FOSTERING A CONSTRUCTIVE INTRA-AFRICAN LEGAL DIALOGUE IN POST-COLONIAL AFRICA

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Abstract

The contention of this paper is that there is a need to debunk the myth that, given the diversity of Africa's inherited legal systems, the continent has little to contribute to the global legal dialogue. For this to happen, there is a need for serious intra-African legal dialogue. The paper focuses on sub-Saharan countries in Africa and provides an overview of the numerous legal traditions that were imposed on them at independence. It then looks at the global legal dialogue, one within which the global south is marginalised. Thereafter, the paper discusses the ways in which an intra-African trans-systemic dialogue can be promoted. The main argument of the paper is that an intra-African trans-systemic legal dialogue is likely to provide the critical understanding necessary to pave the way for closer collaboration between African countries in their efforts to develop legal values, principles and institutions that are better suited than inherited ones to addressing the continent's complex, multifaceted problems.

Keywords:
Africanisation of legal education, decolonisation of legal education, global legal dialogue, intra-African legal dialogue, legal traditions, transsystemic legal dialogue

INTRODUCTION

For diverse reasons, African countries decided to retain the legal systems imposed on them at independence. In the last three decades, the continent has been undergoing a paradigmatic transition that has affected not only every aspect of its social, economic and political life but so too its inherited legal systems. Increasing interdependence and globalisation have made closer collaboration between the different African countries imperative if they are to reap the benefits of the continent's abundant natural and human resources. However, the diversity of legal systems, many of which are based on increasingly outdated and often contradictory laws inherited from the colonial period, has been a major obstacle to intra-African trade and worked to the advantage of non-African trade partners.[1] It is an irony that whilst Africa has taken tremendous strides in regional integration, the legal measures that are crucial to cementing economic and political integration have, by and large, not figured prominently on the agenda.

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[1] As S Fazio *The Harmonization of International Commercial Law*, (2007 Kluwer Law International) at 8, points out, in the globalised and liberalised world economy of today, economic actors decide where to invest and locate their activities depending upon conditions such as low labour costs, environmental rules and rules for the settlement of disputes.

Seven decades after independence, and in spite of considerable efforts, especially since the 1990s, to modernise their laws, there is little sign among African countries that inherited legal systems will be replaced anytime soon. The diversity of legal systems has made it difficult for African countries not only to trade with each other but to adopt common, coherent and consistent positions vis-à-vis other countries or regional blocs in the world when dealing with shared problems. Overcoming this requires a better understanding of, and close collaboration and continuous dialogue between, the different legal systems on the continent, particularly in regard to the two dominant ones, the common law and the civil law systems. This is especially important because in the overall global legal dialogue, the terms of the conversation are dictated by the global north while the global south, Africa in particular, is regularly side-lined.[2] The impression is given that African legal systems are but a poor replica of those in the global north.

The main contention of this paper is that there is a need to deconstruct the myth that, in view of its diversity of inherited legal systems, Africa has little to contribute to the global legal dialogue. For this to happen, there is need for serious intra-African legal dialogue. Such a dialogue is an integral part of the general quest to decolonise and Africanise the law in order to adapt it to the African context. The focus of the paper is on countries in sub-Saharan Africa.[3]

To set the scene, the paper provides an overview in section 2 of the numerous legal traditions that were imposed on African countries at independence – indeed, the legal map of Africa is a microcosm of the legal traditions in the world. Section 3 looks at the global legal dialogue, one in which African and other countries in the global south are marginalised. Section 4 discusses the ways in which an intra-African trans-systemic dialogue can be promoted. In doing so, it examines the different levels at which such a dialogue can be promoted, and emphasises the need both for decolonising and Africanising the curriculum of African law faculties in an increasingly legally migratory world. This, it is argued, should take into account and balance the local and global context in which the law operates. For this to happen, the African Union (AU) and regional economic communities (RECs) have to play a greater and more proactive role than they have done so far.

The main argument of the paper is that an intra-African trans-systemic legal dialogue is an essential part of the project to decolonise and Africanise the law. Only legal modernisation premised on this is likely to provide the critical understanding necessary to pave the way for closer collaboration between African countries in their efforts to develop legal values, principles and institutions that are better suited than inherited ones to addressing the continent's complex, multifaceted problems.

THE COLONIAL LEGACY

An overview of the diversity of legal systems in Africa is important for appreciating the challenges of a cross-systemic legal dialogue on the continent and the collaboration that is needed in dealing with the global north and other non-African countries in the global south.

[2] The concepts of the global north and global south are discussed below.

