Salvatore Mancuso / Charles Fombad (eds.), **Comparative Law in Africa. Methodologies and Concepts,** Juta and Company, Cape Town 2015, 196 pages, soft cover, R 397.00, ISBN 9781485107453

'Comparative Law in Africa. Methodologies and Concepts' is derived from a workshop hosted on October 2012 at the University of Cape Town. It is the first publication of the Centre for Comparative Law in Africa, established in 2011 at the University of Cape Town under the direction of Salvatore Mancuso[1]. The volume, after a foreword by the eminent Jacques du Plessis from University of Stellenbosch, gives voice to 13 authors from different geographical and cultural backgrounds, who explore – each in her/his own way – the prospects and challenges for comparative legal studies in sub-Saharan Africa[2].

Reading this collection of essays is a must do for whoever has an interest in sub-Saharan African law, comparative law, legal education and legal development. It is sufficient to skim the table of contents to appreciate how the volume approaches, in 196 closely written pages, the legal complexity inherent in sub-Saharan Africa. While some chapters tackle sub-Saharan legal pluralism in general[3], other focus on the most ancient layers of sub-Saharan stratigraphy, that is, the customary and indigenous law layers, which in many areas have historically assimilated, through waves of immigration and conquest, a religious component (largely Muslim, but also Christian and Coptic)[4]. Another set of essays puts the emphasis on the variety of colonial and post-colonial layers superimposed on traditional law

1 See Centre for Comparative Law in Africa, comparativelaw.uct.ac.za/ (last accessed on 15 June 2016). The same Centre and the same publisher have launched in 2014 the bilingual English-French 'Journal of Comparative Law in Africa / Revue de droit compare en Afrique', jutalaw.co.za/products/journal-of-comparative-law-in-africa-revue-de-droit-compare-en-afrique (last accessed on 29 July 2017).

2 Although the book is entitled 'Comparative Law in Africa', it is well-known that the Sahara Desert divides Africa geographically and culturally. Northern Africa, namely where the Pharaonic, Persian, Alexandrine, Roman, Ottoman Empires settled (today corresponding to Morocco, Algeria, Tunisia, Libya and Egypt), has historically more in common with the Middle East and the Mediterranean area than it does with the sub-Saharan part of the continent. See, among the many, *Rodolfo Sacco*, The sub-Saharan Legal Tradition, in: Mauro Bussani / Ugo Mattei (eds.), The Cambridge Companion to Comparative Law, Cambridge 2012, p. 313. See also the definition of sub-Saharan Africa given by the United Nations Statistics Division at unstats.un.org/unsd/methods/m49/m49regin.htm (last accessed on 29 July 2017) (which however includes Sudan with Northern Africa).

3 *Charles Fombad*, Africanisation of Legal Education Programmes: The Need for Comparative Legal Studies, p. 1-20 (on legal education); *Salvatore Mancuso*, Comparative Law in the African Context, p. 21-33; *Ignazio Castellucci*, Researching and Teaching (Comparative) Law in Africa, p. 53-74 (both on African legal stratigraphy); *Ada Ordor*, Applying the Tool of Comparative Law to the Study of Africa's Multiple Development Pathways, p. 75-84 (on law and development); *Thomas W. Bennett*, The Meeting of Comparative Law and Legal Anthropology in Africa, p. 134-141 (on legal pluralism).

4 Cf. the essays of *Kebreab Habte Michael*, Comparative Legal Studies in Africa: A Methodological Way, p. 55-62 (on Ethiopia) and of *Fernando Loureiro Bastos*, The Collection and Codification of Customary Law in Force in the Republic of Guinea-Bissau, p. 142-161 (on Guinea-Bissau).

