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Articles and Responses

African Law in Comparative Law: Does Comparativism Have Worth?

Chris Nwachukwu Okeke**

I. INTRODUCTION:

African law is one of the most understudied and under-utilized legal systems in the world today.¹ In contrast with the scholarship and study of South Asian law, there is hardly any concerted scholarship on African law that is undertaken with deliberate purpose by either individual African scholars or institutions.² In discussing African law within the context of Comparative Law, several crucial questions must be clarified. For

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1. JEFFREY HERBST, *STATES AND POWER IN AFRICA: COMPARATIVE LESSONS IN AUTHORITY AND CONTROL*, (2000) (exploring the challenges of State-building in Africa, the construction of States in Africa, national design and domestic politics, boundaries and power, but noticeably absent is a discussion of legal systems).

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

example, it is often inaccurate to suggest there are as many distinct legal systems as there are countries in Africa; the truth is that Africa has more applicable laws (though customary) than countries. Another vexing issue arises when we discuss African Law within Comparative Law — for the purpose of ascertaining either the goals or methodologies used — should we examine each nation on the continent? Such an endeavor may not only yield little fruit, but might also prove futile because of the diversity of the customary law practices and traditions of many African countries. Nigeria, for example, is the most populous black country, not only in Africa, but in the world.³ The country has more than 250 ethnic groups, each with its peculiar Customary Laws. National Laws prevail in towns, while Customary Laws prevail in rural areas, especially in matters personal in nature. Furthermore, Egypt's political designation remains a contentious question when Comparative Law scholars discuss African Law. Is Egypt indeed an African State or a leading Arab State? In discussing African Law, we must reference the historical layering, in addition to the geographical splintering, resulting from Colonialism.⁴ Historically, there exists mainly the Francophone versus Anglophone African legal backgrounds. These backgrounds attempt not only to address globalization but also to create Business and Securities Law. Often it is difficult to determine what models African nations implemented. Many of the issues raised herein may become much clearer if we closely scrutinize the legal orders of certain countries.

The African continent is a patchwork and combination of traditional, religious, western common law, and civil legal traditions. At the same time, many of these combinations are not the result of voluntary development of African legal system; rather they are often influenced by domineering colonial powers. The systems that have arisen are ones of delicate balance, often consisting of conflicting laws. This requires finding common ground between traditional systems and the colonially imposed Western systems. By analyzing and understanding the genesis, background, and nature of these laws, will Comparative Law

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

4. *Colloquium on African Law*, 7 J. AFR. L. 71, 72-83 (1963).

scholars better understand them? Perhaps, the scholars will discover common ground in what are thought irreconcilable conflicts in traditional, religious, and Western systems of law.

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

In the United States, using Comparative Law in the domestic judicial system is controversial and often criticized.⁵ However, given the backgrounds of the selected African countries, it would be difficult, if not impossible, for them to function in the legal realm had they not employed principles of Comparative Law. The selected countries have used Comparative Law to synthesize their nation's own multi-faceted, post-colonial legal systems. Attempting to improve and systematize the legal systems, Comparative Law entails the comparative study of laws, as well as their refinement.

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

This article is organized into nine main sections followed by conclusions and recommendations. Section I is an exposé and clarification of controversial and debatable ideas and questions about Africa and its legal systems. Section II presents a short

5. Adam Liptak, *U.S. Court is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1, available at http://www.nytimes.com/2008/09/18/us/18legal.html?_r=1.

'working' definition of Comparative Law. Section III discusses the purpose of Comparative Law in Africa. Section IV focuses on the methodology of studying Comparative Legal Systems. Sections V, VI, VII, and VIII examine the specific legal systems of the chosen countries, and cursory observations on the similarities and differences in their methodologies of Comparative Law. Section IX is the conclusion. This section eloquently highlights and emphasizes that Comparative Law is not merely an academic luxury suitable for Africa, but is an international necessity. Given the continent's history, it is a necessary tool to manage and integrate its unique legal systems while facilitating the continent's entry into globalization. It is further proffered that in an increasingly globalized world, the interdependence of the world's economies will intensify, which will lead to increasing inter-action among the peoples and nations of the world. Finally, this section contains recommendations intended to promote the importance and awareness of the study of Comparative Law in Africa.

II. DEFINITION OF COMPARATIVE LAW

Black's Law Dictionary defines *Comparative Law* as "the scholarly study of the similarities and differences between the legal systems of different jurisdictions."⁶ The field of Comparative Law originated in legal reform activities in the nineteenth century.⁷ Theoretically, Comparative Law can be studied for academic purposes, such as enlarging one's personal knowledge, or better understanding one's own legal system. Comparative Law is often applicable to many practical uses, a number of which are relevant to Nigeria, Kenya, South Africa, Namibia, Ivory Coast, Egypt, Morocco, and Algeria.⁸ This article concludes that in an increasingly globalized world the interaction and cross-influence of diverse legal systems and cultures will increase as national

6. BLACK'S LAW DICTIONARY 300 (8th ed. 2004).

7. MARY ANN GLENDON, MICHAEL WALLACE GORDON & PAOLO G. CAROZZA, *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 5 (West Group 2d ed. 1999).

8. See GLENDON et al., *supra* note 7, at 14-15 (discussing the indispensability of understanding both the Romano-Germanic civil law tradition and the English system when undertaking comparative legal studies in the United States).

borders become less significant.

III. PURPOSE OF COMPARATIVE LAW IN AFRICA

Understanding the purposes of studying Comparative Law is the first step in the selected African countries. Other Comparative Legal scholars have stated that Comparative Law is the combination of studying legal history and jurisprudence with the intellectual task of studying the relationships between systems of law.⁹ One common objective is informational maintenance of different rules of law relating to different States. This allows comparative legal scholars to track the development of regional laws and the development of the systems of law. Moreover, this study enables International Law scholars to gauge the effectiveness of African involvement in implementing both public and private International Law. "Cross-national studies have yielded important contributions to the understanding, practice, and reform of law in the last century."¹⁰ The two major purposes of comparative legal studies are (1) the better understanding of law and (2) the reform of law. In order to study the legal history and development of systems throughout Africa, the last part of this paper will present case studies of specific African States.

Additionally, the nomenclature and system of study need to be defined prior to analyzing the purpose of Comparative Law in Africa. It is easy to categorize a region such as the United States or Canada as a basis of comparative study. While these regions may have unique law in individual territories or jurisdictions, the overall system of law is similar and exists under a uniform system. However, Africa is comprised of more than fifty-four governments, each with diverse and unique cultures and systems of law. It is both difficult and impractical to take Africa as one region and compare it to the United States. Africa's continental diversity is so great, making such a comparative analysis would be overly broad, and therefore, fruitless. With these caveats in mind,

9. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 7 (Univ. of Ga. Press 2d ed. 1993).

10. MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, *COMPARATIVE LEGAL TRADITIONS* 13 (Thomson/West 3d ed. 2007) [hereinafter GLENDON, *COMPARATIVE LEGAL TRADITIONS*].

we proceed to the purposes served by a comparative legal analysis of African Law.

There is a great need for growth and examination of legal systems in the developing States of Africa. In addition to informational maintenance, another commonly cited purpose for studying Comparative Law relates to creating or reformulating the legal systems of a State.¹¹ This development is not limited to economic or social development, but includes legal development. If there is an ideal and practical example of the purpose of Comparative Law in Africa, it is the story of Comparative Law jurist Judge Taslim Olawale Elias. Judge Elias, of the Nigerian Supreme Court and the International Court of Justice, was an exemplary scholar of Comparative Law. If a State desired to develop a more complete legal system, he emphasized developing the African State through legal reform by examining different methods of law and studying law and its purpose.¹² He also led the way in modernizing and revising the many different laws of Nigeria.

However, it was not only to the development of the domestic legal system that Judge Elias contributed his comparative studies. Like other scholars, Judge Elias thought comparative legal studies were a medium to enhance communication between people who may have fundamentally different methods of thinking about law and order.¹³ Indeed, Judge Elias determined that only Africa is able to solve many of Africa's problems. One of his major points was that to develop themselves, African States must unite into cohesive groups. He helped draft the charter of the Organization of African Unity (O.A.U.), now transformed into the African Union and its Protocol of Mediation, Conciliation, and Arbitration.

Certainly, we might agree that the only solution for developing the African States in any sphere of human need cannot

11. *See id.* at 14-15.

12. Some of Judge Elias's legal works include: *AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW* (1972); *AFRICA BEFORE THE WORLD COURT* (1981); *BRITISH COLONIAL LAW* (1962); *THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS* (1983); *GHANA AND SIERRA LEONE: THE DEVELOPMENT OF THEIR LAWS AND CONSTITUTIONS* (1962); *THE NIGERIAN LEGAL SYSTEMS* (1963). Sadly, there is no current biography or Judge Elias for reference.

13. *See, e.g.,* GLENDON, *COMPARATIVE LEGAL TRADITIONS*, *supra* note 10, at 15 (creating discourse).

be solely from, and dependent upon, international support. Rather, when African States begin to understand each other and learn how they can support each other economically, socially, and legally, they will prevail. It is through the study of Comparative Law that jurists like Judge Elias have been able to find acceptable common legal principles to create regional organizations within Africa. Unfortunately, the problem is categorizing Africa into African States.

African State boundaries were delineated by colonizing powers based on longitude lines without regard for cultural and tribal locations. Many Africans identify themselves first by their tribe or region of origin, and second by the State in which they are bordered. There are many examples of State borders that cut through the middle of villages or tribes. Moreover, within the same State there are diverse communities with different systems of law. Indeed, to express the traditional or tribal law of an African State would be to lump all the different tribal and ethnic laws into one group for a study that does not make sense. For within each African State, the systems of tribal law are as diverse and innovative as the legal system of any State. The dynamic possibilities for studying these tribal and traditional systems of law present a practical problem in the methodology of studying African systems of law.

Finally, there is a practical teaching purpose in studying Comparative Law. By requiring students to study Comparative Law, they are exposed to a great variety of legal systems and thinking methodologies.¹⁴ These exercises often encourage students to better understand the dynamics, strengths, weaknesses, and reforms taking place within their own legal systems.¹⁵

[C]omparative law creates the conditions for a confrontation of different discourses and for the cognitive disruption that can generate creativity. It forces us to articulate a different legal and normative framework, and thus opens a space for the recognition of ways in which our own framework is deficient or flawed. In doing so, it makes us aware of other possible understandings that

14. *Id.* at 14-15.