[3] Sub-Saharan Africa is defined, geographically and ethnoculturally, as the area of the continent of Africa that lies south of the Sahara. This consists of 46 of Africa's 54 countries and excludes Algeria, Djibouti, Egypt, Libya, Morocco, Somalia, Sudan and Tunisia.

With the exception of Ethiopia and Liberia, all African countries were occupied by European imperial powers in the 19th century. The main colonial powers in sub-Saharan Africa were Belgium, France, Germany, Great Britain, Italy, the Netherlands, Portugal and Spain. Germany, however, lost its colonial territories in sub-Saharan Africa (Cameroon, Namibia, Tanzania and Togo) after the First World War.[4] Each of the colonial powers transplanted their administrative and legal systems to the territories they occupied. The three main legal systems during this period were the civil law, the common law, and a combination of them usually referred to as mixed systems.[5] The civil law and common law are the two dominant systems, as they were transplanted mainly by the two most active colonial powers in Africa, namely Britain and France; these two powers, together with the Netherlands, also contributed to those mixed systems that exist.

The civil law system was developed during the Roman Republic by, inter alia, praetorian edicts, and spread throughout Europe. It is the basis of the legal systems of the European countries which had African colonies, among them Belgium, France, Germany, Italy, the Netherlands, Portugal and Spain, and was also the legal system they transplanted to their colonial territories.[6] By contrast, the common law system originated in England and was transplanted by the British to their colonies in sub-Saharan Africa. With the exception of those colonies where the British and French were preceded by another European power, the civil law and common law systems became the dominant legal systems.[7]

There are two groups of countries with mixed systems.[8] The larger of the two groups consist of countries with a mixed common law and Roman-Dutch legal heritage. These countries make up what was referred to as the South Africa Law Association,[9] namely Botswana, Eswatini, Lesotho, Namibia, South Africa and Zimbabwe. The 'reception'[10] of the common law and Roman-Dutch law in these southern African states, with the exception of South Africa, was different from the way in which the common law and civil law was received in the rest of Africa. Whereas South Africa received this mixed

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[4] These territories were seized by the Allied forces during the First World War and confiscated under the Treaty of Versailles of 1919.

[5] One could include Islamic law amongst the transplanted laws. However, although Islam arrived in Africa as early as the 7th century, Islamic law has not influenced the legal systems of sub-Saharan Africa to the same extent as the other, later transplants. One reason is that, apart from a few countries in the region such as Nigeria and Sudan where they are large in number, Muslim communities are a minority. The main reason, though, is that, as with indigenous African customary law, the application of Islamic law was severely restricted during the colonial period and consequently today regulates only certain aspects of personal life such as marriage and succession. Furthermore, in most countries in this region, Islamic law has been largely indigenised, to the extent that it is often classified as a type of indigenous African customary law.

[6] The countries in sub-Saharan Africa that inherited the civil law system from Belgium are the DR Congo, Burundi and Rwanda. Those that inherited it from France are Togo, Gabon, Republic of Congo, Central African Republic, Comoros Island, Madagascar, Mauritania, Cameroon, Ivory Coast, Burkina Faso, Niger, Benin, Burundi, Guinea, Chad, Rwanda, Congo, Mali, the Seychelles, Djibouti and Senegal. Eritrea and, to a limited extent, Ethiopia, inherited their civil law systems from Italy, whilst Equatorial Guinea's system is based on the Spanish civil law tradition. Finally, the legal systems of Angola, Cape Verde, Mozambique and Guinea Bissau are based on the Portuguese civil law system.

[7] The common law jurisdictions in sub-Saharan Africa are The Gambia, Ghana, Kenya, Malawi, Nigeria, Sierra Leone, Sudan, Tanzania, Uganda and Zambia.

[8] Although the concept of mixed systems is widely debated, the best definition is that of Vernon Palmer. According to him, a mixed system must have at least three characteristics. The first concerns the specificity of the mixture and requires that the system should be built upon the dual foundations of common law and civil law materials. This therefore excludes a range of mixtures in sub-Saharan Africa, such as those between either the civil law or common law, on the one hand, and religious law (mainly Islamic law) and indigenous customary laws, on the other. The second characteristic is quantitative and psychological, and requires a significant mixture of both. Hence, the occasional borrowing or transplantation of some elements from one system to another would not on its own transform that system into a mixed jurisdiction. The final characteristic is structural. As Palmer puts it, 'in every case the civil law will be cordoned off within the field of private law, thus creating the distinction between private continental law and public Anglo-American law'. In other words, a pattern has emerged where, in such systems, the common law predominates in the public sphere and the civil law in the private sphere. See V Palmer *Mixed Jurisdictions Worldwide: The Third Legal Family* (2012 Cambridge University Press) 7-11.

