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African Law in Action*

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Abstract

This article discusses the issue of the effectiveness of law in Africa, looking at it from a perspective different from those commonly used in dealing with this theme. It proposes an analysis of the interactions between traditional, religious and official law in the course of the historical development of African law through the lens of the stratigraphic method. The analysis takes into consideration the different legal layers that have been posed upon each other. The work focuses on areas of law that are not commonly considered in this regard; in addition, the discourse is conducted using examples taken from jurisdictions that are not normally present in debates on African law. This implies the use of references that are not commonly encountered in African legal literature, together with some from the most important and renowned authors.

INTRODUCTION

The approach to African legal studies has been traditionally characterized by cultural influences. Studies on English-speaking African countries almost exclusively rely upon English-speaking African and non-African authors and materials, while the same situation occurs in French-speaking African countries with French-speaking African and non-African authors and materials. Interchanges occur quite seldom and references to sources from external experiences are not common.

Concepts and assumptions which are taken for granted in one "cultural block" could need some explanation in the other. In both cases, studies are mainly focused on those aspects of law (such as family, inheritance, land) which are deemed to have specific peculiarities in Africa. The jurisdictions usually considered are then often the same.

This article approaches the issue of law in Africa and its effectiveness from a different and more comparative perspective. The intention is to show how experiences from French-speaking African countries can be useful in approaching legal issues in English-speaking Africa and vice versa, and how external experiences (Italian, Portuguese) and jurisdictions, not often

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considered, can also be used to examine and understand problems and situations which are common across the African continent. The article also intends to make a step forward from the traditional approach to law in Africa by showing how commercial law in its wider sense, not normally taken into much consideration in this perspective, can also be extremely useful in understanding the reasons why (official) law is often very weak in sub-Saharan Africa.

THE ESSENCE OF AFRICAN NATIVE LAW(S)

Any discourse about African law refers to what is commonly called "customary law".

The diverse origins of African groups, together with their varied living conditions, ways of life and geographical divisions, among other factors, account for major differences between them. Therefore, even if the different (local) legal traditions have some similarities and common features,[1] it is impossible to speak about a single "African customary law", since "*il est impensable que des tribus de la savane aient les mêmes règles juridiques que celles de la forêt tropicale, et que celles-ci soient régies par le même droit qu'une population vivant de la pêche ou exerçant le commerce maritime*" [it is impossible that tribes from the savannah have the same legal rules of those from the tropical forest, and that those are all bound by the same law which rules the life of people living on fishing or maritime commerce].[2]

Any reference to "African customary law" must therefore be understood as referring to the different rules, having "legal" value, of different African populations, which are grouped because they share the same characteristics.

However the definition of "customary" also needs to be reviewed. The word "customary" is used to refer to a law with a non-authoritative source, but it can refer to two extremely different situations. It may refer to a system of rigid norms (for example, Roman *mores*, French *coutumes* or usages of international commerce) applied by a permanent judicial authority, which then become functionally equal to written rules. Alternatively the word may refer to a collection of elastic, fluid and flexible rules that can be changed quickly according to the circumstances, where a number of elements infinitely higher than those considered by a western lawmaker are considered relevant. These rules are applied by organs which are neither institutionalized nor specialized, and are focused on conciliation and peacekeeping rather than on the coercive

1 R Sacco *Di Alcune Singolari Convergenze Fra il Diritto Ancestrale Dei Berberi e Quello Dei Somali* [On some strange convergences between Berbers and Somali customary law] in *Scritti in Onore di Angelo Falzea* (1991, Giuffrè) vol IV at 397.

2 H Lévy-Bruhl "Introduction à l'étude du droit coutumier Africain" [Introduction to the study of African customary law] (1956) 8 *Revue Internationale de Droit Comparé* 67 at 68.

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imposition of a predetermined social rule.[3] African native laws [*droits originellement Africains*] are of this second type.[4]

The study of African native laws shows us a new legal order, very different from those legal orders with which westerners are familiar. The western jurist needs to abandon his traditional ways of thinking about and understanding law if he wants to study and understand the African concept of law.

Traditionally in Africa, law is not perceived in the western sense, ie a set of binding norms the creation and enforcement of which is assured by specialized (and centralized) entities. One of the peculiarities of African societies is that social phenomena are undifferentiated, so that it is impossible (and probably useless) to separate what is juridical from what is religious, supernatural or economic.[5]

Another issue to be considered is that law and legal rules are expressed in words, either written (western law) or spoken (native laws). Some Africans may not be literate, and this creates a gap between the "official" law and its effectiveness since the rural African in most cases does not have access to the law and may have not studied its language.

However in Africa not only is the traditional rule unwritten, its application is unwritten as well.[6] The entire juridical process, from rule to decision and legal reasoning, lacks not only written enunciation but also a technical formulation. This is attributed to the fact that, in Africa, there had traditionally been no need to verbalize the legal rule prior to the advent of European influence. African cultures ignore the role of the jurist and African languages do not have legal terminology.[7]

One of the problems in dealing with African native laws has to do with the knowledge of what constitutes the law. Jurists have often tried to write down the "custom". The act of writing changes the nature of the rule, since the validity of a spontaneous legal rule lies in the fact that it has come into use. In other words, it exists since it is applied, not because it has been written down.[8] It is incorrect to give authority to the text where the "custom" has

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3 R Sacco *Introduzione al Diritto Privato Somalo* [Introduction to Somali private law] (1973, Giappichelli) at 17.

4 The French appellation "African native law(s)" is used in this article instead of "African customary law(s)" since it emphasizes that these legal rules are derived from African cultures and traditions. The French appellation, which can be attributed to J Vanderlinden *Les Systèmes Juridiques Africains* [African legal systems] (1983, PUF), perhaps better renders the essence of African laws.

5 Lévy-Bruhl "Introduction à l'étude", above at note 2.

6 Nothing is written down (neither rules nor judgments) and "doctrine" is the oral transmission of legal rules from one generation to another.

7 See R Sacco *Antropologia Giuridica* [Legal anthropology] (2007, Il Mulino) at 196; JF Holleman *Issues in African Law* (1974, Mouton) at 13; AN Allott *Essays in African Law with Special Reference to the Law of Ghana* (1960, Butterworths) at 61.