15. *Id.*

better account for who we are and who we aspire to be.¹⁶

It is in this way that the study of Comparative Law in Africa can fulfill its highest purpose. First, if students of the law, irrespective of where they live on the globe, are encouraged to understand alternative legal systems, they can possibly identify jurisprudential shortcomings in their domestic law, and seek its reformation. Alternatively, Comparative Law can provide practical solutions to the development of human rights and International Law. Overcoming the traditional Euro-centric approach to studying Comparative Law and understanding the more effective traditional law systems in African States would greatly benefit law students.¹⁷

Another area of Comparative Law study is International Law and its enforcement in Africa. Within Africa are States, like South Africa, whose entire legal system changed to comply with International Law. Further, there are States that are cited repeatedly for gross violations of International Law. These realities suggest that Comparative Law analysis is vitally important today “as the growth and increasing vitality of international juridical, administrative and legislative institutions is placing demands on International Law not previously experienced.”¹⁸

As illustrated by examples in Nigeria and Kenya, the use of Comparative Law is mandatory because the country must use Comparative Law principles when selecting which law to apply from the various available sources within the country.

The following subsections, while not an exhaustive list, will highlight some of the most important, useful, and practical goals of Comparative Law.

A. Integrating multiple legal systems within a unified framework

Because of their respective indigenous and then colonial histories, when the many African countries became independent,

16. *Id.* at 15.

17. See Xavier Blanc-Jouvan, Book Review, 56 AM. J. COMP. L. 1075, 1081 (2008) (reviewing THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., Oxford Univ. Press 2006)).

18. Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT'L L. 1083, 1083 (2008).

they were left with multiple forms of law.¹⁹ As the famed British jurist Lord Denning noted, the laws of Africa were “a jumble of pieces, much like a jigsaw or a mosaic . . . [a]ll have to be fitted together to form a single whole, and developed so as to meet modern conditions.”²⁰ For functioning legal systems, it was imperative that these countries use Comparative Law to determine how their systems would integrate each body of law, if at all. Like putting together a puzzle, it is impossible to fit the pieces together without examining the contour and shape of each piece. Comparative Law enabled the governments of these fledgling States to determine how they would adjudicate matters, the laws they would follow in different areas, and the type of court systems they would use. Comparative Law also represented the governments’ value judgments and policy choices as indicated by the laws they chose to integrate.

On the African continent, it has been predominantly Family Law that retained elements of Customary Law, or Islamic law, or, specifically in the case of Kenya, Hindu law.²¹ Recently, in Nigeria, Islamic Law application has been broadened to include some criminal offenses, such as drinking or promiscuity.²² Given the presence of Customary Law throughout these countries’ legal systems, their courts needed to be equipped to deal effectively with these laws when necessary, since the courts would have to apply Customary Law, in particular at the appellate level.²³ Kenya actually abolished its customary courts altogether.²⁴

19. Yemisi Dina, John Akintayo & Funke Ekundayo, *Guide to Nigerian Legal Information*, GLOBALEX (Feb. 2005), <http://www.nyulawglobal.org/globalex/nigeria.htm>; Tom Ojienda & Leonard Obura Aloo, *Researching Kenyan Law*, GLOBALEX (Nov. 2006), <http://www.nyulawglobal.org/globalex/Kenya.htm>.

20. James S. Read, *Law in Africa: Back to the Future?*, in *COMPARATIVE LAW IN GLOBAL PERSPECTIVE* 173, 182 (Ian Edge ed., 2000) (internal citation omitted).

21. Dina et al., *supra* note 19, at Legal System; Ojienda et al., *supra* note 19, at Historical Background.

22. Dina et al., *supra* note 19, at Islamic Law/Sharia/Moslem Law; N. Coulson, *A History of Islamic Law* in WERNER MENSKEI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* 347 (2d ed. 2006).

23. Anthony Allot, *The Hunting of the Snark or the Quest for the Holy Grail? The Search for Customary Law*, in *COMPARATIVE LAW IN GLOBAL PERSPECTIVE* 79, 85 (Ian Edge ed., 2000).

24. WERNER MENSKEI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* 477 (2d ed. 2006).

Attempts have been made to codify the traditionally unwritten Customary Law. The Restatement of African Law Project ("ALP") was a systemic examination and recording of the different Customary Laws used in African countries.²⁵ In order for the courts to apply the Customary or Native Law, it was necessary to "codify" this unwritten law.²⁶ This was a complex and daunting task that had varying levels of success in the participating countries. In nations such as Kenya, the documents became official and were cited by courts.²⁷ However, as noted by author Werner Menski, "[d]ifferent grades of myopia exist among African leaders about the extent to which their people have continued to follow traditional legal systems outside state-centered court structures."²⁸ He cites author Ebo as reporting that in Nigeria, it is "an open secret that" citizens sometimes still follow traditional law outside of the official court system using village tribunals.²⁹

Author Kivutha Kibwana, of the Centre for Human Rights at University of Pretoria, South Africa, detailed suggestions for what the goals of Comparative Law *should* be.³⁰ Kibwana noted that African legal pedagogy is "preoccup[ied]" with studying, researching, and teaching foreign or imported laws resulting, largely as "a function of the [African] legal systems having been founded on imposed law[.]"³¹

Kibwana noted that the majority of Comparative Law is focused on transferring law from the "Western world."³² However, Kibwana postulated that Western laws transplanted to Africa to solve local problems may not operate as expected, and that "Africa could solve her legal problems better if the experiences of all her countries are . . . used in fashioning common legal solutions."³³

25. Allott, *supra* note 23, at 85-88.

26. *Id.* at 88.

27. *Id.*

28. MENSKI, *supra* note 24, at 477.

29. *Id.*

30. See Kivutha Kibwana, *Enhancing Co-operation Among African Law Schools: Comparative Law Studies Within the African Context*, CENTRE FOR HUMAN RIGHTS UNIV. OF PRETORIA (Dec. 1993), http://www.chr.up.ac.za/images/files/about/archive/occasional_paper_4.pdf.

31. *Id.*

32. *Id.*

33. *Id.*

Kibwana's point is well-taken, as the comparison of legal systems in African countries, which are more "similarly suited in economic, cultural, social, [and] historical" circumstances, may prove to be of more practical value in solving Africa's legal problems.³⁴ At the time Kibwana authored his paper in 1993, he indicated that existing comparative legal studies among African nations tend to center on comparisons between neighboring countries or limited regions such as East Africa, rather than concentrate on a broader, systematic purview.³⁵

B. Legal Education Modification

Kibwana suggested prioritizing specific African comparative legal study on a continent-wide basis.³⁶ Kibwana's recommendations included, among other ideas, studying the following: the efficacy of transplanted foreign laws in Africa; the efficacy, continued use, and evolution of the use of Customary Law in Africa's modern day systems; and differences between legal systems of socialist oriented versus capitalist oriented countries.³⁷

Kibwana articulated concrete steps in developing the study of African Comparative Law.³⁸ In order to institutionalize this type of comparative study, Kibwana encouraged the formation of pan-African law teachers and student associations, leading to the ongoing exchange of publications, competitions, personnel, and regular efforts of legal inquiry on the topic.³⁹ Kibwana also recommended that African Comparative Law be a mandatory part of every African law school's curriculum.⁴⁰

One important and unique feature of African Comparative Law is the use of Customary Law, which is uniformly taught in Western law curricula. Author Menski noted that "[p]romising models of teaching about [C]ustomary [L]aws exist in Namibia and some South African universities."⁴¹

34. *Id.*

35. *Id.*

36. Henk Botha, *Comparative Constitutional Law in the Classroom: A South African Perspective*, 28 PENN ST. INT'L L. REV. 531 (2010).

37. Kibwana, *supra* note 30.

38. *Id.*

39. *Id.*

40. *Id.*

41. MENSKI, *supra* note 24, at 73, n.107.

In the early days of independence, lawyers in Nigeria and Kenya were trained in the U.K.⁴² However, it became obvious that given the varied sources of law applicable in Nigeria and Kenya, British training was inadequate for effective practice of law in these countries.⁴³ In East Africa, including Kenya, advised by Lord Denning, African legal training was modified to include the study of necessary laws in addition to common law.⁴⁴ Nigeria, in 1962, with the passage of the Legal Education Act, augmented the required training of lawyers with coursework that included local Customary Law and the Nigerian court system.⁴⁵ Islamic Law is an additional source of legal training.

C. Legal Reform

There are many examples of using Comparative Law in these countries to effect legal reform. Kibwana averred that Africa can avoid the pitfalls the West encountered when reflecting on the comparative Western legal tradition.⁴⁶ South Africa abolished the law prohibiting mixed racial sexual relations in June 1985.⁴⁷ At a basic level, the evolution of the democratic principle—one person, one vote—and the lessons of the abolition movement in the United States were a partial model for the long struggle for equality in South Africa.⁴⁸

Author Werner Menski stated that visions of an “ideal society” and human rights are not a topic free of debate in post-apartheid South Africa.⁴⁹ “To survive as a rainbow nation,” it is apparent that South Africa has embraced the view that diversity and plurality are important to its people’s well-being and global

42. *Legal Education*, INTERNATIONAL CENTRE FOR NIGERIAN LAW, <http://www.nigeria-law.org/Legal%20Education.htm> (last visited Feb. 1, 2009).

43. *Id.*

44. Allott, *supra* note 23, at 86.

45. *Legal Education*, *supra* note 42.

46. Kibwana, *supra* note 30.

47. D.H. Sampson, *The Legal System of South Africa*, in MODERN LEGAL SYSTEMS CYCLOPEDIA 6A.70.1, 6A.70.93 (Kenneth Robert Redden ed., William S. Hein & Co. 1990).

48. See generally GEORGE M. FREDRICKSON, BLACK LIBERATION: A COMPARATIVE HISTORY OF BLACK IDEOLOGIES IN THE UNITED STATES AND SOUTH AFRICA 14-56 (Oxford Univ. Press 1996) (focusing on “the suffrage questions and the origins of Black protest”).

49. MENSKI, *supra* note 24, at 13.

uniformity would be ill-advised.⁵⁰ Menski noted that South African law, by incorporating the plurality inherent in their mixed legal system, is “not turning out as a carbon copy of Western legal systems.”⁵¹

Driven both by internal considerations and the international influence that has arisen from globalization, Nigeria and Kenya have used Comparative Law to achieve legal reform.⁵² One relevant example is anti-corruption laws. Nigeria has explored numerous avenues to eradicate corruption including consultations, public hearings, and visits to other countries such as Ethiopia, Zimbabwe, Zambia, and Hong Kong.⁵³ This effort has resulted in identifying defects in anti-corruption legislation, unifying its anti-corruption laws, and appointing an independent agency.⁵⁴

In 1997, the International Monetary Fund suspended aid to Kenya because of corruption violations.⁵⁵ The donors required requisite reforms to be undertaken before they would resume their aid programs.⁵⁶ This necessitated Kenya’s review of its laws against other, more effective laws in areas of de-monopolization, deregulation, privatization, prosecution and governance of enhanced human rights, accountability, and clarification of rules.⁵⁷ Since some of the reforms failed to correct the problems, it was also necessary to review why a law may not work the same way in multiple countries.⁵⁸ This is another important goal of Comparative Law that is useful in the African context.

John Cantius Mubangizi, author and judge, surveyed the Comparative Laws of four African countries in order to make recommendations on constitutional protections of socio-economic

50. *Id.* at 14.

51. *Id.* at 22.