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by colonisation and decolonisation processes[5]. Still other entries look at the additional layer of trans- and inter-national law that surfaced in sub-Saharan Africa at the end of the 20th century, through the development of many regional political or economic organisations, such as the African Union (AU), the Economic Community of West African States (ECOWAS), the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), and the South African Development Community (SADC)[6]. This wide range of perspectives cuts across a variety of legal systems (from Guinea Bissau to Ethiopia, from Cameroon to Seychelles, from Zambia to South Africa) and subject matters (ranging from constitutional adjudication to business law, from human rights to legal education). The diversity in the authors' personal and professional backgrounds, experiences and beliefs resulting from each chapter[7] further contributes to enrich the picture that the book offers and to make it a unique reservoir of information about the legal history, features and recent developments of many sub-Saharan jurisdictions.

Yet, the book does much more than merely portray the legal diversity of the sub-Saharan continent. Authors confront themselves and shed new light on long debated comparative law issues, such as the aims and objects of comparative law[8], the value and limits of legal systems[9], the possibility and desirability of legal harmonisation[10] and legal transplants[11], the relationship between state-posited law, unofficial law, and legal develop-

5 See *Chris Nwachukwu Okeke*, Methodological Approaches to Comparative Legal Studies, p. 34-54 (on Ghana, Nigeria and South Africa); *Mathilda Twomey*, Legal Salmon: Comparative Law and its Role in Africa, p. 85-106 (on Seychelles); *Mulela Margaret Munalula*, Responding to Zambia's 'Mixed' Legal System: seeking a 'Visibly' Comparative Approach to Law Studies, p. 122-133 (on Zambia).

6 Cf. the contributions by the late *Claire Moore Dickerson*, The Role of African Comparative Legal Studies in the Development of Law in Africa, as illustrated by OHADA in Cameroon, p. 107-122, and by *Mahutodji Jimmy Vital Kodo*, A New Approach to African Comparative Law in the Field of Business Law: Comparison of Cases from Different Jurisdictions, p. 162-167 (both on OHADA), as well as by *Moussa Samb*, Human Rights and Business Law in the African Context, p. 168-174 (on the African Union's human rights system).

7 Shamefully the book provides no biographical information on the authors, but all chapters offer glimpses of the diverse richness of contributors' paths.

8 Contributors have different ideas about what comparative is for and about. Some of them praise comparative law for its critical and emancipatory potential (e.g., *Fombad*, note 3, p. 13-18; *Mancuso*, note 3, p. 29; *Twomey*, note 5, p. 88-92), or for its ability to scrutinise legal pluralism (*Castellucci*, note 3, p. 72-74; *Ordor*, note 3, p. 77-80; *Bennett*, note 3, p. 136-140; *Bastos*, note 4, p. 148-150). Others look at comparative law as a tool for promoting legal integration (*Okeke*, note 5, p. 39-40; *Moore Dickerson*, note 6, p. 118-20), for aiding national judges and legislators (*Okeke*, note 5, p. 37-40, 49-53; *Moore Dickerson*, note 6, p. 119-20; *Kodo*, note 6, p. 163-4; *Samb*, note 6, p. 173), or for "benchmarking foreign legal systems for purposes of developing one's own legal system" (*Munalula*, note 5, p. 123; on similar lines, *Okeke*, note 5, p. 38-39).

9 See especially *Fombad*, note 3, p. 4-6; *Castellucci*, note 3, p. 64-68.

10 *Fombad*, note 3, p. 14-15.

11 *Michael*, note 4, p. 59-60; *Bennett*, note 3, p. 134-136.

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ment[12], and the quandaries produced by state-driven attempts to collect, apply, and teach customary laws[13]. In doing so, the contributors engage in a deeply critical review of mainstream comparative law, denouncing the many biases affecting it since its foundation as a scholarly discipline at the beginning of the 20th century. These critiques are essentially twofold. On the one hand, contributors unveil the more or less implicitly colonialist and 'civilising' attitude that permeates most comparative law scholarship, making Western law the benchmark for what the law should be, and relegating whatever does not resemble it to the peripheral dimension of sub- or non-law[14]. On the other hand, authors attack the positivistic and state-centric credo underlying the great majority of self-proclaimed comparative law studies, resulting in the inability to detect and gross misunderstandings of the plurality of normative orders that live beyond and across official laws in 'non-Westphalian'[15] states[16]. Both the critiques apply even more strongly to the approach to law, legal reform and legal harmonisation propounded by many global institutions (be they international organisations or multinational companies), mirroring the tenets of Western law and reflecting the interests of the Western world[17].