8 There is a broad doctrinal contribution on the issue of "codification" of native laws and related problems. An important part of this contribution can be found in A Dundes Renteln "The ascertainment of folk law" in A Dundes Renteln (ed) *Folk Law: Essays in*

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been reported without considering all the external circumstances that are important for the elaboration of a single rule. Giving authority to the text means the text is valued, and this deprives the "custom" itself of its adaptability and flexibility.[9] Thus the codification of custom paradoxically increases the resistance of native law to culturally foreign influences.[10] Spontaneous law is by nature not immutable, and it can change whenever the circumstances render such change necessary; on the other hand, any written law, by its nature, cannot change until it is re-written. Undoubtedly "a code is necessarily antithetical to customary law".[11]

It should be also taken into consideration that any attempt to verbalize an African native rule will involve using language with terminology that implies legal concepts that are in most cases extraneous to native African languages. Thus there is a risk that the meaning of the rule will be misconstrued. Yet, a traditional African rule gives significance to elements and factors that a western jurist would probably not regard as legally relevant. This is because African society is characterized by a vision of life where everything is linked: life and the supernatural, human behaviours and natural phenomena, law, power and that which is sacred. In this context, the application of the rule traditionally is not directly intended to punish the guilty, but to consolidate the cohesion of the group and to restore accord within the group.

Another element should also be considered. African native law is based on a concept of time that is completely different from the concept of time in western law, since in many traditional African societies time is linked to factors such as market cycles or the harvesting of crops.[12] African law does not view time as relevant to law, thus it does not quantify or apportion time in a way that recognizes legal concepts like the limitation of actions, prescription and interest-bearing loans.[13]

Since native laws were not collected methodically and officially, they avoided the risk of being crystallized through their redaction and then

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the Theory and Practice of Lex Non Scripta (1995, The University of Wisconsin Press) vol I. See also TW Bennett and T Vermeulen "Codification of customary law" (1980) 24 *Journal of African Law* 206.

9 R Sacco *Il Diritto Africano* [African law] (1995, UTET); LP Vorster "Indigenous law and development" (1985) 1 *Development Southern Africa* 38; Bennett and Vermeulen id. But see Lévy-Bruhl "Introduction à l'étude", above at note 2 at 74.

10 WL Twining *The Place of Customary Law in the National Legal Systems of East Africa* (1964, University of Chicago Law School).

11 Bennett and Vermeulen "Codification of customary law", above at note 8 at 219.

12 M Aime *La Casa di Nessuno: I Mercati in Africa Occidentale* [The house of no-one: Markets in West Africa] (2002, Bollati Boringhieri) at 34 et seq.

13 M Alliot "Les résistances traditionnelles au droit moderne dans les états d'Afrique francophone et à Madagascar" [Traditional resistance to modern law in the Francophone states of Africa and in Madagascar] in C Kuyu (ed) *Le Droit et le Service Public au Miroir de l'Anthropologie* (2003, Karthala) 169 at 170.

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rationalized through the use of a different (western) legal approach in their elaboration.

THE CIRCULATION OF WESTERN PATTERNS IN AFRICA

Comparative law scholars have always viewed the African continent as valuable for studying the circulation of western legal models, since such circulation happened relatively recently, in a considerable number of countries and in a way that makes a comparative analysis easier.[14]

Scholars have traditionally classified today's African legal systems (with the exception of South African Roman-Dutch law, and other mixed systems like those of Mauritius and Seychelles) by considering the circulation of western patterns. The presence of African native laws and of Islamic šarī'a law within the legal system of a given country has been the distinctive element between the original western pattern and its African transplant.

The legal structure of most African countries appeared to be construed as a division between two profoundly different systems: native (or traditional) law and modern law.[15] African legal studies have shown how a classification based on such a dichotomy lacks any ground, emphasizing that African legal systems have a structure with specific peculiarities and differences from other legal systems in the world.[16] The study of African law using the legal stratification approach demonstrates how the importing of western legal systems has given a specific imprint to the legal system of each African state, differentiating it from other African states and giving rise to the sub-classification of an African legal system that is rooted in the structure and tradition of the former parent country.[17]

In any event, the official consolidation of the western pattern was achieved after colonization, when African countries obtained independence. At this point African countries worked with a system of law for their development, breaking with the past and looking forward. Such development was to be obtained by extending to all state citizens the law previously imported for

14 M Guadagni *Il Modello Pluralista* [The pluralist pattern] (1996, Giappichelli) at 27. AN Allott "African law" in JDM Derrett *An Introduction to Legal Systems* (1968, Sweet & Maxwell) 140 at 140 observed that "Africa … is a comparative-law laboratory, in which the process of legal comparison and conflict can be seen in action".

15 Alliot "Les résistances traditionnelles", above at note 13.

16 See Sacco *Il Diritto Africano*, above at note 9; Guadagni *Il Modello Pluralista*, above at note 14; K M'Baye "The African conception of law" in *International Encyclopedia of Comparative Law* (vol II, 1975, Tubingen) 138; C Ntampaka *Introduction aux Systèmes Juridiques Africains* [Introduction to African legal systems] (2005, Presses Universitaires de Namur); A Badara Fall *Il Diritto Africano ha una sua Collocazione Nel Diritto Comparato?* [Has African law its own place in comparative law?] (2007, Pensa Ed).

17 G Bamodu "Transnational law, unification and harmonization of international commercial law in Africa" (1994) 38 *Journal of African Law* 125 at 127.

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the minority of the settlers, because this law seemed more suited to the problems and needs of 20th century African societies.[18]

The official consolidation of the western pattern does not necessarily imply the effective consolidation of the transplanted model, or that its development in the former colony is in line with the development of the law in the former colonizing country. Indeed it is apparent that legal rules in African countries are definitely not identical to those of the European countries from which their legal system was transplanted. After such transplant, there were several legal developments in European countries that have not subsequently been imported into the legal systems of African countries. In addition, the latter engaged in their own legal developments, often involving the contamination of the transplanted laws or transplants from non-European legal systems.[19]

Moreover, the resistance of indigenous laws through the phenomenon of "legal mimesis" and the divergence between state law and underground law deeply characterize the African legal experience. Thus there is a need to go beyond the "law in the books" in order to grasp the real "law in action" practised both by jurists and legal practitioners and by ordinary people.[20]

Therefore, the significant role still played by native law, and the influence of religious law (for instance, šarī'a) when present (often combined with traditional influences), give African legal systems characteristics that are not found anywhere else in the world.

THE RESISTANCE OF AFRICAN NATIVE LAWS

When African countries attained independence, their legal systems had to be modernized speedily.

The need for viable modernization of African legal systems required the adoption of reforms that could take into consideration the peculiarities of each country and its effective development possibilities, in order to create solutions that could properly support such important changes. The entrance of new states into the community of nations made these states realize that their legal systems needed to be adjusted quickly to conform to international standards. This was easily and quickly achieved through the simple adoption of patterns already existing in the western world, generally those of the former colonizing countries, based on which the constitutions of the newly independent African countries were shaped, and whose systems of substantive and procedural law, already imported during the colonial period, were maintained.[21]

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18 Alliot "Les résistances traditionnelles", above at note 13.