52. See Okechukwu Oko, *Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus*, 34 N.Y.U. J. INT’L L. & POL. 397, 439 (2001); see also James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 CONN. J. INT’L L. 407, 408 (1999).

53. Oko, *supra* note 52, at 439, n.217.

54. *Id.* at 439.

55. Gathii, *supra* note 52, at 408.

56. *Id.*

57. See *id.*

58. See *id.* at 412-16 (analyzing the promises and limits of the rule of law in eradicating corruption).

rights.⁵⁹ In his review, he found examples on the African continent to share with other countries in the region.⁶⁰ His article encourages the various African countries, especially since they are in transitional stages of development, to learn from one another.⁶¹

D. Harmonization of laws

Due to increasing globalization of trade, on both a regional and international scale, harmonization of trade laws is an important topic for these developing countries. For example, in evaluating the desirability of joining a treaty, such as OHADA (Organization Pour L'harmonisation du Droit des Affaires en Afrique), Nigeria must evaluate the effect of the treaty laws on national laws, choose the best legal result for its development, and identify any trade-offs.⁶² While entry into such a treaty promises additional business prosperity, the requirements of law modernization, e.g. accepting arbitration rather than court adjudication for business law disputes, need to be evaluated and balanced with an eye toward local legal context.⁶³

As part of the East African Community ("EAC"), consisting of Kenya, Uganda, and Tanzania, the countries used Comparative Law to enhance trading and economic development amongst its members.⁶⁴ The EAC was originally established in 1967 and dissolved temporarily in 1977.⁶⁵ The Regional Economic Development treaty required harmonization of laws between countries with differing historical backgrounds since Tanzania was a former German colony.⁶⁶ A renewed EAC treaty went into

59. See John Cantius Mubangizi, *Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation*, 2 AFR. J. LEGAL STUD. 1 (2006).

60. *Id.* at 18-19.

61. *Id.* at 2, 19.

62. Muna Ndulo, *Harmonisation of Trade Laws in the African Economic Community*, 42 INT'L & COMP. L.Q. 101, 103 (1993) (Nigeria has yet to join this treaty).

63. *Id.*

64. Salvatore Mancuso, *Trends on the Harmonization of Contract Law in Africa*, 13 GOLDEN GATE ANN. SURV. INT'L & COMP. L. 157, 163, n.19 (2007); EAST AFRICAN COMMUNITY, <http://www.eac.int/> (last visited Feb. 1, 2009).

65. *History of the EAC*, EAST AFRICAN COMMUNITY, <http://www.eac.int/about-eac/eac-history.html> (last visited Feb. 1, 2009).

66. *Colonial Period*, TANZANIA NAT'L WEBSITE, <http://www.tanzania.go.tz/history.html> (last visited Feb. 1, 2009).

force in 2000, and the original three countries have been joined by Rwanda and Burundi.⁶⁷

Since, as author James Read notes, “[A]frican legal systems are particularly dysfunctional in the field of Family Law, where African forms of social organisation have resisted harmonisation,” it is clear that a major goal of Comparative Law in African countries is to resolve “[l]egal conflicts arising from the frequent combination of ‘customary’ forms of [law]. . . with statutory [laws],” for example, in marriage and succession laws.⁶⁸ For instance, in South Africa, Muslim marriages are not recognized because they may be polygamous.⁶⁹

Another area where Comparative Law is useful in these countries is when regional cooperation is necessary or desirable.⁷⁰ When addressing environmental issues, it is natural that countries in the African region should assemble and harmonize applicable laws to ensure environmentally safe development.⁷¹

E. Effective Problem Solving

Comparative law can assist in finding novel solutions to legal problems.⁷² In Kenya, after the turmoil of the contested 2007 Presidential elections, the country needed to find a solution to a dramatically splintered government in a unitary system. The resulting solution, an extra-constitutional power sharing agreement, which provided for a prime minister position and cabinet memberships for the opposition, was modeled after coalition governments established in times of crisis, such as the coalition government in Britain during the Great Depression.⁷³

67. *History of the EAC*, *supra* note 65.

68. Read, *supra* note 20, at 176.

69. *Id.* at 197.

70. See, e.g., William B. Barker, *Expanding the Study of Comparative Tax Law to Promote Democratic Policy: The Example of the Move to Capital Gains Taxation in Post-Apartheid South Africa*, 109 PENN ST. L. REV. 703 (2005) (analyzing Comparative Law and the place of Comparative Tax Law).

71. See e.g., Agreement on the Establishment of a Permanent Water Commission, Namib.-S.Afr., Sept. 14, 1992, 32 I.L.M. 1147; Conference on Co-Operation in the Protection and Development of the Marine and Coastal Environment of West and Central African Region, Mar. 23, 1981, 20 I.L.M. 729.

72. GLENDON et al., *supra* note 7, at 7.

73. Jeffrey Gettleman, *2 Kenyan Rivals to Share Power in Bid for Peace*, N.Y. TIMES, Feb. 29, 2008, at A1, available at

The Kenyan Parliament has committed to amending the constitution and to continuing legal reform.⁷⁴

Comparative Law may evaluate in-country risks and the effect of supranational laws. In the case of *Wiwa v. Dutch Petroleum Co.*, Wiwa was an Ogoni leader that challenged the business and environmental practices of multi-national firms in Nigeria, in particular the practices of Shell Nigeria, a division of the Dutch company Royal Dutch Shell.⁷⁵ Following a sham trial, the Ogoni leaders were executed by Nigeria's military government, then the decedents' relatives filed suit under the Alien Tort Claims Act of the United States.⁷⁶ "The plaintiffs alleged that Shell Nigeria was complicit in the execution[s]."⁷⁷ After initially being dismissed for *forum non conveniens*, the Second Circuit Court of Appeals reversed, holding that the case should go forward in the United States, in part because some of the plaintiffs were residents of the United States, but also because the Second Circuit determined the "text of the Act seems to reach claims for international human rights abuses occurring abroad."⁷⁸ Without a Comparative Law view, countries and the companies operating within them lack a complete picture of how the companies' conduct will be evaluated by supranational laws and how these laws affect the risk inherent in activities within the country.

There are several areas of South African legal evolution that indicate the influence of other legal systems.⁷⁹ First is consumer protection, which drew influence from the British.⁸⁰ The result was a shift from the traditional view that contracts were deemed "sacred" to ensuring consumer protection and equitable remedies

<http://www.nytimes.com/2008/02/29/world/africa/29kenya.html?pagewanted=2>; Bob Hepburn, *Coalition government still a good idea*, THE STAR (Jan. 29, 2009), <http://www.thestar.com/Worldwide/article/578796>.

74. Gettleman, *supra* note 73, at A12.

75. 226 F.3d 88 (2d Cir. 2000); Nicola M.C.P. Jagers & Marie-José van der Heijden, *Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands*, 33 BROOK. J. INT'L L. 833, 838-39 (2008).

76. 28 U.S.C. § 1350 (1994) (providing original jurisdiction in the U.S. District Courts for tort claims by an alien civil plaintiff where a violation of the law of nations has occurred); Jagers, *supra* note 75, at 839.

77. Jagers, *supra* note 75, at 839.

78. *Wiwa v. Dutch Petroleum Co.*, 22 F.3d 88, 91, 105 (2d Cir. 2000).

79. Sampson, *supra* note 47, at 6A.70.55.

80. *Id.* at 6A.70.55-57.

in the case of unconscionable contract terms.⁸¹ Another area is property ownership.⁸² Difficulties in a number of traditional property ownership schemes led to “a full investigation of systems prevailing in other countries providing for the ownership of a section of a building.”⁸³ The result was new legislation that allows the holding and recording of “sectional titles.”⁸⁴ A further development has been the introduction of the *time share* concept and related legislation to support that market development.⁸⁵

Other legal systems’ precedent also influenced South Africa’s amnesty offer to past violators of human rights on all sides of prior conflicts.⁸⁶ As author Catherine Jenkins stated, “South Africa is neither the first nor the last State to make use of amnesty . . . governments from Argentina to Zimbabwe have employed some form of amnesty in the attempted resolution of internal conflict[.]”⁸⁷

“In South Africa, detailed consideration of foreign solutions is a regular part of tax reform.”⁸⁸ The government has used comparative capital gains tax policy to achieve its national tax equalization goals.⁸⁹

One current development that is demanding the attention of all African countries is the recently issued International Criminal Court (“ICC”) arrest warrant for the Sudanese President.⁹⁰

81. *Id.*

82. *Id.* at 6A.70.57.

83. *Id.* at 6A.70.58.

84. *Id.*

85. *Id.*

86. Catherine Jenkins, *Amnesty for Gross Violations of Human Rights in South Africa: A Better Way of Dealing with the Past?*, in *COMPARATIVE LAW IN GLOBAL PERSPECTIVE*, 345 (Ian Edge ed., 2000).

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

88. Barker, *supra* note 70, at 708.

89. *Capital Gains Tax in South Africa*, BRIEFING BY THE NAT’L TREASURY’S TAX POL’Y CHIEF DIRECTORATE TO THE PORTFOLIO AND SELECT COMMS. ON FIN., 2 (Jan. 24, 2001), available at <http://www.ftomasek.com/NationalTreasure.pdf>.

90. On March 4, 2009, the ICC issued an arrest warrant for Sudanese President Omar al-Bashir. *International Warrant Issued for Sudan President*, ASSOCIATED PRESS (Mar. 4, 2009), <http://www.foxnews.com/story/0,2933,504426,00.html>. The warrant was the

African leaders are looking around the continent at one another and at situations where other leaders have been apprehended to determine the appropriate course of action and response. It is clear from publication of some of the discussions ensuing from the issuance of the ICC warrant that Comparative Law includes applying existing International Law. African Union commission chairman Jean Ping “complained that Africa was being selectively targeted by the court.”⁹¹ Ping stated:

African Union’s position is that we support the fight against impunity, we cannot let crime perpetrators go unpunished. . . . But we say that peace and justice should not collide, that the need for justice should not override the need for peace. . . . Issues of peace are so important that justice must take them into account in Sudan *just as elsewhere*. . . . What we see is that international justice seems to be applying its fight against impunity *only to Africa as if nothing were happening elsewhere, (such as) in Iraq, Gaza, Colombia or in the Caucasus*.⁹² (emphasis added).

F. Differentiation

Watching global legal trends through a Comparative Law lens occasionally results in differentiating national laws or differently adapting laws when a government deems legal trends will have a dissimilar effect in its home country. The rising trend of gay and lesbian rights and same-sex marriage throughout the West has resulted in Nigeria’s proposing what could be termed *preventative legislation*.⁹³ The Same Sex Marriage Prohibition Act (“The Act”)

first issued by the ICC for a sitting head of state. *Id.*; see also, e.g., Kabiru Danladi, *Sudan: Al-Bashir and the Politics of War Crimes*, DAILY TRUST (Mar. 28, 2009), available at <http://allafrica.com/stories/200903290010.html>; Andrew N. Matjila, *Africa, Where Are You?*, NEW ERA (Mar. 27, 2009), <http://allafrica.com/stories/200903270803.html>.