Contributors however agree that Western comparatists, and Western-driven globalisation forces are not the only ones to blame. When the focus shifts on the way in which lawyers in sub-Saharan Africa look at, teach and apply their own law, all voices become one. Everybody notes that sub-Saharan African lawyers, because they are either trained in the West or educated in law schools filled with Western-trained professors, often share Western biases and misconceptions about sub-Saharan legal systems, perceiving them as uncertain, unpredictable and irrational, and reproaching these legal orders for being flexible, multiple, verbal, too mixed with traditional and religious elements, and therefore 'inferior' or not properly 'legal'[18]. Such an ingrained inferiority complex nurtures, and is nur-

12 Esp. *Ordor*, note 3, p. 75-84; *Moore Dickerson*, note 6, p. 113-119; *Bennett*, note 3, p. 136-140.

13 *Fombad*, note 3, p. 11-12; *Mancuso*, note 3, p. 45; *Ordor*, note 3, p. 77-81; *Twomey*, note 5, p. 94-98; *Moore Dickerson*, note 6, p. 113-119; *Bennett*, note 3, p. 136-140; *Bastos*, note 4, p. 149-160.

14 *Fombad*, note 3, p. 5-6; *Mancuso*, note 3, p. 31; *Twomey*, note 5, p. 94, 105.

15 For the notion of 'non-Westphalian' states, see *Turan Kayaoglu*, Westphalian Eurocentrism in International Relations Theory, International Studies Review 12 (2010), p. 193-217.

16 See especially *Castellucci*, note 3, p. 63-64; *Ordor*, note 3, p. 75-84; *Bennett*, note 3, p. 134-141. For similar considerations in the Western comparative law literature, see *Mauro Bussani*, Comparative Law beyond the Trap of Western Positivism, in: Tong-Io Cheng / Salvatore Mancuso (eds.), New Frontiers of Comparative Law, Hong Kong 2013, p. 1-9; *Marta Infantino*, Integration through comparative private law: Four lessons from Cappelletti, International Journal of Constitutional Law 14 (2016), p. 492-497.

17 *Fombad*, note 3, p. 14; *Bennett*, note 3, p. 134-135. On the same lines, see the contributions collected in *Mauro Bussani / Lukas Heckendorn Urscheler (eds.)*, Comparisons in Legal Development. The Impact of Foreign and International Law on National Legal Systems, Zurich 2016.

18 See for instance *Fombad*, note 3, p. 3-5; *Mancuso*, note 3, p. 31; *Okeke*, note 5, p. 53. For the same kind of remarks, but with regard to Latin American lawyers' approach to their own laws, see *Jorge L. Esquirol*, The Failed Law of Latin America, American Journal of Comparative Law 56 (2008),