19 See, for example, M Guadagni (ed) *La Scelta 'Socialista' in Etiopia, Somalia e Tanzania* [The socialist option in Ethiopia, Somalia and Tanzania] (1979, CLUET).

20 BE Harrell-Bond and EAB van Rouveroy van Nieuwaal (eds) *Disparity Between Law and Social Reality in Africa* (1975, Kroniek van Africa, Leiden, Afrika Studiezentrum).

21 AN Allott "Law in the new Africa" (1967) 66 *African Affairs* 55; M Guadagni "La riforma del diritto privato nel Sudan: Uno studio sui modelli normativi nel diritto Africano" [The

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While this phenomenon can be explained by familiarity with the system already present in the country during colonial times, as well as the desire for continuity, those factors are certainly not the only ones; countries which were not deeply influenced by a colonial experience (such as Ethiopia) also spontaneously adopted western (European) models.[22]

Subsequently, the most common approach of the African legislature has been to eliminate the recognition of the value of traditional rules, declaring that the state law is the only law applicable in a country.[23]

It soon became very clear that, in most cases, the imported western pattern was unable to work as expected. A large number of constitutions enacted immediately after independence have subsequently been repealed or radically changed, to try to find new approaches better adapted to the local reality and to the solution of national problems.[24] In many cases European codes are only theoretically in force since they are seldom, if ever, applied.[25] The lack of resources results in a lack of available legal information and also means that judges, lawyers and citizens alike are unaware of the applicable law;[26] furthermore, people very often do not resort to the official judiciaries due to their lack of power and autonomy, preferring to resort to other, informal dispute resolution mechanisms.[27] The same is true of the socialist legal reforms adopted by some African countries in contrast to their colonial heritage,

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reform of private law in Sudan: A study of normative models in African law] in *Scritti per il 50° della Facoltà di Economia e Commercio* (1974, Del Bianco) 183.

22 JH Beckstrom "Transplantation of legal systems: An early report on the reception of western laws in Ethiopia" (1973) 21 *American Journal of Comparative Law* 557; R David "Les sources du code civil Éthiopien" [Sources of the Ethiopian civil code] (1962) 14 *Revue Internationale de Droit Comparé* 497; J Vanderlinden "Civil law and common law influences on the developing law of Ethiopia" (1966–67) 16 *Buffalo Law Review* 250.

23 A good example of this approach is the Ethiopian codification project, which proposed a radical reform of the whole legal system, including the almost total abolition of native law since it was considered to vary too much from one area to another, to be unstable and often to lack true juridical characteristics. See David, ibid.

24 G Conac *Les Institutions Constitutionnelles des États d'Afrique Francophone et de la République Malgache* [The constitutional institutions of the Francophone African countries and of the Malgasy Republic] (1979, Economica).

25 J Mande Djapou "L'état du droit civil en République Centrafricaine" [The state of civil law in the Central African Republic] in J Willybiro-Sako (ed) *Le Rôle de la Justice dans le Développement de la RCA* (1991, published in Bangui) 141; Bennett and Vermeulen "Codification of customary law", above at note 8. A particular case is that of Eritrea, where the Ethiopian presence has been regarded as a colonial one and where the Ethiopian system has been provisionally maintained until a new Eritrean system is in place.

26 T Dejean "L'organisation judiciaire Centrafricaine" [The judicial organization in Central African Republic] in Willybiro-Sako (ed) id, 28; S Mancuso "African legal hybridity: Interaction of western, Islamic and native law in the Comorian legal system" in E Cashin Ritaine, SP Donlan, M Sychold (eds) *Comparative Law and Hybrid Legal Traditions* (2010, Schulthess) 97.

27 Dejean, ibid.

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where the application of socialist tenets is limited to the main cities and surrounding areas, while the rest of the country continues to be ruled by native law.[28]

Quite often the legislature which proclaimed the abandonment of the traditional system in favour of a more modern and efficient system provided for by state law, still had to resort back to the traditional system in order to make the official law work. In Eritrea, the new land tenure system based on the Land Proclamation 58/94 repealed all traditional land tenure systems present in the country in favour of a unique form of land ownership by the state, with the possibility of citizens obtaining an usufructuary right over the land. The proclamation also demands the classification of all lands through mapping, in order to determine their borders and to award them to the persons entitled to the plots. Lacking suitable resources to carry out these activities, the government had to resort to consulting village chiefs to determine the historical borders of the different plots of land and to determine which persons were entitled to the plots.[29]

Legislation that claims to have been enacted to solve problems, but is then not observed and enforced, is therefore a common occurrence in Africa. Most of the laws copied from the western model failed to adapt to African legal culture.

This is because the western approach does not embrace the same values of the people in the area to which it has been transplanted. The adoption of the western pattern is a revolutionary change in Africa: the abandonment of the community-centred approach in favour of a model based on individualism and the centralization of law, where only the state law can provide the country with a uniform set of rules since native laws change from one ethnic group to another. This constitutes the problem of adaptation and effectiveness for the transplanted and imposed law.[30]

Thus, the modernization of African law, in an attempt to officially adopt western patterns, does not seem to be a real and effective legal reform, but rather an attempt to present an outward image of a modern country and legal structure, while the legal reality evolves differently within the country. More recently, the introduction of legal rules modelled on western patterns has been considered a "declaration of intent" – a final goal to which the

28 With reference to Mozambique, see M Guadagni *Il Diritto in Mozambico* [Law in Mozambique] (1989, Trento University Press); with regard to Ethiopia, Somalia and Tanzania see again id *La Scelta 'Socialista'*, above at note 19.

29 S Mancuso *Terra in Africa: Diritto Fondiario Eritreo* [Land in Africa: Eritrean land law] (2013, EUT). See also L Castellani "Recent developments in land tenure law in Eritrea" (working paper no 37, Land Tenure Centre, Madison, University of Wisconsin, 2000).

30 On this point see V Kangulumba Mbambi "Les droits originellement Africains dans les récents mouvements de codification: Le cas des pays d'Afrique francophone subSaharienne" [African traditional laws in the recent codification trends : The case of sub-Saharan African Francophone countries] (2005) 46 *Les Cahiers de Droit* 315.

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legal reform should aim, while in the meantime the law in action does not necessarily comply with the principles set forth in the written law.[31]

The characteristic of this recent development is the emergence of a law claiming to be less linked to the western pattern and more closely aligned to African characteristics, but this is again the official state law, which is not necessarily the one really applied in the country.