91. *Africa, Russia Blast Bashir Warrant*, ISLAMONLINE.NET & NEWS AGENCIES (Mar. 4, 2009), available at http://www.islamonline.net/servlet/Satellite?c=Article_C&cid=1235628862974&pagename=Zone-English-News/NWELayout.

92. *Id.*

93. Emma Mittelstaedt, *Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing Human Rights Obligations*, 9 CHI. J. INT’L L. 353, 371 (2008).

was presented in 2006, and although it has not passed due to political instability surrounding the 2007 Presidential election, it could resurface at any time.⁹⁴ The Act makes Nigeria's law more punitive for anyone participating in a same-sex marriage ceremony and provides for a five-year sentence.⁹⁵

An example of Comparative Law driving differentiation, or adaptation, in Africa includes laws pertaining to National Parks. The United Kingdom, one of Africa's first legal role models, established National Parks in the National Parks and Access to the Countryside Act of 1949.⁹⁶ People actually lived in the United Kingdom's national parks, and although both centrally appointed and locally elected people managed the parks, there was no suggestion that people would no longer live in the parks or that the inhabitants' viewpoint would not be taken into consideration.⁹⁷

In contrast, the central government manages Kenyan National Parks and it prohibits human inhabitation within the parks.⁹⁸ African National Parks are more likely to have been influenced by South Africa, which established Kruger National Park in 1898.⁹⁹ Despite the United Kingdom's influence on a large part of African law, a regional neighbor's version of this particular law is possibly better suited to the goals of African nations.

Sometimes the goals of Comparative Law are more specific to a given region. For example, there are some issues or practices that are more unique to one region than another. Female genital circumcision ("FGC") is an issue of that nature.¹⁰⁰ FGC is commonly practiced in the Middle Eastern region and on the

94. *Id.*

95. *Id.*

96. Patrick McAuslan, *The Best Laid Schemes o' Mice an' Men: The Diaspora of Town and Country Planning Law in Africa and Asia*, in COMPARATIVE GLOBAL PERSPECTIVE 199, 218 (Ian Edge ed., 2000).

97. *Id.*

98. *Id.*

99. *Id.*

100. Marianne Sarkis, *Female Genital Cutting (FGCO: An Introduction*, THE FEMALE GENITAL CUTTING EDUCATION AND NETWORKING PROJECT, available at <http://www.fgmnetwork.org/intro/fgmintro.html> (last visited Mar. 29, 2009).

continent of Africa, including, in the past, the Ivory Coast.¹⁰¹ There are various laws, customary and more modern, regulating and, in some cases specifically outlawing the practice.¹⁰² Since FGC is more common in the context of African countries than it is in the developed world, comparing laws between Africa and the West, in this case, would be less useful.

IV. METHODOLOGY OF STUDYING COMPARATIVE LEGAL SYSTEMS

It is necessary to define our adopted meaning of the term *methodology*. One definition is the “set or system of methods, principles, and rules for regulating a given discipline.”¹⁰³ Methodology can properly refer to the theoretical analysis of the methods appropriate to a field of study or to the body of methods and principles particular to a branch of knowledge.¹⁰⁴ Specifically, regarding Comparative Law “[t]he range and eclecticism of its methods is matched by the wide variety of its aims and uses.”¹⁰⁵ In addition to the many goals of Comparative Law, various methods apply to its use. While Comparative Law can result in comparison of like systems, meaning systems at the same stage of legal, economic, and cultural development,¹⁰⁶ this would ignore the aspirational aspect of Comparative Law—comparing and analyzing for reform and improvement.

Other methodologies of Comparative Law that are apparent in the legal development of these countries are: (1) functional approaches, such as “which institution in Country A performs the same function in Country B?”, and (2) the problem-solving approach, such as “how this legal problem is solved in Country A and would that approach work in Country B?”¹⁰⁷ These approaches assume a common need or problem in multiple systems and the useful application of Comparative Law to answer

101. *Id.*

102. *Id.*

103. THE AMERICAN HERITAGE DICTIONARY 534 (Houghton Mifflin Co. 4th ed., 2000).

104. *See id.*

105. GLENDON, COMPARATIVE LEGAL TRADITIONS, *supra* note 10, at 13.

106. Órúcu A. Esin, *Methodology of comparative law*, in ELGAN ENCYCLOPEDIA OF COMPARATIVE LAW 442, 442 (Jan M. Smits ed., Edward Elgar 2006).

107. *Id.* at 443.

that need or solve that problem.¹⁰⁸

Comparative Law can be based on a macro methodology, exploring multiple legal systems within the context of the economic, social, or cultural stage of development surrounding them,¹⁰⁹ or it can focus on a microelement.¹¹⁰ It is apparent from the goals and uses of Comparative Law evident in these countries, that their methodologies contain both macro and micro approaches. These countries had to take a macro approach when determining which elements of what body or source of law they would use in their integrated legal system in the context of their historical, political, economic, religious, and cultural reality.¹¹¹

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

The author Órúcu suggests that the following steps can be followed in most Comparative Law research: (1) conceptualization; (2) observation; (3) identification; (4) explaining or describing; (5) measurement; and (6) confirmation and theory testing.¹¹² This must then lead to prescription, a plan of action, and a choice of what to do with the results.¹¹³ The method will vary somewhat with the goal of the research and the required result.¹¹⁴ Evaluation of the method will be driven by the results.¹¹⁵ Did the method achieve the desired results, e.g., reform, problem solving, harmonization, an integrated legal system?¹¹⁶ In these countries, the results of using Comparative Law will continue to be evaluated.

Author Andrew Harding discussed two types of Comparative

108. *Id.* at 443-44.

109. *Id.* at 443.

110. *Id.*

111. *See id.* at 445.

112. *Id.* at 447-50.

113. *Id.* at 450.

114. *Id.* at 451.

115. *Id.*

116. *Id.*

Law: (1) "theoretical Comparative Law", which he described as interesting "but not essentially very useful," and (2) "applied Comparative Law", which he defined as "a practical method by which we can decide . . . legal transplantation and legal development or reform."¹¹⁷ It is clear that of the two, Africa as a region would more likely employ the latter. Harding referred to the practical application of Comparative Law as "the business end of the subject," although he noted that the former provides an "important and useful . . . indispensable foundation or framework for the second."¹¹⁸ As William B. Barker noted, to use Comparative Law to achieve these practical goals, it is important to study the ideological purpose behind law and legislation.¹¹⁹

The methodology of Comparative Law in African countries, such as South Africa and Namibia, is not limited to comparing laws of Western countries with those of African nations. As mentioned previously, in his article in *African Journal of Legal Studies*, John Cantius Mubangizi, compared the constitutional protection of socio-economic rights in four African countries, including South Africa, Namibia, Uganda, and Ghana.¹²⁰

Werner Menski described a contrast between global uniformity and the legal pluralism that is often required in the updating of law on the African continent.¹²¹ Menski noted that the constitutions of both South Africa and Namibia used "culture specific plural reconstruction."¹²² South Africa, for example, used both Indian constitutional law and customary South African law in developing of their post-apartheid law.¹²³

Menski also stated there are important lessons for Comparative Law gleaned from Indian Hindu law in South Africa.¹²⁴ Reflecting upon the development of Indian Hindu law highlights the need "to look out for larger issues raised by governing unimaginable multitudes of people[.]"¹²⁵ "Hindu law

117. Andrew Harding, *Comparative Public Law: A Neglected Discipline?*, in *COMPARATIVE LAW IN GLOBAL PERSPECTIVE* 101, 103 (Ian Edge ed., 2000).

118. *Id.*

119. Barker, *supra* note 70, at 708.

120. Mubangizi, *supra* note 59, at 2.

121. MENSKI, *supra* note 24, at 4.

122. *Id.* at n.4.

123. *See id.* at 54, n.87.

124. *Id.* at 203.

125. *Id.*

never took the stance that human conduct can be totally regulated by external force or state-made laws.”¹²⁶ Variations in law throughout Africa “illuminate the reasons for and the advantages of each system in its own environment.”¹²⁷

In Africa, with the influences of Customary Law and Western legal systems, the methodology of law making is not only by the state, but also by social groups. This multi-faceted process of law making creates a debate: is law making by social groups legal?¹²⁸ Menski suggested a practical reason behind the influence of social groups on law making.¹²⁹ For example, South Africa has acknowledged that statutory reform concerning Muslim polygamy is likely to be ineffective if the community itself fails to “modif[y] its norms.”¹³⁰ The South African term, *ubuntu*, is a term for “an ethical framework that contains a range of indigenous rights,”¹³¹ and is frequently used in discussions of the legal system development. The term has also been described in African case law “as a concept concerned with communality, social interlinkedness and interdependence of the members of the community.”¹³² Namibia has legislatively formalized community development of laws through traditional leaders in the Community Courts Act of 2003.¹³³

In general, belief systems “had enormous implications for the internal organisation of traditional African societies, including their legal structures.”¹³⁴ A key term, *overta*, which is used amongst the Ovahimba of Namibia, means “the duty to do the right thing.”¹³⁵ The concept “involves a fine balancing between matrilineal and patriarchal principles.”¹³⁶ Meanwhile, the Subia in Northern Namibia have a belief in a supreme being, heavens, earth, and sky, “holistically focused complex constructs developed

126. *Id.*

127. *Id.* at 383 (quoting ANTHONY N. ALLOT, AFRICAN LAW: INTRODUCTION TO LEGAL SYSTEMS 131 (J.D.M. Derrett, ed. 1968)).

128. *Id.* at 54.

129. *Id.*

130. *Id.*

131. *Id.* at 489, & n.150.

132. *Id.*

133. *Id.* at 54, n.87.

134. *Id.* at 410-11.

135. *Id.* at 411, n.52.

136. *Id.*

and manipulated by humans all the time to link themselves to the wider order of Nature.”¹³⁷

In South Africa, the Xhosa herbalists (*ixhwele*) both dispense medicine and communicate with ancestors.¹³⁸ Similarly, in Namibia, within the Hambukushu and Bayeyi communities, Shamans and herbalists (nganga) are viewed as being connected to the supernatural world.¹³⁹

The German view, in former colonies such as Namibia, was that codification of Customary Laws should rely on indigenous customs.¹⁴⁰ It is important to note that continued adherence to Customary Law in Africa does not necessarily indicate a lack of development, but “rather . . . a skillful survival-centered method of exploring sustainable legal arrangements [.]”¹⁴¹

As far back as 1965, Menski noted that authors Kuper and Kuper “emphasized the continuing need for recognizing the ever-present dynamic ‘relative emphasis on imperium, tradition and divine relation’ in African laws.”¹⁴² As we will examine below, some methods used to understand traditional law might differ greatly in studying African Law.

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

The full understanding of the traditional system would also require a greater knowledge of the way the culture and social relations are conducted in the region. As stated by the prominent Comparativist, Ernst Rabel, understanding the paper institution, the rules or doctrines as they appear in books, provides little

137. *Id.* at 413.