[9] See Justice Schreiner in *Anna Lokudzinga Mathenjwa* 1970-1976 SLR 25, 29.

[10] In this era of increasing sensitivity to the grave injustices of colonialism, the word 'reception' is used in this chapter with reservation. There is no evidence to suggest that there was any willing acceptance of these European legal systems by Africans, or that the process was anything less than a manifestation of cultural imperialism by the powerful colonial nations. See further J R Schmidhauser "Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems" (1992) 13/2 *International Political Science Review* 321-34.

system directly from the Dutch and later the British, the other countries in the region generally received it indirectly from South Africa.[11] In the other category are Mauritius and Seychelles, which have a mixture of the common law and French civil law. Finally, there are two anomalous cases that do not fit into the threefold classification of sub-Saharan African countries according to their inherited legal traditions. The first is Cameroon, which purports to be a bi-jural jurisdiction in which the common law (applied in the two English-speaking regions) and the French civil law (applied in the eight French-speaking regions) co-exist. However, the reality is that since independence and the reunification of the English- and French-speaking regions in 1961, legal reforms have been implemented and designed to replace the common law with the civil law in the anglophone regions.[12]

The second anomaly is Somalia, which has a similar history. Formed from a union of the former British Somaliland and Italian Somaliland in 1960, this unity-of-two-parts came to an end in 1991 when the dictatorship of its former president, Siad Barre, was toppled. Thereafter, the former British part unilaterally seceded from the rest of the country to form the Republic of Somaliland, which is still largely unrecognised. Another part of the country seceded and in 1998 declared its independence as the Republic of Puntland. The rest of Somalia has remained in a protracted civil war in spite of numerous efforts by the international community and the United Nations to broker a peace between the warring clans. The turmoil in the country has brought to an end a brave experiment in integrating the common law and civil law into one system of law applicable to the whole country.

It was, and remains, a surprise that African countries retained a colonial administration and legal system that had come to symbolise subordination, exploitation, repression and violence against their people. Three main reasons may explain why the new ruling African elites retained legal systems which had been imposed on their countries at independence. First, the extreme haste[13] with which many European powers withdrew from the continent and their lack of advance planning for political transition left the new leaders with no alternative but to retain the legal system with which they had some familiarity however superficial. Secondly, retaining the inherited system was all the more imperative given the urgent need to focus on issues such as economic development, the maintenance of public order, the regulation of commerce, and ensuring the proper functioning of the administrative and judicial services.

Moreover, the departing colonial powers did not entirely rupture their links and allow the new ruling elites a free hand. The key instruments of statehood, namely the independence constitutions, were drafted in the main by these powers and were again based on their legal traditions. The foundations for continued dependence and interference in the future affairs of the newly independent

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[11] The Dutch initially settled in large parts of what eventually became South Africa and introduced Roman-Dutch law in the mid-17th century; when the British took over the colony in 1806, they retained this law whilst also introducing the common law. Because the British eventually took control over the other countries in the region and administered them from South Africa, they simply extended to them the mixed common law and Roman Dutch law that was already in place in South Africa. See in general JH Pain "The Reception of English and Roman-Dutch Law in Africa with Reference to Botswana, Lesotho and Swaziland" (1978) 9 CILSA, 137-167; and AJGM. Sanders "Legal Dualism in Lesotho, Botswana, Swaziland: A General Survey" (1985)1 *Lesotho Law Journal* 51-53; and E Fagan "Roman-Dutch Law in its South African Historical Context"' in R Zimmermann and D Visser (eds) *Southern Cross. Civil Law and Common Law in South Africa* (1996 Clarendon Press) 33-64.

[12] See further CM Fombad "Managing Legal Diversity: Cameroonian Bijuralism at a Critical Crossroads" in V Palmer, M Mattar and A Koppel (eds) *Mixed Legal Systems, East and Wes t*(2017 Ashgate Publishing) 187-17and CM Fombad "An experiment in legal pluralism: The Cameroonian bi-jural/uni-jural imbroglio (1997) *University of Tasmania Law Review* 209-34.

[13] In some cases, such as Algeria, this was so because the colonial power was forced out after a war of independence, and in others, such as Guinea, because the French left abruptly after trying to destroy every remnant of their presence when the Guineans would not accept independence on French terms.

states were laid in arrangements, such as the Commonwealth of Nations, and Francophonie, that grouped together the former British or French colonies. This was reinforced by monetary unions that, in the case of France, continue to this day.[14] In short, unequal power relationships and the economic and political dependence of the newly independent states limited the ability of their leaders to undertake a change as radical as replacing the legal systems of the former metropoles.