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tured by, xenophilic reliance upon (not to say "slavish devotion" to[19]) Western legal models, often those of former colonial powers[20]. Evidence of this attitude is the state of art of comparative law courses and researches in sub-Saharan Africa's universities. While few law schools devote a course on the subject, simplified comparisons with the legal system of the previous colonisers, or with Western 'dominant' legal models, are virtually omnipresent[21]. In contrast, no or little space is devoted to comparisons between African state laws, or customary legal systems, thus "reinforce[ing] and perpetuat[ing] the myth that African law and African legal systems do not deserve anything more than a passing mention"[22]. The many fallouts of such a myth are before everyone's eyes. For instance, as noted by the late Moore Dickerson[23], when building OHADA's complex legal architecture to boost trade and attract foreign investors, OHADA reformers felt obliged to imitate Western (and mostly French) business law models. In doing so, however, they drafted a harmonised business law that is hard to reconcile with the unofficial rules of ethnic or religious heritage that govern a large number of business transactions in the OHADA region – think for instance of ethnically-based rules on pooled borrowing, or of the shariatic constraints on the payment of interest on loans. This does not contribute to bridge the divide between formal and informal economy, with the latter producing (conservatively) between 40% to 60% of sub-Saharan Africa GDP[24]. In the constitutional domain it is no better. Fombad observes that so far there has been little intra-African constitutional dialogue, either in terms of cross-fertilisation of ideas from one African constitution to another or through the use by judges of jurisprudence from other African jurisdictions: "Current comparative law studies on the continent, as well as African judges, continue to work under the assumption that what needs to be studied or copied can only come from the legal systems of the former colonial powers or other Western systems"[25]. Even in South Africa, the Constitutional Court has since its establishment extensively relied on foreign jurisprudence following the authorisation in Section 39 (1) (c) of the Constitution to "consider foreign law" when interpreting the Bill of Rights, virtually none of the cases cited by the Court was taken from other African jurisdictions[26].

p. 75-124; *Diego López-Medina*, The Latin American and Caribbean Legal Traditions, in: Mauro Bussani / Ugo Mattei (eds.), Cambridge Companion to Comparative Law, Cambridge 2012, p. 344-367.

19 *Okeke*, note 5, p. 53.

20 *Fombad*, note 3, p. 5-6; *Okeke*, note 5, p. 53; *Twomey*, note 5, p. 93.

21 *Fombad*, note 3, p. 3-5; *Mancuso*, note 3, p. 25; *Okeke*, note 5, p.36, 53; *Michael*, note 4, p. 60-61; *Ordor*, note 3, p. 65; *Twomey*, note 5, p. 93; *Munalula*, note 5, p. 122-4.

22 *Fombad*, note 3, p. 5.

23 *Moore Dickerson*, note 6, p. 113-118.

24 *Moore Dickerson*, note 6, p. 113-118.

25 *Fombad*, note 3, p. 12.

26 *Fombad*, note 3, p. 12-13; see also the illustration of judicial comparisons made by *Okeke*, note 5, p. 49-53.

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The picture sketched by the contributors is not all dark, though. All authors agree on the potential that comparative legal studies, when deprived of their imperialistic and positivistic traits, may have for the development of sub-Saharan African law. Many contributors praise the few Western comparatists, schools of thoughts and methodologies, whose efforts to overcome Western mainstream legal cartography[27] and unspoken assumptions[28] might pave the way for revitalising comparative studies in sub-Saharan Africa, and transforming them into a tool for retrieving and affirming an 'African' legal identity vis-à-vis Africans, and vis-à-vis the rest of the world. Yet, obviously, a great part of this constructive agenda lies in the hands of African scholars. According to the contributors, African scholars should strive to include in the curricula of their own law schools courses on African legal studies, customary laws and legal pluralism. African scholars should also explore the plurality of normative orders that shape people's identity and life on the continent, investigate what legitimises these orders in people's eyes, and scrutinise their interaction with one another and with official law[29]. Needless to say, the proposal of re-focusing teaching and research interests in sub-Saharan African universities does not imply celebrating all local differences, nor does it imply refusing the colonial past or resisting legal globalisation. Rather, it means becoming aware of the many complexities and available alternatives[30]. It means assimilating colonial heritage as a "bold acceptance of the constant, fluid interconnectedness between cultures and traditions"[31]. It means asserting African identity from within globalisation in

27 Many references go to the work of the late *Patrick Glenn*, Legal Tradition of the World, Oxford 2014; of *Werner Menski*, Comparative Law in a Global Context: The Legal Systems of Asia and Africa, Cambridge 2006; and of *Ugo Mattei*, Three Patterns of Law: Taxonomy and Change in the World's Legal Systems, American Journal Comparative Law 45 (1997), p. 5-44.