138. *Id.* at 417, n.65.

139. *Id.*

140. *Id.* at 447.

141. *Id.* at 466.

142. *Id.* at 485.

insight into the comparative study;¹⁴³ i.e., insight is derived through understanding how the legal system functions within their legal, economic and cultural contexts.¹⁴⁴ This alone may be a major reason why so little comparative studies have been done on traditional systems of law. The practical methodology of studying African systems of law differs in the fundamental aspect that they are often unwritten systems and thus require far more effort than studying a series of constitutions or codes for effective analysis. However, as the methodology for studying these systems of law is different, so is the outcome and knowledge to be gained through studying these vastly different systems.¹⁴⁵ In this way, the methodology relating to Comparative Law studies in Africa is unique to the regions with systems of unwritten law. In the examples of specific States discussed below, this becomes clear.

Meanwhile, the traditional categories used in analyzing a system of law do not apply. African systems of law are often a combination of foundational traditional laws, sometimes religious laws, and often the western influence of previous colonial powers. One example is the system in Egypt, which is further discussed in future sections.

[W]hen it comes to describing the legal systems of the Arab world, and particularly that of Egypt, [C]omparative [L]aw scholarship has long suffered from a state of labeling disarray. On the one hand, comparatists generally find it reasonable to classify Arab legal systems as predominantly belonging to the civil law tradition, much like those of Latin America: both systems rely on codes of civilian origin transplanted during the colonial encounter with European powers, thereafter developing the distinct indigenous identity of other postcolonial regimes, but still keeping within the familiar contours of

143. GLENDON, COMPARATIVE LEGAL TRADITIONS, *supra* note 10, at 16.

144. *Id.*

145. See generally Christopher J. Roederer, *Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa's Bill of Rights*, 26 ARIZ. J. INT'L & COMP. L. 427 (2009) (comparing the common law of torts in both the United States and South Africa). Specifically, "Part IV returns to the theme of South Africa's open tradition by detailing the mechanisms in South Africa for developing the common law in general." *Id.* at 471-502.

their European derivation. On the other hand, one finds a pronounced reluctance in [C]omparative [L]aw scholarship to simply box Arab legal systems into the civil law tradition. After all, Arab states were governed by an Islamic legal system before the colonial encounter, and this Islamic heritage influences their normative structure today. The concern is that a blanket civil law label for Arab legal systems might flatten their hybrid postcolonial identity and risk discounting the continued relevance of Islamic law norms to both contemporary judicial applications and debates over future legal reform across the region. So instead of comparing *between* civil and common law systems, I wanted to compare the various layers *within* a single legal system across a defined period of history.¹⁴⁶

Indeed this statement precisely defines the difficulties arising from Comparative Law studies of African States. A simple classification of common or civil legal system cannot be used to identify the fundamental basis of the legal system. Rather, the civil or common law legal tradition is often a layer that has been added on top of a previously existing traditional or religious legal system. The addition of this layer sometimes clashes with the previous system but was meant to address what were perceived as inadequacies within those legal systems.

V. BACKGROUND: LEGAL SYSTEM IN NIGERIA

A. Brief History

Nigeria, a former British colony, was originally the product of many ancient kingdoms. This series of kingdoms was followed by a number of reorganizations orchestrated by local rulers and the British government.¹⁴⁷ Nigeria became the Federation of Nigeria and Lagos on October 1, 1954.¹⁴⁸ Eventually, on October 1, 1960,

146. Amr Shalakany, *The Closeted Comparative Lawyer: On How to Pass for Human Rights Material*, 20 HARV. HUM. RTS. J. 41, 44 (2007).

147. THOMAS H. REYNOLDS & ARTURO A. FLORES, FOREIGN LAW: CURRENT SOURCES OF CODES AND LEGISLATION IN JURISDICTIONS OF THE WORLD III Nigeria 1 (William S. Hein & Co., Inc. 2003).

148. *Id.* at III Nigeria 2.

it gained its independence.¹⁴⁹ On October 1, 1963, Nigeria became a republic within the British Commonwealth.¹⁵⁰

After a military coup and some additions to the number of states, the country has, at present, thirty-six states in the federation, as well as the Federal Capital Territory of Abuja.¹⁵¹ The country has had a succession of military governments that occasionally suspended the Constitution.¹⁵² However, a new Constitution was promulgated in 1999, and the country has since transitioned to an elected government.¹⁵³ Following a protracted agitation by the people of Nigeria for a critical review of the present Constitution, the national assembly has set up a national committee made up of legislators from both the House of Assembly and Senate under the Chairmanship of the Deputy Senate President to address the assignment. The people wanted to deal with marginalization and develop a formula for sharing natural resources, among other concerns.

B. Government Framework

The government in the Federal Republic of Nigeria is modeled after the American system.¹⁵⁴ Similarly, Nigeria has three branches of government: Executive, Legislative, and Judiciary.¹⁵⁵ Like the United States, Nigeria's Constitution is the supreme law of the land and all decisions by the Supreme Court are binding on all other courts, including state courts.¹⁵⁶

C. Legal System

There are three factors that had significant influence on the development of law in Nigeria: (1) it is a product of native kingdoms with approximately 250 ethnic groups; (2) its status as a former British colony; and (3) its substantial Muslim

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at III Nigeria 3.

153. *Id.* at III Nigeria 3-4.

154. *See* Dina et. al., *supra* note 19 (although the source makes direct reference to the English influence, the system of government is comparable to the United States).

155. *Id.* at Government Bodies.

156. *Id.* at Government Bodies: Judiciary.

population.¹⁵⁷ The confluence of these factors has resulted in a system that is comprised of English common law, Customary Law, and Islamic law, called Shari'a, which is prevalent in the Muslim North.¹⁵⁸

Nigerian federal law is based on English Common Law.¹⁵⁹ This fact is reflected in the country's commercial, economic, criminal, and procedural law.¹⁶⁰ However, Customary Law also plays a role, albeit a diminishing one, in Nigeria's legal scheme.¹⁶¹ Customary law, which is categorized as ethnic/non-Moslem and Islamic Law/Sharia,¹⁶² still has an impact, mostly in civil, family, and personal relations.¹⁶³ Because of the continued presence of Customary Law, Nigeria has a dual system of courts.¹⁶⁴ In the South, Muslim law is administered as part of the customary system. However, in the North, Muslim law is accorded a completely separate Sharia system.¹⁶⁵ Appellate decisions from the two court systems converge in the Supreme Court, which has appellate jurisdiction over both court systems.¹⁶⁶

D. Customary Law

Customary Law is indigenous law that applied to the various ethnic groups.¹⁶⁷ Mainly used in the area of family relations, such as dissolution of marriages, it is complex because it is unwritten and there are differences between the laws of the various ethnicities.¹⁶⁸ In many cases, the Customary Courts are presided

157. REYNOLDS, *supra* note 148, at III Nigeria 5; Nigeria's citizenship is 50% Muslim, generally occupying the North, and 40% Christian, while the remaining 10% practice indigenous beliefs. *The World Fact Book*, THE CENTRAL INTELLIGENCE AGENCY, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html#Intro>.

158. See REYNOLDS, *supra* note 148, at III Nigeria 5-7.

159. *Id.* at III Nigeria 5.

160. *Id.*

161. *Id.*

162. Dina et. al., *supra* note 19, at Legal System: Customary Law.

163. *Id.*

164. REYNOLDS, *supra* note 148, at III Nigeria 6.

165. Dina et al., *supra* note 19, at Customary Law: Islamic Law/Sharia/Moslem Law.

166. REYNOLDS, *supra* note 148, at III Nigeria 6.

167. Dina et. al., *supra* note 19, at Customary Law: Ethnic/Non-Moslem Law.

168. *Id.* at Customary Law: Ethnic/Non-Moslem Law.

over by people that do not have legal training.¹⁶⁹ In contrast, Sharia is based on the Islamic religion and is in written form.¹⁷⁰ As noted, in the South, Sharia is treated as one aspect of Customary Law, whereas in the North, Sharia has been a separate legal system since 1956.¹⁷¹

When originally adopted, Sharia was used only for civil matters.¹⁷² However, in 1999, one of the Northern states, followed by other Northern states, extended Sharia to apply to penal law matters.¹⁷³ Because some elements of Sharia, e.g., stoning people to death to punish adultery, are not well-regarded by the international human rights community, this development has caused some concern both within and outside the country.¹⁷⁴ In theory, Sharia is not supposed to apply to non-Muslims; nevertheless, many of the laws in the North reflect Sharia principles, such as laws prohibiting the sale of alcohol and laws segregating the sexes at school or in hotels.¹⁷⁵

E. Courts

The Nigerian judicial system at the federal level includes the Supreme Court of Nigeria, the Federal Court of Appeal, and the Federal High Court.¹⁷⁶ There are also Customary Courts, which are called "Area Courts" in the North.¹⁷⁷

The Supreme Court has original jurisdiction for cases involving the federation and any state, as well as, among the states.¹⁷⁸ The Supreme Court also has appellate jurisdiction for appeals from the High Court, and the Shari'a Courts of Appeals in the Northern states.¹⁷⁹ The Federal Court of Appeal serves as a

169. *Id.*

170. *Id.* at Customary Law: Islamic Law/Sharia/Moslem Law.

171. *Id.* at Customary Law.

172. Pavani Thagirisa, *A Historical Perspective of the Sharia Project & a Cross-Cultural Determination Approach to Resolving the Sharia Project in Nigeria*, 29 BROOK. J. INT'L L. 459, 470 (2003).

173. *Id.*

174. *Id.* at 472.

175. Johannes Harnischfeger, *Sharia and Control over Territory: Conflict between "Settlers" and "Indigenes" in Nigeria*, 103 AFR. AFF. 431 (2004) available at <http://afraf.oxfordjournals.org>.

176. REYNOLDS, *supra* note 148, at III Nigeria 6.

177. *Id.*

178. *Id.*

179. *Id.*

national appellate court.¹⁸⁰ Federal High Courts are the courts of original jurisdiction for the federal system.¹⁸¹ There is also a federal court system for the Capital Region.¹⁸² These courts generally apply British Common Law rather than Customary Law.¹⁸³ Recent legislation has indicated that non-Customary Law is to be supreme if there is incompatibility with Customary Law.¹⁸⁴

The Constitution also provides for the formation of state courts.¹⁸⁵ There is variation here, in particular between the predominantly Muslim Northern states and the rest of the country.¹⁸⁶ The state courts outside the North include the Magistrate's Court as basic civil and criminal courts.¹⁸⁷ Most states also have Customary Courts to hear family civil matters and misdemeanor criminal matters.¹⁸⁸ The North has Magistrate's Courts with criminal jurisdiction and a Shari'a court system that includes Courts of Appeal.¹⁸⁹

F. Legal Education

Anyone who wants to practice law in Nigeria must attend the Nigerian Law School.¹⁹⁰ Prior to 1962, Nigerian lawyers were not required to know Customary or Sharia Law, despite the role these systems had in the Nigerian legal system.¹⁹¹ This was remedied with the passage of the Legal Education Act, which created the national law school and developed a curriculum.¹⁹² The course is now divided into two parts: Bar Part I and Bar Part II.¹⁹³ Bar Part I is for students who previously studied law in a foreign university, and it consists of Constitutional Law, Criminal Law,

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at III Nigeria 4.