Thus in Africa the application of law is progressive, its effects are felt very slowly, there is a gap between the law of the state and that of the people, the law is more an ideal than an immediate instrument, and it represents a development plan determining the objectives to be reached.[32]

THE RESULT OF THE INTERACTION: STATE LAW V UNDERGROUND LAW …

The dichotomy illustrated above reveals how the state law represents the most visible but less applied legal layer with respect to what is called "underground law".

The ways in which the African state is evolving transform it into an extremely complex social (and consequently legal) field in which state and non-state, formal and informal, local and transnational relations interact, merge and confront each other in dynamic and even volatile combinations, making the legal framework even more complex, and where, in extreme cases, multiple, unofficial microstates existing within the same state can be born.[33]

The African state is not yet able fully to extend the effectiveness of law to the entire country, especially in rural districts, where the presence of the state, from a western perspective, is clearly deficient or sometimes even non-existent. In such areas, often untouched by the modernization process, a law still strongly linked with local traditions is usually applied.

But even in areas closer to the cities and in capital cities, and especially in the densely populated suburbs comprising huts and shacks, state law is only partially enforced.[34] Here traditional rules cannot be effectively applied even if people feel culturally linked to them, as the urban context is so different to that of the rural areas and thus does not permit a simple transposition of the traditional ruling system.

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31 This phenomenon was already described by Allott "Law in the new Africa", above at note 21, who observed how this different view on law had already been adopted through the enactment of the Ethiopian Civil Code.

32 M Alliot "Un droit nouveau est-il en train de naitre en Afrique?" [Is a new law appearing in Africa?] in Kuyu (ed) *Le Droit et le Service Public*, above at note 13, 193.

33 B de Sousa Santos "The heterogeneous state and legal pluralism in Mozambique" (2006) 40 *Law and Society Review* 39.

34 F Snyder "Droit non-étatique et législation nationale au Sénégal" [Non-state law and national legislation in Senegal] in G Conac (ed) *Dynamiques et Finalités des Droits Africains* (1980, Economica) 259 at 259.

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People living in the cities therefore tend to abandon their own native laws, but the official law does not address their needs effectively. Such a situation creates a gap in the social regulation system that is filled by the emergence of spontaneous legal orders designed to regulate urban relations outside the official state framework.[35]

This spontaneous law is unofficial but is not necessarily "underground". It is unofficial because it is not recognized as a law introduced by the state; it may be prohibited or tolerated, but most of the time it is ignored. It becomes "underground law" when it competes with a state law that claims supremacy.

"Underground" law does not come from the supremacy of one native law over another, but develops from a variety of compromises that work in practice.[36] These are different legal solutions that are all outside or in competition with the state order, which in most cases must abdicate in favour of those alternative systems.[37] These new hybrid legal orders cover different aspects of the urban social order.[38]

Some rules are relevant to family relations, where marriages (whether traditional, religious or civil) are being more and more frequently replaced by de facto unions to avoid marriage-related costs (for example, the payment of a dowry).[39] These rules break down the traditional lineage links and create new spontaneous methods of "family" regulation.[40] Inheritance requires the creation of specific rules to resolve conflicts between the different traditional rules of the affected people, as well as between those rules and statutory law.[41]

Different methods of dispute settlement have emerged to deal with cases involving people belonging to different groups[42] and to compensate for the state's inability to enforce effectively that system based on the rule of (western)

35 Guadagni *Il Modello Pluralista*, above at note 14.

36 BE Harrell-Bond "'Native' and 'non-native' in Sierra Leone law" (1977) 17 *American Universities Field Staff Reports, Africa, West Africa Series* 1.

37 J Vanderlinden "Villes Africaines et pluralisme juridique" [African towns and judicial pluralism] (1998) 42 *Journal of Legal Pluralism and Unofficial Law* 245.

38 J Pauwells "Le droit urbain de Kinshasa" [The urban law of Kinshasa] (1998) 42 *Journal of Legal Pluralism and Unofficial Law* 9.

39 S Mancuso "O direito da familia num contexto pluralista: O caso do Moçambique" [Family law in a pluralist context: The case of Mozambique] in D Wei and O Massarongo (eds) *Contribuições Jurídicas Sobre a União de Facto e Direitos Sobre a Terra em Macau e Moçambique* (2011, IEJA Universidade de Macau) 47; N Coissoro "African customary laws in the former Portuguese territories 1954–1974" (1984) 28 *Journal of African Law* 72.

40 A Chaïbou "La jurisprudence Nigérienne en droit de la famille et l'émergence de la notion de 'coutume urbaine'" [The jurisprudence of Niger and the emergence of the notion of 'urban customary law'] (1998) 42 *Journal of Legal Pluralism and Unofficial Law* 157.

41 Harrell-Bond "'Native' and 'non-native'", above at note 36.

42 In reality native laws already had rules relating to the settlement of disputes where the parties were from different groups or clans. See for example G Brausch "La justice coutumière chez les Bakwa Luntu" [The customary justice of the Bakwa Luntu] (1942) 1 *African Studies* 235.

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law.[43] Sometimes these alternative methods will override state law, but the link between law, witchcraft and the supernatural is often maintained.[44]

New legal instruments govern economic relations in informal commerce, work relations, transport services, the renting of property, and the exercise of unrecognized professions like that of the shaman or witch doctor.[45] Sometimes such spontaneous law is applicable only in a specific city or even in one of its suburbs, but at other times it applies beyond the state borders, for example in cases of informal foreign commerce or migrant work. In the latter case this spontaneous law becomes a sort of alternative *lex mercatoria* [commercial law], where the principles governing such activities are completely outside the normal legal channels.[46]

It is interesting to note the trend of avoiding recourse to official state courts where the "applicable law" can be found in the hybrid legal orders, although the possibility of successfully contesting their application in an official context does exist.[47]

… AND LEGAL PLURALISM

The expressions "legal pluralism" or "legal syncretism" are used to describe the encounter between western legal culture based on written rules and the oral African tradition. This encounter created a hybrid legal system based on tacit compromise and the formal subjugation of African legal traditions to western law. An essential element of this hybrid system is the resistance of African legal traditions to the attempt to subjugate them, and their capacity to adapt themselves to the changes occurring in African societies.

Sometimes the written law bows out when faced with competing traditional legal culture. The 2005 Comorian family code has been largely inspired by

43 D Rodriguez-Torres "La justice expéditive à Nairobi: Informalité ou formalité juridique?" [Quick justice in Nairobi: Legal informality or formality?] (1998) 42 *Journal of Legal Pluralism and Unofficial Law* 179.