28 The path-breaking works in this regard are the study of African laws carried out by e.g.: *Jacques Vanderlinden*, Les systèmes juridiques africains, Paris 1983; *Rodolfo Sacco*, Il diritto africano, Turin 1995; *Marco Guadagni*, Il modello pluralista, Turin 1996. Many contributors in the book under review also refer to the revolutionary methodology proposed and refined by Mauro Bussani and Ugo Mattei in more than twenty years of activity of 'The Common Core of European Private Law' project (for more information about this project, its contents and history, see *Mauro Bussani*, The Common Core of European Private Law Project Two Decades After: An Endless Beginning, European Lawyer Journal 12 (2016), p. 9-43), and to the recent turn of some European comparatists to the lens of legal mixity and legal hybridity (see for instance *Sue Farran* / *Esin Örücü* / *Seán Patrick Donlan* (eds.), A Study of Mixed Legal Systems: Endangered, Entrenched or Blended, New York 2014; *Eleanor Cashin Ritaine* / *Seán Patrick Donlan* / *Martin Seychold (eds.),* Comparative Law and Hybrid Legal Traditions, Zurich 2010). Other authors praise recent works on comparative law and development (such as that of *Mariana Mota Prado* / *Michael Trebilcok* (eds.), Advanced Introduction to Law and Development, Cheltenham 2014) and the deconstructive critique advanced thirty years ago to mainstream comparative law by *Günther Frankenberg*, Critical Comparisons: Re-thinking Comparative Law, Harvard International Law Journal 26 (1985), p. 439-455.

29 *Fombad*, note 3, p. 3-14; *Ordor*, note 3, p. 77-83; *Twomey*, note 5, p. 105.

30 *Twomey*, note 5, p. 105.

31 *Twomey*, note 5, p. 94.

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"a world in which, unlike the past, African law and African legal principles must be taken into account in shaping the future direction of global legal developments"[32].

Such a plan looks full of promises well beyond the intra-African perspective. As put by Mathilda Twomey, the role for sub-Saharan Africa, "given its experience of custom, posited laws from Europe and reconfigured laws post-colonialism, should be to inform generally and to free Western legal scholars from 'cognitive lock-in' while contributing to the new global perspective of laws"[33]. Taking up this challenge, sub-Saharan lawyers might help uproot widespread Western legal ethnocentrism and positivism[34], and disclose – outside and inside the West – the plurality of normative regimes that people identify with and live by, as well as the variety of factors legitimising people's commitment, or resistance to those regimes[35]. All of this might teach important lessons not only to Western-driven efforts to export Western legal models or to promote others' legal development, but also to Western lawyers working to better understand, and envisage solutions for their own societies. We waited too long to learn.

Marta Infantino, Trieste

32 *Fombad*, note 3, p. 15.

33 *Twomey*, note 5, p. 86.

34 *Twomey*, note 5, p. 94.

35 *Mancuso*, note 3, p. 26; *Ordor*, note 3, p. 79; *Twomey*, note 5, p. 105; *Bennett*, note 3, p. 136-137. Examples of 'unofficial' normative orders living within and across states in the West are countless. Suffice here to recall Ellickson's seminal sociolegal study of the behavior of ranchers and farmers in Shasta County, California, showing how rules stemming from local communities of ranchers and farmers shape who can claim what and against whom in cases of illegal trespassing (*Robert Ellickson*, Order without Law: How Neighbours Settle Disputes, Cambridge 1991, p. 209-219), and Bernstein's analysis of the way in which professionally (if not ethnically) homogenous groups govern transactions and disputes in the transnational traffic of diamonds and in the cotton industry (*Lisa Bernstein*, Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, Journal of Legal Studies 21 (1992), p. 115, 119-143; *Bernstein*, Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions, Michigan Law Review 90 (2001), p. 1724-88). For some additional examples, see *Marta Infantino* and *Mauro Bussani*, Tort Law and Legal Cultures, American Journal of Comparative Law 63 (2015), p. 77, 83-90.

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