185. *Id.* at III Nigeria 6-7.

186. *Id.* at 7.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Legal Education*, *supra* note 42.

191. *Id.*

192. *Id.*

193. *Id.*

Nigerian Legal System and Nigerian Land Law.¹⁹⁴ Bar Part II is for all law students and includes Civil Procedure, Company Law and Commercial Practice, Criminal Procedure, Law of Evidence, Legal Drafting and Conveyancing, Professional Ethics, Legal Practitioner's Accounts, Law Office Management and General Paper.¹⁹⁵

G. Comparative Law in the Nigerian Judiciary

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

In the interesting case of *Agbakoba v. The Director of SSS*,¹⁹⁶ the issue was whether the possession of a national passport or its withdrawal had any relevance to the constitutionally guaranteed right of freedom of movement, including the right to exit Nigeria. Justice Emmanuel Ayoola JCA (as he then was) who was not only a former Chief Justice of the Gambia, but also President of the Court of Appeals of the Island of Seychelles, and later Chair and President of the Special Court of Sierra Leone, relied on comparative jurisprudence from the United States, the United Kingdom, and India. In *Ogugu v. The State*,¹⁹⁷ extensive use was made of comparative case law from the United Kingdom, Zimbabwe, India, United States and Jamaica.

In *Lakanmi v. Attorney General (West)*,¹⁹⁸ the Supreme Court of Nigeria examined the events surrounding the emergence of the

194. *Id.*

195. *Id.*

196. *Agbakoba v. The Director, S.S.S.*, [1994] 6 NWLR 475.

197. *Ogugu v. State* [1996] 6 NWLR (Pt. 316), 1; see also Chinonye Obiagwu & Chidi Anselm Odinkalu, *Nigeria: Combating Legacies of Colonialism and Militarism*, in HUMAN RIGHTS UNDER AFRICAN CONSTITUTIONS: REALIZING THE PROMISE FOR OURSELVES 211, 248 n.65 (Abdullahi Ahmed An-Na'im ed., 2003).

198. *Lakanmi v. Attorney Gen. W. Nigeria*, (1970) 6 NSCC 143.

Military in the body polity in Nigeria. In delivering judgment, the Nigerian Apex Court relied on the judgment of then Chief Justice of Uganda, Sir Udo Udoma in a similar case, *Uganda v Commissioner of Prisons*.¹⁹⁹ Reference was made not only to the above Ugandan case, but also to cases from Australia, United Kingdom, Cyprus, United States, and Pakistan.

Our research overall revealed no consistent pattern or clear cut position on the question of the use or non-use of Comparative Law within the Nigerian judiciary. Perhaps much depends on the nature of the case, but more importantly, the use of Comparative Law relies on the background, training, orientation and legal world view of the judges deciding such questions as happened in the cases cited above. One is disturbed by the fact that little is known about Comparative Law, and that little notice, if any, is taken of the need and use of Comparative Law in the country's judiciary as is the case in South Africa. This is particularly worrisome when one considers that the judiciary of every nation in the world is looked upon as the last hope of the ordinary citizen. Members of that arm of government represent the hard core of the legal elite of the society.

VI. BACKGROUND: LEGAL SYSTEM IN SOUTH AFRICA

A. Brief History

South Africa was first colonized by the British in a violent process.²⁰⁰ The British and the Afrikaners, descendants of seventeenth century Dutch settlers, fought over political power in the colony.²⁰¹ The South African population is diverse; it is comprised of "whites," mostly Afrikaners of European descent; "blacks," from a variety of linguistic groups and tribes; mixed race, loosely described as "colored"; Bushmen and Hottentots who were indigenous to the area; and Muslim and Hindu Asians from India.²⁰² The Republic of South Africa was created on May 31, 1961, when the protectorate's parliament severed the link with

199. *Uganda v Commissioner of Prisons, ex parte. Matovu* (1966) E.A.L.R. 514. Sir Udo Udoma obtained a Ph.D. in Comparative Constitutional Law from the University of London.

200. Sampson, *supra* note 47, at 6A.70.12-.13.

201. *Id.* at 6A.70.13-.14.

202. *Id.* at 6A.70.15-.19.

the British sovereign.²⁰³

South Africa's policy of government mandated racial segregation, called *apartheid*, caused years of international controversy.²⁰⁴ This policy originated when the Afrikaner Nationalist Party came to power in 1948, advancing a course of "separate development."²⁰⁵ The manifesto deemed that an identified group of non-white citizens should be regarded as "migratory," and "not entitled to political or social rights equal to those of Whites."²⁰⁶ A sustained revolt against apartheid began in 1976, when the schoolchildren of Soweto, a poor township, rebelled against apartheid education.²⁰⁷ After years of resistance, struggle, and international protests, reform finally took hold.²⁰⁸ In September of 1989, F.W. de Klerk was elected President and called for an end to apartheid.²⁰⁹ De Klerk ordered the release of political prisoners, among them the influential resistance leader, Nelson Mandela.²¹⁰ The African National Congress ("ANC") was increasingly seen as a "government-in-waiting."²¹¹ In 1994, the ANC won 252 of 400 seats in South Africa's first democratic elections, and Nelson Mandela, a prominent member of the ANC, became the first black President of South Africa.²¹²

B. Government Framework

The South African government is comprised of three branches: the Executive, led by a President; a bi-cameral

203. *Id.* at 6A.70.27.

204. *See, e.g.*, G.A. Res. 1761 (XVII), at 9, U.N. Doc. A/1761 (Nov. 6, 1962).

205. Robert C. Barclay, *The Current Legal Status of the South African Homelands*, in 6A MODERN LEGAL SYSTEMS CYCLOPEDIA 6A.90, 6A.90.7 (Kenneth Robert Redden, ed., William S. Hein & Co., Inc. 1996).

206. *Id.*

207. *History: The End of Apartheid*, SOUTH AFRICAN GOVERNMENT, <http://www.info.gov.za/aboutsa/history.htm#end> (last visited Mar. 26, 2009).

208. *Id.*

209. F.W. de Klerk, *Biography*, NOBELPRIZE.ORG, http://nobelprize.org/nobel_prizes/peace/laureates/1993/klerk-bio.html (last visited Mar. 26, 2009).

210. *History: The End of Apartheid*, *supra* note 208.

211. *Id.*

212. 1994: *Mandela Becomes SA's First Black President, On This Day: 1950-2005*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/may/10/newsid_2661000/2661503.stm (last visited Feb. 9, 2011).

Legislative branch called Parliament, which is comprised of the National Assembly and National Council of Provinces; and the Judicial Branch.²¹³ On September 28, 2008, President Thabo Mbeki resigned because of dissent within the ANC.²¹⁴ Kgalema Motlanthe, the ANC General Secretary, served the remainder of Mbeki's term, until elections were held in early 2009 that produced Jacob Zuma as the new President of South Africa.²¹⁵

C. Legal System

South African law evolved from traditional or inherited law, legislation, judicial precedent, and custom.²¹⁶ South African law was not founded on English common law; it is also not a purely civil law country.²¹⁷ The major influence on modern South African law was the Roman-Dutch system, which was the law in force in Holland at the time of Dutch colonization.²¹⁸ Roman law is distinctive in that historians "seem to agree that early classical Roman law was [C]ustomary [L]aw, rather than enacted law."²¹⁹ Apparently, there was also a "noticeable absence of professional judges."²²⁰ When the British took over the area, they rejected replacing the existing law with English Common Law.²²¹

Law developed and recorded by Dutch jurists characterizes the Roman-Dutch system.²²² In this system, Latin is compulsory for a qualifying degree in law.²²³ Interestingly, the Netherlands replaced Roman-Dutch law with the Napoleonic Code, and then with Dutch "Burgerlijk Wetboek" (Civil Code).²²⁴ South Africa and Zimbabwe are the only countries left where Roman-Dutch Law prevails.²²⁵ In the intervening years, Roman-Dutch law has

213. Barclay, *supra* note 205, at 6A.90.7.

214. *Id.*

215. *Id.*

216. Sampson, *supra* note 47, at 6A.70.49.

217. *Id.*

218. *Id.*

219. PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 47 (2d ed. 1999).

220. *Id.*

221. *Id.*

222. Sampson, *supra* note 47, at 6A.70.49.

223. *Id.* at 6A.70.50.

224. *Id.*; see also Gerrit Meijer & Sjoerd Y. Th. Meijer, *Influence of the Code Civil in the Netherlands*, 14 EUR. J. L. & ECON. 227 (2002).

225. Sampson, *supra* note 47, at 6A.70.50.

been complemented by English case law.²²⁶

Legislation is promulgated in the two official languages, English and Afrikaans.²²⁷ Judicial precedent is also a source of law; however, *stare decisis* is not given the same deference as in the United States, for example.²²⁸ A former chief justice once commented: "It is a lesser evil for a court to override its own legal opinion, clearly shown to be wrong, than indefinitely to perpetuate its error."²²⁹ Because ancient customs were recognized "in Holland as part of the common law if they had been recognised as law from time immemorial,"²³⁰ South Africa recognizes long-established custom that is "reasonable, certain, and has been uniformly observed for over thirty years."²³¹

As a result of its historical development, South African law is a blend of Roman-Dutch Law, English case law as persuasive authority, and in some less frequent instances, American, Australian, or Canadian decisions.²³² Also relevant is that South Africa has not accepted compulsory International Court of Justice ("ICJ") jurisdiction.²³³

D. Courts

The South African court system consists of the Constitutional Court, the Supreme Court of Appeals, High Courts, and Magistrate Courts.²³⁴ The creation of the Constitutional Court of South Africa was a very important and historical component of South Africa's transformation from an apartheid parliamentary regime to a representative constitutional democracy. That court, along with all other courts and tribunals, was explicitly instructed by the Constitution that when interpreting the Bill of Rights, it "must consider [I]nternational [L]aw and it may consider foreign

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 6A.70.51.

231. *Id.*

232. *Id.* at 6A.70.54-55.

233. *The World Factbook: South Africa*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html#Issues> (last visited Mar. 25, 2009).