44 É le Roy *Les Africains et l'Institution de la Justice* [The African people and the judicial institution] (2004, Dalloz). On law and witchcraft, see OK Mutungi *Legal Aspects of Witchcraft in East Africa* (1977, East African Literature Bureau).

45 J Ross and Z Berhe "Legal aspects of doing business in Addis Ababa: A profile of mercato businessmen and their reception of new laws" (1974) 10 *African Law Studies* 1.

46 This is the case, for example, in today's Somalia, where in the total absence of a centralized state (an institution that is not part of Somali culture) a thriving commercial system has developed governed by a system of usages and practices based on Somali traditions. For example, in Mogadishu there is a flourishing market of foreign products of many kinds, furnished by a traders' network which collects savings from Somali emigrants around the world and invests them in the purchase of goods that gives them the possibility of recovering the amount of the remittances as well as generating some income once the goods have been brought into and sold in Somalia. This happens without any written contract, and is based purely on trust and relations within the clans. See for more information: Guadagni *Il Modello Pluralista*, above at note 14.

47 Harrell-Bond "'Native' and 'non-native'", above at note 36.

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Islamic law,[48] since Islam is the dominant religion of the country, but the code also retains the traditional rules of *magnahoulé* that favour the assets of the spouse, as well as the validity of *grand mariage* ["great marriage"]. Customary courts exist in several African countries (for example Cameroon, Comores, Ghana and Nigeria). A judge from a Mozambican district court interviewed about the resolution of family disputes (which fall under the competence of those courts of first instance) declared that these types of conflicts "are not for a judge to hear, but should be resolved within the family or in the neighbourhood".[49]

Sometimes the written law is amended to include rules that comply with tradition. The Central African *Code de la famille* [Family Code] and the Togolese *Code des Personnes et de la Famille* [Code of Persons and the Family], for example, both recognize monogamous and polygamous marriages as equal, allowing the parties to choose their preferred option. In Sierra Leone, the 2007 Registration of Customary Marriage and Divorce Act contains principles which recognize the validity of traditional marriages and their relationship with other kinds of marriages.

In other circumstances, tradition prevails over the written law, when the traditional cultural background is used to interpret the written code or law of European origin. In the Comorian *grand mariage* the negotiations concerning marriage are extremely long and are conducted directly between the families according to traditional rules, while in the case of normal marriages concluded under the family code the bride's consent implies the intervention of the *walī* [the closest male relative in the ascending genealogy] following the normal family law principles guided by šarī'a.[50] The expressions "*père de famille*" ["father of the family"] and "*solidarité non présumée*" ["non-presumed solidarity"] that appear in the Civil Code of the Democratic Republic of Congo have always been interpreted by resorting to the usages of informal commerce.[51]

Sometimes it is native law which ensures that state law can be applied. A 1950 decree forbids polygamy in the Democratic Republic of Congo, but also recognizes the "customary" effects of the marriage for the spouse who enters into a polygamous marriage in good faith and her children. This means that sons are regarded as legitimate even if the marriage has been declared null and void for being polygamous.[52]

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48 The Comorian family code was approved by Law 05-008 of 3 June 2005. See L Sermet "Droit de la femme et pluralisme aux Comores" [The law of women and pluralism in Comoros] (2008) 1 *Revue Aspects* 87.

49 Such a reaction is reported by de Sousa Santos "The heterogeneous state", above at note 33 at 59.

50 Further details can be found in P Guy "Le Minhadj-at-twalibin et les coutumes Comoriennes dans le statut personnel" [The Minhadj-at-twalibin and Comorian customs on family law] (1985) 6 *Études Océan Indien* 7.

51 Ntampaka *Introduction aux Systèmes Juridiques*, above at note 16 at 98.

52 Ibid.

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Furthermore, the 2000 Arusha peace and reconciliation agreement for Burundi expressly resorted to traditional cultural values (*ibanga*, *ubupfasoni* and *ubuntu*) and a traditional dispute resolution system (*ubushingantahe*) to restore and maintain peace in the country. One of the pillars of the peace and reconciliation process in Rwanda has been the resort to the *gacaca* traditional dispute settlement system to resolve many of the genocide-related criminal cases.

Despite allowing this recourse to traditional legal culture, state law remains unable to exercise direct control over the law in action, especially in those sectors where the influence of native law is shown to be stronger.

The next step has therefore been the official recognition of legal pluralism. For example, the latest 2004 Mozambican Constitution officially recognizes the pluralist composition of the country's legal system, providing that "The State recognises the different normative and dispute resolution systems that co-exist in Mozambican society, insofar as they are not contrary to the fundamental principles and values of the Constitution."[53]

It is not within the scope of this article to deal with legal pluralism in general and it will therefore not tackle a detailed discussion of the different theories of legal pluralism.[54] This article will simply proceed with considering legal pluralism in an African context, accurately described by Jacques Vanderlinden as "*une situation dans laquelle un individu se trouve au carrefour de plusieurs ordres juridiques et oriente par son choix la solution à donner à un conflit éventuel tant du point de vue du for compétent que du droit applicable. … Quel que soit le choix qu'il fasse, il risque d'entrer en conflit avec l'un, voire plusieurs, des réseaux dont il aura refusé de reconnaître le prescrit*" [a situation where a person is at the crossroads of different legal orders and by his decision influences the solution to be given to a possible dispute with reference both to the competent forum and the applicable law. … Whatever the choice he makes, he runs the risk of entering into conflict with one or more of the legal orders of which he has refused to recognize the validity].[55]

However if legal pluralism, as defined by Jacques Vanderlinden, identifies a situation of "real" pluralism, characterized by the conflict (at least potentially) existing between different legal orders present in a particular system, a

53 The declamation is contained in art 4 of the constitution, significantly titled "Legal pluralism".

54 The existing body of literature on legal pluralism is extremely extensive. On the origin of the concept, see J Carbonnier *Flexible Droit* [Flexible law] (7th ed, 1992, LGDJ). See also D Pimentel "Legal pluralism in post-colonial Africa: Linking statutory and customary adjudication in Mozambique", available at: <http://works.bepress.com/cgi/viewcontent.cgi?article=1006&context=david_pimentel> (last accessed 13 January 2012); J Griffiths "What is legal pluralism?" (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1 at 38; J Glissen (ed) *Le Pluralisme Juridique* [Legal pluralism] (1972, Éditions de l'Université de Bruxelles); M Guadagni "Legal pluralism" in P Newman (ed) *The New Palgrave: A Dictionary of Economics and the Law* (1998, McMillan) 542.

