacco, in Gambaro & Sacco *Sistemi* (n 41) 15.

[46] Mattei 'Verso una tripartizione' (n 44).

[47] Glenn's taxonomical criteria (see n 43).

[48] M Guadagni 'African Law and Legal Pluralism' in Y Hong & X Xia (eds) *African Law and Social Development* (2010) 90–102.

[49] Reference is made here to the OHADAC project; on which, see Y Franck 'L'OHADAC, une opportunite a saisir pour l'arbitrage en Amerique Latine?' available at www.ohadac.com where the entire website is dedicated to the project.