234. *Id.*

law.”²³⁵ The Constitutional Court has the final say on all constitutional matters and binds all other courts on any constitutional issue.²³⁶ The South African Constitutional Court has set forth in some of its judgments its appreciation that the Constitution encourages regard for foreign law. In a 2005 case, regarding whether the minister of police should be vicariously liable for the gross misconduct of three members of the Johannesburg police department, the court consulted certain decisions from the United Kingdom, Canada, and the United States.²³⁷ In a unanimous decision written by Justice O’Regan, the youngest member of the court with experience as an International Law professor and scholar, he explained the reference to such foreign sources thus:

It is not only our law that has struggled to determine the proper ambit of the principles of vicarious liability and to apply them in a manner that is both consistent and fair. There can be no doubt that it will often be helpful for our courts to consider the approach of other jurisdictions to problems that may be similar to our own.²³⁸

The learned Justice acknowledged that the “dangers of shallow comparativism must be avoided, but to forbid any comparative review because of those risks . . . would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions”²³⁹

E. The Use of International Law

The South African Constitutional Court is required, by law, to consider International Law in interpreting the Bill of Rights. It appears that the Court has not made much use of International Law in constitutional interpretation, whether in regard to the Bill of Rights or other contexts hence the criticism leveled against it in some scholarly writings.²⁴⁰ A very notable South African

235. S. AFR. CONST., § 39(1)(b)-(c).

236. *The Courts of South Africa*, http://www.capecgateway.gov.za/afr/pubs/public_info/C/32303/E (last visited Mar. 25, 2009).

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

238. *Id.* at 34.

239. *Id.* at 35.

240. Richard Cameron Blake, *The World’s Law in One Country: The South*

International Law scholar John Dugard lamented the minimal use of International Law in the Constitutional Court's decision in *Azapo*. There, the Court decided the constitutionality of the Promotion of National Unity and Reconciliation Act 34 of 1995 which granted amnesty from both criminal prosecutions and civil claims to members of the apartheid police responsible for killing anti-apartheid activists. Dugard stated as follows:

The Court considered only the question whether the provisions of the 1949 Geneva Conventions requiring prosecution for 'grave breaches' were applicable (which it held were not applicable to the South African situation), but made no attempt to examine whether the [C]ustomary [L]aw rules relating to genocide, torture, war crimes and particularly crimes against humanity required prosecution of offenders. As apartheid has been labelled as a crime against humanity by the General Assembly and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, and seems to fall squarely within the accepted definitions of this crime, it is surprising that no attempt was made to address the question whether customary [I]nternational [L]aw requires the prosecution of those who commit this crime, particularly in respect of systematic murder, torture and disappearances which were crimes under South African law before 1990.²⁴¹

The Supreme Court is the highest court on all non-constitutional matters.²⁴² The Court's decisions are binding on all lower courts; they were formerly called the Appellate Division, since their jurisdiction is appellate.²⁴³ The High Court, formerly called the Supreme Court, has jurisdiction over all matters in their geographic area.²⁴⁴ The High Court generally hears monetarily significant civil cases, major criminal cases, appeals

African Constitutional Court's Use of Public International Law, 115 S. AFR. L. J. 668, 669, 684 (1998).

241. John Dugard, *International Law and the South African Constitution*, 8 EUR. J. INT'L L. 77, 90-91 (1997).

242. *The Courts of South Africa*, *supra* note 236.

243. *Id.*

244. *Id.*

from the Magistrate Courts in their region, and matters concerning personal status, such as insolvency or adoption.²⁴⁵ Magistrate Courts hear most matters generally.²⁴⁶ In addition, there are Circuit Courts that sit in different geographies at fixed times during the year, and a variety of specialized courts for matters such as divorce or tax.²⁴⁷

F. Legal Education

In South Africa, the legal profession is comprised of two branches: advocates and attorneys.²⁴⁸ These are the legal equivalents of English barristers and solicitors, respectively.²⁴⁹ Generally, advocates are those who assist litigants by speaking on their behalf.²⁵⁰ They enjoy the virtual monopoly of appearing in superior courts.²⁵¹ Advocates admitted in the British Isles and in Holland were automatically admitted to practice; eventually those with an LL.B. from the University of Cape Town were also accepted.²⁵²

Attorneys are generalists, unlike advocates, although there are some limited specializations available, such as notary public, conveyance, or patent attorney.²⁵³ They interact directly with the public and brief the advocates for appearance in court.²⁵⁴

South African legal education evolved as a result of British administration in the early nineteenth century.²⁵⁵ There are two degrees available: the LL.B., which is available at a variety of South African universities that have a somewhat uniform core of law subjects;²⁵⁶ and the B. Proc. Degree, applicable to attorneys, which is overseen by a board for the Recognition of Law Examinations.²⁵⁷

245. *Id.*

246. *Id.*

247. *Id.*

248. Sampson, *supra* note 47, at 6A.70.65.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 6A.70.67-.68.

254. *Id.* at 6A.70.69.

255. *Id.* at 6A.70.72.

256. *Id.* at 6A.70.73.

257. *Id.*

VII. BACKGROUND: LEGAL SYSTEM IN EGYPT

A. Ancient Egyptian Law

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

B. Contemporary Legal Structure in Egypt

Egypt's highest court, the Supreme Constitutional Court, reviews the constitutionality of laws and regulations, resolves jurisdictional conflicts, settles disputes in cases where lower courts have made conflicting judgments, and interprets the government's laws and decrees.²⁵⁸ Below this court are courts of general jurisdiction and administrative courts. Courts of general jurisdiction include the Court of Cassation, the courts of appeal, the tribunals of first instance, and the district tribunals.²⁵⁹ Established in 1931, the Court of Cassation is the only one in its category and is based in Cairo. The Court of Cassation has final jurisdiction in criminal and civil cases.²⁶⁰ The courts of appeal have jurisdiction over one or more of Egypt's governorates, or administrative divisions, and hear appeals of decisions made by lower courts.²⁶¹ The tribunals of first instance are the courts that hear major criminal and civil cases. The district tribunals have jurisdiction over minor criminal and civil cases.²⁶² The Public Prosecution, headed by an attorney general, serves at all levels of courts of general jurisdiction in all criminal and some civil cases.²⁶³ The administrative courts have jurisdiction over cases involving the government or any of its agencies and may investigate administrative crimes committed by officials or civil

258. *Egypt*, MICROSOFT ENCARTA ENCYCLOPEDIA (2008).

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

servants.²⁶⁴ Other judicial bodies include the Council of State, which settles administrative disputes and deals with disciplinary cases within the judicial system, and the Supreme Judicial Council, which ensures the judiciary's independence from outside interference and helps regulate other judicial bodies.²⁶⁵ There are also courts of limited jurisdiction for geographical disputes, family courts for addressing family law divorce and child custody issues, and an administrative judiciary.

Egypt's legal system is closely patterned on that of France.²⁶⁶ A panel of judges, as opposed to a jury, reaches verdicts. Religious courts once operated, with separate systems for Muslims, Christians, and Jews, but they were abolished in 1956.²⁶⁷ Many Muslims argue that Islamic law, or the Sharia, should be the sole basis for all Egyptian legislation.²⁶⁸ A constitutional amendment adopted in 1980 recognized the Sharia as a principal source of Egypt's laws, but the legal system is secular.²⁶⁹ Another example of a prominent comparative scholar who influenced the development of Egyptian Law is the lawyer 'Abd al-Razz-aq al-Sanh-ur-i, who was trained in France and Egypt.²⁷⁰ He was instrumental in formulating hybrid codes for Egypt, Iraq, and Kuwait.²⁷¹

A rigid comparative analysis of Egyptian Law is important for several reasons. Egyptian Civil Code has been the source of law and inspiration for other Middle Eastern jurisdictions, including the pre-dictatorship kingdoms of Libya, Jordan and Iraq, Bahrain (2001), as well as Qatar (1971), and the commercial code of Kuwait. The Egyptian system is an important source of law for understanding legal systems and the development of other systems that were based on the Egyptian system. In examining the Egyptian legal system, one finds a practical source for combining the notions of Common Law and Islamic Law. As an additional benefit, examination reveals aspects of both legal and

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. Intisar A. Rabb, "We the Jurists": *Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527, 532, n.9 (2008).

271. *Id.*

cultural understanding where these two systems are compatible. "[A]fter reminding us of the importance of legal anthropology in [C]omparative [L]aw, the author insists on the necessary compromise between the old [C]ustomary [L]aw and other legal cultures, notably Islamic or European."²⁷² From a practical standpoint, comparative analysis is useful in creating International Contracts between Common Law and Islamic Law States for compatibility of binding terms on both State parties. Most important are binding terms for investment in foreign firms as well as arbitration clauses enforceable in domestic court systems.²⁷³

By understanding the foundation and history of development of these mixed systems of Western and Islamic law, we come to a new understanding of where many similarities and compatibilities lie in these systems of law. Through the study of the development of the Egyptian system, we see the development of the mixed Islamic and Common Law systems and their eventual conflicts played out through cases in the State. Indeed Egypt's constitution recognizes Sharia Islamic Law as a source of Law.²⁷⁴ This combination of the two systems creates a wonderfully exciting situation for studying the relationship of the two systems of law within the same state. Egypt was one of the first nations to develop such a system and is, therefore, a prime example for comparative study.

In a world where national and cultural difference is often seen as posing a formidable challenge, comparatists hold up a view of diversity as neither an impenetrable barrier to comparison nor an aberration to be ignored or reduced, but instead as an invitation, an opportunity, and a crucible of creativity and dynamism.²⁷⁵

272. Blanc-Jouvan, *supra* note 17, at 1081.

273. Andrea K. Bjorklund, *Mandatory Rules of Law and Investment Arbitration*, 18 AM. REV. INT'L ARB. 175, 182 (2007).

274. *Egypt*, *supra* note 258.

275. Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 45-46 (1998).

VIII. BACKGROUND: LEGAL SYSTEM IN MOROCCO

A. Judicial Structure

Morocco has a four-level Court or Judicial setup. It has twenty-seven *sadad* courts, thirty *regional* Courts, nine Courts of Appeal and a Supreme Court in Rabat.²⁷⁶ *Sadad* and regional courts divided into four sections: shari'a; rabbinical; civil, commercial and administrative; and penal.²⁷⁷ *Sadad* courts are courts of first instance for Muslim and Jewish personal law.²⁷⁸ Shari'a sections of regional courts also hear personal status cases on appeal.²⁷⁹

B. Legal Structure

The laws of Morocco are similar to other African nations in that they are developed through a struggle of balancing a previously imposed colonial legal system with the traditional and religious requirements of the Moroccan people. However, Morocco deserves special attention because while it has shared the African regions' struggle with human rights violations and weakness of the rule of law, it has begun developing and implementing new laws and successfully tackling the challenges of eliminating human rights violations within its government and legal system.²⁸⁰ The Moroccan Constitution was adopted on March 10, 1972.²⁸¹ Article 6 of the Constitution declares Islam the official state religion and guarantees freedom of worship for all citizens.²⁸² The development of Moroccan law is tied to three critical political movement periods. The first is 1912 to 1956 during the French colonization.²⁸³ The second is from 1957 to

276. *Morocco, Islamic Family Law: Possibilities of Reform Through Internal Initiatives*, EMORY L. SCH. (2009), <http://law.emory.edu/ifl/legal/morocco.htm> (working draft).

277. *Id.*

278. *Id.*

279. *Id.*

280. Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT'L L. 103, 111-13 (2002).

281. *Morocco, Islamic Family Law: Possibilities of Reform Through Internal Initiatives*, *supra* note 277.