55 J Vanderlinden "Villes Africaines", above at note 37 at 250.

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situation like that of Mozambique, of recognized or "official" legal pluralism, should then lead to the conflict situation being overcome. This would mean that the different legal orders, without following an ethnocentric approach, would be interdependent and equal, and able to use all the proper instruments and institutions of the other order for their complete application. It does not seem that such a situation is operating anywhere.

A NEW ACTOR IN THE PLURALIST SCENE: AFRICAN UNIFORM LAW

The boundaries between different legal orders become less clear every day. During colonial times it was easy to identify the different legal orders present in the system (European colonial law and native law) and their respective spheres of action, and thus to regulate the relationships between them. However, the plurality of legal orders in Africa today is much more extensive and the interactions amongst them much more complex than during colonial times.

Indeed, until recently, the study of legal pluralism focused on tracking the local legal orders which coexist in different ways with official state law. Today, in addition to native and national legal orders, regional and supranational legal orders are emerging, interacting in multiple ways with the other legal orders, and creating considerable interactions involving supranational, national and sub-national legal orders.

At the beginning of the 21st century a new layer seems to be emerging in African law. This is the law made by westerners (mostly Europeans) for Africans. It is this law that follows the general pattern in terms of current legal development, where the law is designed to serve as a tool for economic development: the law must be easily accessible and comprehensible for both lawyers and non-lawyers; it must provide a legal environment favourable to investment; and it must be affordable and predictable with regard to its application, thus avoiding the possibility of state intervention (by means of legislation or judicial decisions) rendering an investment void. Moreover, the costs related to the application of the law should be minimized for the investor, giving him greater economy of scale. It is clear that, if law is harmonized at supranational level, the same law can allow the investor to enter more than one market.

Reference is made here to the Organization for the Harmonization of Business Law in Africa (OHADA) which currently represents the most advanced example of this new layer of African law. The objective of OHADA is to implement a modern harmonized legal framework in the area of business law in order to promote investment and develop economic growth in African countries. Discussions are also underway in the Southern African Development Community (SADC) about the possibility of moving towards legal integration in the area of commercial law.

The OHADA Treaty calls for the development of uniform acts, which would be directly applicable in member states notwithstanding any provision of

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domestic law. To date, the uniform acts that have been adopted relate to general business law, company law and pooling of economic interests, securities law, bankruptcy law, debt collection and enforcement law, accounting law, arbitration law, contracts for the carriage of goods by road, and co-operative companies law.[56]

This new legal framework also provides a dispute settlement mechanism, as one of the goals of the treaty is to establish judicial security in the countries involved.[57] The Common Court of Justice and Arbitration (CCJA) is the highest level of jurisdiction for all matters involving the application of the OHADA Treaty and the uniform acts. The CCJA has jurisdiction over judicial matters, since it rules on decisions rendered by the Courts of Appeal of the member states, as well as arbitration matters, as it supervises the appointed arbitrators and can grant enforceable status to awards. The CCJA thus ensures the harmonized interpretation of the treaty, the uniform acts and the corresponding regulations and arbitration agreements.[58]

A NEW RESISTANCE FROM AFRICAN NATIVE LAW?

African lawmakers today rely on law to develop their countries economically and socially, to affirm state authority and to build national unity, in opposition to any particularism emanating from any village, lineage or tribe, or from any ethnic, religious or language group.[59] They embarked upon a process of modernizing their legal systems on the assumption that people who refused to acknowledge the foreign law transplanted during colonialism would welcome a new, locally made law that intended to take local needs into consideration. Since this new law is intended to serve the promotion of

56 The existing body of literature on OHADA law is quite extensive. The French law journal *Revue Penant* dedicates most of each quarterly issue to doctrine and case law related to OHADA law. For a general overview of OHADA, see: "L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA)" 205 (13 October 2004) *Petites Affiches*; J Issa-Sayegh "L'intégration juridique des états Africains dans la zone Franc" [Legal integration of the African countries in the Franc zone] (1997) 823 *Revue Penant* 5 and (1997) 824 *Revue Penant* 120 (parts I and II); J Issa-Sayegh "Quelques aspects techniques de l'intégration juridique: L'exemple des actes uniformes de l'OHADA" [Some technical aspects of legal integration: The example of OHADA uniform acts] (1999) 4 *Uniform Law Review* 5; B Martor, N Pilkington, DS Sellers and S Thouvenot *Le Droit Uniforme Africain des Affaires Issu de l'OHADA* [African uniform business law issued by OHADA] (2009, Lexis Nexis Litec); A Mouloul *Comprendre l'OHADA* [Understanding OHADA] (2nd ed, 2008, published in Conakry); P Tiger *Le Droit des Affaires en Afrique* [Business law in Africa] (1999, Presses Universitaires de France); as well as the official collections of OHADA law, one published by Presses Universitaires d'Afrique in Yaoundé in 1999, the other by Bruylant in Brussels in 2002.

57 P Meyer "La sécurité juridique et judiciaire dans l'espace OHADA" [Legal and judicial security in the OHADA zone] (2006) 855 *Revue Penant* 151.

58 Issa-Sayegh "Quelques aspects techniques", above at note 56 at 12.

59 Alliot "Un droit nouveau", above at note 32.

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the country's development, legal reforms have mainly occurred in the area of commercial or business law.

In the case of OHADA, modern business laws have been enacted by giving an African flavour to the French rules in the sectors that have been harmonized. This is because those who prepared the draft uniform acts were French jurists who used the model with which they were familiar, and which seemed more appropriate for the countries where the new legislation was to be introduced. Moreover, this activity has been facilitated by the western scholars' traditional approach, based on the assumption that commercial law is one of the areas where state laws have a monopoly, since the area of commercial law is not usually covered by African native law. This traditional approach will now be reviewed.

In the area of contract, for example, the author has already observed[60] that there is no general theory of obligations in African native law and the concept of contract in the modern sense is absent, while the concept of "exchange" (having its main expression in the concept of barter) is present, as well as, to a certain extent, the concept of consideration.[61] Freedom of contract is strongly limited in African traditional societies, where the interests of the community are of primary concern, with the interests of an individual playing a secondary role. The same conclusion of a contract could not be directly linked to the declaration of will, as it is affected by factual elements other than simple consent, like its form (such as the presence of witnesses or required formalities) and the fulfilment of one or both of the contractual obligations, since the contract is considered to be concluded when its performance has been initiated or completed.[62]

Several analyses have demonstrated that African native laws contain the concept of personal securities and of how security can be provided through goods or the people themselves.[63] Moreover, the charging of usurious interest was

60 S Mancuso "Trends on the harmonization of contract law in Africa" (2007) 13 *Annual Survey of International & Comparative Law* 157.

61 Consideration can be seen, for example, in the consent to marriage given by a woman to her suitor and the performance that he has to execute in her favour, as well as in the case of donations, because in several cultures a gift creates the need for a counter-gift.

62 See J Vanderlinden *Coutumier, Manuel et Jurisprudence du Droit Zande* [Handbook and jurisprudence on Zande customary law] (1969, Éditions de l'Institut de Sociologie, Université Libre de Bruxelles); AA Da Silva *Usos e Costumes Jurídicos dos Felupes da Guiné* [Customary law of the Felupes from Guinea] (1960, published in Bissau); A Lyall "Traditional contracts in German East Africa: The transition from pre-capitalist forms" (1986) 30 *Journal of African Law* 91; I Schapera "Contract in Tswana law" and Y Ghai "Customary contracts and transactions in Kenya" both in M Gluckman (ed) *Ideas and Procedures in African Customary Law* (1969, Oxford University Press) 319 and 333 respectively; A van Schalkwyk "The indigenous law of contract with particular reference to the Swazi in the Kingdom of Swaziland", available at: <http://uir.unisa.ac.za/bitstream/handle/10500/1084/thesis.pdf?sequence=1> (last accessed 13 January 2012).

63 R Verdier "Les sûretés personnelles dans les droits Africains traditionnels" [Personal guarantees in African traditional law] in *Recueil de la Societè J Bodin pour l'Histoire Comparative des Institutions, XXVIII: Les Sûretés Personnelles* (1974, Éditions de la Librairie Encyclopédique) 148 at 148–53; F Snyder "Land law and economic change in rural

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forbidden, being regarded in African societies as contrary to the universal order.[64]

More generally, it has already been highlighted how new legal instruments are created to deal with economic relations in informal commerce and how these successfully compete with the official law. With regard to the latter, the African lawmaker (especially in the area of commercial law) has thus far simply adopted rules approved in the former colonizing country, by utilizing the same lawmaking tools. He has basically transplanted texts developed by a European lawmaker, making only cosmetic alterations that left the substance unchanged.

But western commercial law has evolved using legal concepts and technicalities that were developed by western legal culture over time, and only a jurist trained in western concepts can understand them, since they are not contemplated in African traditional legal culture. This also seems to be the limitation of the OHADA system of harmonized business law referred to above.

Daily practice in OHADA's member countries indicates, in general, several constraints on the implementation of the OHADA system, which was substantially developed by transplanting the French pattern of business law, especially if the system is compared with African reality.

The Uniform Act on Company Law, for example, requires the presence of a notary in order to comply with many formalities required by the act. In most cases notaries are present only in capital cities and major towns, and it is inconceivable that a person from a rural area will travel to town simply to sign something before a notary because a written law requires it, when that person probably does not even know about the law. Furthermore, there are logistical challenges in Africa and all travelling involves considerable time and expense.

The Uniform Act on General Commercial Law provides for the establishment in each member country of a Registre de Commerce et du Crédit Mobilier [register of commerce and securities over movables] at local and state level.[65] The information related to companies and chattel mortgages held by this register must then be centralized at CCJA level.[66] The new version of this uniform act has become even more onerous, by increasing the number of rules regarding the register and inserting specific rules to computerize it.[67] There is great difficulty, again, in establishing the register since, apart from the occasional experience (like that of Senegal), the system of the Registre de Commerce already in place did not work. In the Comoros, for example, only

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contd
Senegal: Diola pledge, transactions and disputes" in I Hamnet (ed) *Social Anthropology and the Law* (1977, London Academic Press) 113; G Masucci *Il Garante Nelle Consuetudini Etiopiche* [The guarantor in Ethiopian customary law] (1941, OIDA Ed).

64 Ntampaka *Introduction aux Systèmes Juridiques*, above at note 16 at 18.

65 Uniform Act on General Commercial Law, art 34 et seq.

66 Id, art 36.

67 Id, art 79 et seq.

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companies which intend to deal with the state register with the Registre de Commerce, and quite often the real company is not the same as that which registers.[68]

The Uniform Act on Securities (even in its revised version) provides that only a mortgage can serve as security over immovable property,[69] in a region where less than 5 per cent of land is registered.[70]

Many more examples could be provided.

The question therefore is whether this western (French) approach to business law can be effectively transplanted into Africa and its business environment. The African jurist who examines the law through the western lens that he learnt at university will immediately answer affirmatively. However, such an answer does not take into consideration the fact that such law is applicable to a small élite capable of understanding it, and willing and able to apply it. But what law for the rest of the citizens?[71]

Moreover, it should be noted that, just as there is official law and unofficial law in Africa, there is also, as noted above, an area of official commerce and a wide area of "informal" commerce,[72] both equally important to the economy.[73] These two types of commerce co-exist in most African countries. Informal commerce does not comply with official legal rules, which are too complex and inflexible, and it has therefore developed its own set of rules that exist outside the official legal systems of each nation.

If the legal order in the area of business law is characterized by written rules imposed by the state, then the legal principles among "informal" tradesmen are characterized by the persistence of the oral tradition which remains their main means of expression. Contracts of purchase or sale, transport or

68 See further Mancuso "African legal hybridity", above at note 26.

69 Uniform Act on Securities, title 3, art 190 et seq.

70 P Dima Ehongo "L'intégration juridique du droit des affaires en Afrique: Les pièges d'un droit uniforme et hégémonique dans le droit de l'OHADA" [Legal integration of business law in Africa: The traps of a uniform and hegemonic law in OHADA law] in É le Roy (ed) *Juridicités: Témoignages Réunis à l'Occasion du Quarantième Anniversaire du LAJP* (2006, Khartala) 137.

71 C Tohon "Le traité de l'OHADA, l'anthropologue du droit et le monde des affaires en Afrique et en France" [OHADA treaty, the legal anthropologist and business people in Africa and France] in le Roy (ed) id, 129.

72 There are many definitions of the "informal sector". In its 1972 report "Employment, incomes and equality: A strategy for increasing productive employment in Kenya" at 6 the International Labour Organization defined "informal activities" as "the way of doing things, characterised by (a) ease of entry; (b) reliance on indigenous resources; (c) family ownership of enterprises; (d) small scale of operation; (e) labour-intensive and adapted technology; (f) skills acquired outside the formal school system; and (g) unregulated and competitive markets. Informal-sector activities are largely ignored, rarely supported, often regulated and sometimes actively discouraged by the government."

73 On average, informal commerce today represents around 60% of the GDP of African countries. Source: African Union "Study on the informal sector in Africa" sixth ordinary session of the Labor and Social Affairs Commission of the African Union, Addis Ababa, 2008.