282. *Id.*

283. Mounira Maya Charrad, *Family Law in Morocco: A Brief History*,

1958 when the immediate post-independence period saw a promulgation of a national body of legislation.²⁸⁴ The third stage of Moroccan legal development is the recent liberalization reforms, beginning in 2004.²⁸⁵

During the French occupation colonial periods from 1912 to 1956, the French attempted to develop a uniform system of law for Morocco. The Treaty of Fez, signed on March 30, 1912, made Morocco a protectorate of France.²⁸⁶ The French largely left the substance of Family Law “untouched in part because they feared violent reactions to any alteration of established norms.”²⁸⁷ Polygamy is legal within Morocco based on Islamic tradition. Many of the regions were left to create their own versions and local variations of laws.²⁸⁸ Many of these systems were based upon principles of Islamic Law, but improperly carried out. Most importantly, there was no single source of uniform laws for either foreigners or Morocco’s own citizens for reference.

“Following national sovereignty in 1956, Morocco equipped itself with a national body of legislation called the *Mudawwana* or *Code of Personal Status*, promulgated and implemented in 1957-58.”²⁸⁹ The Code of Personal Status stayed true to the Islamic tradition while clearly defining family and other related laws. There were two major differences between the colonial system of law and the Code of Personal Status. “For the first time, Morocco had a family law that applied to the population as a whole.”²⁹⁰ “The regional differences that had existed previously were no longer recognized.”²⁹¹ “This meant that some women now had less freedom and some more, but all Moroccan women were subject to the same law.”²⁹² “The other difference with the colonial period was that the *Mudawwana* presented in a concise and codified manner what had been previously a set of

INT’L MUSEUM OF WOMEN (Mar. 8, 2008),
<http://www.imow.org/wpp/stories/viewStory?storyid=124>.

284. *Id.*

285. *Id.*

286. *Morocco*, THE NEW ENCYCLOPEDIA BRITANNICA 331 (15th ed. 1997).

287. Charrad, *supra* note 284.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

interpretations by legal scholars or a set of customs.”²⁹³ Moroccan law began its transformation and updating from traditional legal systems. Indeed, the reason this update was so effective was because for over forty years, the traditional legal system was allowed to develop and interact with very little interference from a Western system of law. After the traditional and religious systems of law had developed into well-established precedents and interpretations known to most legal scholars, they were codified into a uniform set of binding laws.²⁹⁴

Growing United States and European interest in the region as well as the motivation of the Moroccan Monarch, King Mohammad VI, has put national and legal reform at the forefront of the national agenda.²⁹⁵ It has been King Mohammad VI's goal to lead his country forward in political, social, economic, and legal development and modernization. While there have been many economic and social consequences from the reforms, the legal developments I will focus on are the issues of Women's Rights and Human Rights violations.

C. Women's Rights in Morocco

“The Muslim woman in Morocco is considered an adult when it comes to managing her own patrimony or exercising her civil rights.”²⁹⁶ “Yet she remains a minor under the law for other civil acts: concluding her marriage, for instance, or managing her children's estate.”²⁹⁷ While this seems discriminatory, many steps are being taken to change women's rights in Morocco and update the legal system to address women's rights issues.²⁹⁸

“Morocco has tried to reconcile the law of the Koran with the universal human rights laid down in the country's

293. *Id.*

294. Marta Tarnawksy & Maria Smokla-Day, *Selected Current Bibliography on Foreign & Comparative Law*, 14 COMP. LAB. L. J. 104 (1992) (see for additional resources).

295. Haim Malka & John Alterman, *Arab Reform and Foreign Aid: Lessons from Morocco*, 28 CTR. FOR STRATEGIC & INT'L STUD. vii, (2006), available at

<http://www.csis.org/media/csis/pubs/malkamoroccobook4webuse.pdf>

296. Fadela Sebti, *Rights of the Muslim women in Morocco* (Nov. 17, 2003), http://www.mediterraneas.org/article.php3?id_article=10.

297. *Id.*

298. Adjami, *supra* note 281, at 110.

constitution.”²⁹⁹

The most remarkable reforms of 2004 concerned the age for marriage, divorce and polygamy. In brief, they set the age of marriage for women at eighteen, established the right to divorce by mutual consent, thus, giving women the right to divorce on the same grounds as men. They placed polygamy and unilateral repudiation by the husband under judicial control and restricted the conditions under which a judge would grant them, thus, making them quite difficult for a man to obtain. They also eliminated the requirement of a matrimonial guardian for a woman to marry.³⁰⁰

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

D. Human Rights violations in Morocco

The first set of reforms in Morocco dealt with relations of the individual and human right issues. In the previous section we focused the analysis on the issue of women's rights. The second set of reforms aimed at categorically correcting problems with the structure and functioning of the government itself. The reforms include economic reform, revision of press laws, parliamentary reform, and judiciary reform.³⁰¹

One of the first things that King Mohammad VI recognized was that traditional democracy was not how his government functioned nor was it what his people wanted or expected of their government. The system of what he calls *political pluralism* within a democracy is how he went about reforming the government and was able to adjust his reforms according to the

299. Sebti, *supra* note 297.

300. Charrad, *supra* note 284.

301. Malka & Alterman, *supra* note 296, at 45.

people's expectations.³⁰²

Finally, the King ordered the creation of a Human Rights Council to investigate government abuse of its citizens. The Council reported over 1500 pages of human rights violations inflicted upon Moroccan citizens by State actors.³⁰³ Bringing these acts into the open has exposed the agencies and prompted guidelines for preventing future violations.

In order to deal with the problems of terrorism, the King has incorporated the Islamist party into the government.³⁰⁴ By this bold move, he has given the party a political voice and risked legitimizing the fundamentalist rhetoric. However, with the voice comes the responsibility to refrain and possible accountability for future acts of terrorism.

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

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

At the same time, the government recognized issues important to the protection of the people and made changes to protect those people. The female citizens may have not have had a

302. *Id.* at 47.

303. *Id.* at 49.

304. *Id.*

strong voice in the Moroccan legal system, and yet the government and leaders were willing to take any political consequences of supporting reforms in order to protect, increase, and promote women's rights. The government has also created a new body for regulating itself to prevent future human rights violations. Additionally, instead of taking a hard line against fundamentalists and religious groups, incorporating them into the government to help combat terrorism seems like an opportunity to reduce that type of violence.

IX. OBSERVATIONS: SIMILARITIES AND DIFFERENCES IN METHODOLOGIES OF COMPARATIVE LAW

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

One consideration in whether a country can use a structured methodology effectively, including confirmation and theory testing, is the level of political and economic stability in the country. It is unlikely that it would be possible for a country to systematically monitor and tweak legal reforms if the government or political leaders are in a state of flux, which has been the case recently in Kenya³⁰⁵ and South Africa.³⁰⁶

X. CONCLUSION AND RECOMMENDATIONS

More than ever before, Africa is fast emerging as an important continent with great potential in terms of economic and strategic importance. Many more industrialized and newly economically emerging nations of the world that played no role in colonization in Africa, such as the United States of America and China, have joined in the aggressive exploitation of the economic

305. Gettleman, *supra* note 73, at A1.

306. Sampson, *supra* note 47, at 6A.70.49.

resources of the enormous deposits of oil, natural gas, and other mineral resources. Most actively involved in this new economic venture are many major multinational corporations from Western countries. Sadly, the huge profit derived from the massive economic activities undertaken by these actors does not reach the people of Africa. This raises the inevitable question which we and other scholars have addressed in other papers, which is whether the people's God-given wealth has become a curse instead of a blessing?³⁰⁷ I have proposed and vigorously argued elsewhere, that the people's right to exercise permanent sovereignty over their wealth and natural resources has risen to the level of international customary law.³⁰⁸ There is urgent need for the reformation of African judiciaries to be more accessible to individuals and groups seeking to enforce fundamental rights.

The application of Comparative Law is not an academic luxury throughout Africa; given the continent's history, it is a necessary tool to manage and integrate the reality of their unique legal systems and to enable the continent's entrée into globalization. It is true that these countries share common goals and methodologies in employing Comparative Law. Nevertheless, their Comparative Law goals and methodologies are calibrated to their individual countries' requirements, political environment, history, and aspirations.

In addition, because many of the countries in Africa, such as South Africa and Namibia, formed their constitutions relatively recently, they had a wide selection of laws and experiences to draw upon.³⁰⁹ By using Comparative Law, these countries have incorporated a wide variety of legal concepts, both from the developed world as well as from other countries within the region.

In an increasingly globalized world, the interaction and cross-

307. For a detailed general discussion of this situation and other related issues by the present writer and other scholars, see Chris Nwachukwu Okeke, *The Second Scramble for Africa's Oil and Mineral Resources: Blessing or Curse?*, 42 INT'L LAW., 193 (2008); see also Chris N. Okeke, *The Debt Burden: An African Perspective*, 35 THE INT'L LAW. (2001); Emeka Duruigbo, *The Global Energy Challenge and Nigeria's Emergence as a Major Gas Power: Promise, Peril or Paradox of Plenty*, GEO. INT'L ENVTL. L. REV. (2009).

308. See *supra* note 297.

309. Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176, 177-78 (1998).

influence of diverse legal systems and cultures is only going to increase, as borders become less visible. This development speaks to the continued relevance of the discipline of Comparative Law and the importance of continued education and interaction among comparative scholars.

Because of the inter-connectedness, engendered partly by globalization, the era of hostility toward foreign legal systems or cultures is essentially over. Perhaps the strongest argument for drawing from other societies is the inefficiency of re-inventing the wheel. To address their present situations, societies should adapt what they have seen work in other societies. Africa would particularly benefit from this course of action.

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

Adoption, adaptation, and borrowing should not necessarily be uni-dimensional, with Africa and the rest of the world drawing from the West. Western societies can learn from Africa in dealing with pressing issues, especially in the areas of Family Law and Alternative Dispute Resolution. In Africa, we aim for justice that benefits everyone, unlike the winner-takes-all practice in the West that only breeds animosity and further conflict. The Kenyan example illustrated herein, which was borrowed from Britain, shows that the West understands this concept very well; only that it seems to apply it mainly to political conflicts; it should be extended to other areas, and Africa can help.

Finally, the application of Public International Law ("PIL") is certainly an important factor in the debate and current developments in Comparative Law. However, to what extent it should form part of domestic legal structure remains controversial and unresolved. Should other African countries and the West

copy the South African example of making PIL a part of their constitutions? What are the pros, cons, and constraints?

In my considered opinion, the example of South Africa in terms of her constitutional recognition of the importance of international law in its legal system should be considered and adopted by other African countries. Considering the importance of International Law in contemporary times, we have advocated and strongly argued that its teaching and study be made compulsory in national law schools of all nations.³¹⁰ We have had no reason to retract from this position yet.

310. See CHRIS NWACHUKWU OKEKE, *THE THEORY AND PRACTICE OF INTERNATIONAL LAW IN NIGERIA* ch. 15 (Fourth Dimension Publishers 1986).