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delivery, performance of services or mandates, in short commercial contracts, are concluded orally. Despite these contracts being unwritten, the parties involved easily remember all the obligations resulting from their oral engagements, even if certain arrangements are concluded in the presence of witnesses to ensure the safety of the transactions.

Resorting to legal orality and not reducing contracts to writing favours simplicity and avoids heavy formalism; the main obligations arising from the oral contract are formulated simply with all the parties, in easily comprehensible terms. Ultimately, the "informal entrepreneurs" do not act or move in a zone of non-law or illegality; they enter into business transactions according to their beliefs, and carry them out because people's words are respected. Recourse to writing is therefore not excluded in principle from commercial relations among them, but it may be considered unnecessary.

Most "informal entrepreneurs" do not meet the legal requirements that would give them access to the official credit system for setting up and running their business. They have therefore drawn on the institution of *tontine* [a group of people who are spontaneously co-opted and who meet periodically to exchange goods, services or money],[74] which has become one of the pillars of Africa's informal economy today (especially in west Africa) and where the obligations between participants are all based on oral agreements.[75]

Sometimes the writing or legal orality is not exclusive to one or other of the formal or informal sectors. It is not unusual to resort to oral contracts in commercial relations between a formal and an informal businessman. The coexistence of written and oral contracts can be found, for example in the case of the west African *nana benz* [businesswomen who wear typical African clothes and are likely to own Mercedes Benz cars] wholesalers and "informal" retailers. The *nana benz* are businesswomen officially registered with the trade registrar, who respect the legal obligations imposed by that

74 The denomination of *tontine* sometimes may change, but the structure of the institution remains the same.

75 In Africa, a *tontine* is extremely common, facilitating a friendly exchange of goods in kind, meals, mutual aid to help build a roof or cultivate a field, and so on. So far as the exchange of money is concerned, the principle is simple: members contribute money to a communal fund and each person, in turn, receives the money which has been collected for a certain period of time, normally for small investments. The return on these investments is also used to pay back the money. See Aime *La Casa di Nessuno*, above at note 12; AJ Njoh *Tradition, Culture and Development in Africa: Historical Lessons for Modern Development Planning* (2006, Ashgate); and, with specific reference to the *tontines*, E Kamdem Bukam *Tontines ou Schwa: Banques des Pauvres* [Tontines or Schwa: Banks of the poor] (1995, Edilis), M Nzemen *Tontines et Développement ou, le Défi Financier de l'Afrique* [Tontines and development or, the African financial challenge] (1993, Presses Universitaires du Cameroun), M Lelart (ed) *La Tontine, Pratique Informelle d'Épargne et de Crédit dans les Pays en Voie de Développement* [The tontine, savings and credit informal practice in developing countries] (1990, UREF) and again M Nzemen *Théorie de la Pratique des Tontines au Cameroun* [Theory and practice of tontines in Cameroon] (1988, Société de Presse et d'Éditions du Cameroun).

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registration, but who prefer not to enter into written contracts with their "informal" retailers for the sale of their goods. However, when the "informal" retailer is a novice in the area of purchase and resale, a very concise written agreement is concluded between the parties. Digital fingerprints are affixed to the bottom of the document, which includes the expiry date, identity of the parties and the sum that the "informal" retailer must repay after the resale of the goods.

The simplicity of these instruments is a sign of how this new law, that is nevertheless based on the formalism derived from the western pattern, is creating a new distinction from underground law, and in particular between the formal and informal business omitted from the application of the law due to the requirements, formalisms and technicalities of the western approach to law. Again, African legal culture is reacting by creating its own set of rules outside the official system.

In Somalia, in the absence of any functioning national government since 1991, three telephone companies are engaged in fierce competition for both mobile and landline customers as well as for internet services. Since there is no need to obtain a licence, there is no state-run monopoly preventing the emergence of new competitors and the prices are the lowest in Africa since taxes are not collected. However what is more significant is the fact that, despite the absence of law and a functioning court system, bills are paid and contracts are enforced by relying on Somalia's traditional clan system.[76]

The existence of this new gap between official and unofficial law has now been recognized, and it is significant that it is official law that is once again being adapted to the unofficial. The OHADA legislator tried to reform the Uniform Act on Commercial Law by creating the "*entreprenant*" [small entrepreneur], which should help the official law to approach informal commerce.[77]

WHERE IS AFRICAN LAW GOING?

It is not easy to answer this question.

In 1959 a conference was held in London on the future of law in Africa,[78] and there was much optimism about the future of Africa and its legal systems. More than 50 years later, hope has been replaced by general scepticism and cynicism, and the future and the development of African law are under consideration again.

The impression that emerges from the analysis above indicates that African law today is developing in two directions.

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76 See J Winter "Telecoms thriving in lawless Somalia" (19 November 2004) *BBC News*, available at: <http://news.bbc.co.uk/2/hi/africa/4020259.stm> (last accessed 13 January 2012).

77 See art 30 of the revised OHADA Uniform Act on General Commercial Law.

78 The proceedings have been published in AN Allott (ed) *The Future of Law in Africa* (1960, Butterworth).

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In the areas where native law traditionally competed with official law there is a general move towards recovering and giving new dignity to African traditions, by elevating native law to the same level as that of official law and considering it as a viable alternative, or by trying to find a way of integrating native law into the official system, possibly without removing its natural characteristics.

On the other hand, business law remains strictly linked with western patterns. The new approach of law and economics, the new vision of (business) law as an instrument for serving countries' economic development,[79] together with the fierce (but how useful?) civil / common law debate on the suitability of this or that pattern for economic development, have all had a deep impact on the development of African law.[80]

Once again, there is a risk that the existing gap between the formal and the informal, between cities and rural areas, will be widened.

OHADA's attempt to find a solution to the issue of informal commerce is surely praiseworthy, but the unavoidable vagueness of the rules provided clearly shows how difficult it is for the law to deal with the flexible and "slippery" institutions of the informal sector.

The start point anyway is always the fundamental axiom: the writing, the code, the compilation is the exclusive mode to have law. But is this true?

The question then is whether the problem of the effectiveness of law in Africa and the issue of the gap between formal and informal law can be solved through written law, or if it is time to find solutions that take account of the fact that the African experience is unique and quite different from the experience in other parts of the world.

The African legislator continues to act alone, unperturbed. Perhaps it is time to start looking at law in the living (African) context and to consider the possibility of having an interrelated approach to law.

Africa needs law, but law in Africa needs Africans.

79 The preamble of the OHADA treaty is very clear on this point.

80 With reference to this last point, the newsletters of the *Fondation pour le Droit Continental* and its support for the spreading of the OHADA model in Africa are available at:<www.fondation-droitcontinental.org> (last accessed 18 November 2013).

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