As a result of these factors, colonial inheritances have made it almost impossible to disengage the colonial from the post- and the neo-colonial. This is particularly so with respect to the two dominant legal systems that operate side by side and divide Africa – the civil and the common law systems – and continually impact on legal developments on the continent both at national and continental level.

THE MARGINALISATION OF AFRICA IN THE GLOBAL LEGAL DIALOGUE

It is necessary to preface this section with a brief explanation of the concept of legal dialogue. Ordinarily, the term 'dialogue' denotes the exchange of arguments, a conversation, discussion or similar discourse aimed at reaching some form of agreement or understanding. Most of the legal literature on dialogue focuses on judicial dialogue or, as some call it, transnational judicial dialogue.[15] It is a dialogue in the sense that judges from different countries, whether formally obliged to do so or not, draw upon each other's reasoning in their judgments and incorporate it in their own rulings. This is usually significant where reference is made to the decision of a court in a different legal system: the ultimate goal is to promote the cross-fertilisation of legal principles and values among courts of different jurisdictions and across different legal systems. Such judicial dialogue occurs at three levels: between domestic courts, between international courts, and between domestic and international courts. For it to be constructive, judicial dialogue involves what Eduardo Ferrer Mac-Gregor refers to as 'reciprocal deference'.[16] This allows for a free and lively interaction among courts that respects their differences and acknowledges the rules applicable in a given court's jurisdiction as well as the varying spheres of competence as defined by domestic law and its unique cultural identity.

By contrast, the concept of legal dialogue, which is the focus of this paper, is broader in scope. It includes not just judicial dialogue but a wider trans-systemic dialogue that involves judges as well as legal scholars (especially comparatists and legal historians), policy-makers (especially those involved in law reform), legal practitioners, students and researchers. Like judicial dialogue, it entails a willingness to engage regularly in conversation about modernising law to address contemporary challenges. Besides involving courts at all levels, it involves legal stakeholders at the national, regional and international levels, and includes, or should include, interaction not only between the global north

[14] For example, the impact of the British Sterling Area in 1972 was limited because it came to an end in 1972. By contrast, CFA franc (African Financial Community franc), comprising all 11 francophone countries in West and Central Africa, has been used by the French Treasury to exercise direct control of the monetary policies of these countries. See further I Coulibaly "Costs and Benefits of the CFA Franc"
<https://worldpolicy.org/2017/02/28/costs-and-benefits-of-the-cfa-franc/> (last accessed in April 2021); and NS Sylla "The CFA Franc: French Monetary Imperialism in Africa" <https://bit.ly/2KGMHBR> (last accessed in April 2021).

[15] See K Littlepage "Transnational Judicial Dialogue and Evolving Jurisprudence in the Process of European Legal Integration" <http://aei.pitt.edu/52924/1/LITTLEPAGE.pdf> (last accessed in April 2021).

[16] See E F Mac-Gregor "What Do We Mean When We Talk About Judicial Dialogue? Reflections of a Judge of the Inter-American Court of Human Rights" (2017) 30 *Harvard Human Rights Journal* at 91.

and global south but within each of these two regions.[17] At the heart of this paper is a concern with the absence of serious legal dialogue between the global north and global south, more specifically Africa, and, even more seriously, the absence of intra-African dialogue. These absences are especially problematic because, in spite of more than half a century of independence, the colonial juristic mindset survives. In fact, the legacy of colonialism continues to have an impact on the power relations between the global north and global south, particularly since most of the contemporary frameworks for global legal and economic collaboration were determined before most of the countries in the global south gained their independence.

The colonial jural inheritance left Africa with a predominantly Euro-American epistemic heritage embedded with practices of exclusion. In spite of the diversity of legal systems in the world, the global legal dialogue so far has been reduced to discussion about Euro-American legal systems. There is little interest in looking beyond the borders of the global north. As Daniel Bonilla puts it, Africa is regarded as a 'young and naïve participant in the Anglo-American or civil law tradition'.[18] The assumption is that there is little to be gained from engaging with legal developments and scholarship on the continent because, so it is tacitly believed, these lack originality and academic rigour. Even leading legal scholars such as Jurgen Habermas, John Rawls, Noam Chomsky and Ronald Dworkin expound legal theories in a manner which suggests that the global south does not exist or is irrelevant.[19] It is a flawed assumption that is reinforced by the absence of any serious effort to promote a trans-systemic legal dialogue within Africa. If the African legal voice that has been silenced for so long is to be heard, it must speak up; it can speak up only when it breaks out of the mental bondage in which it finds itself. To escape the clutches of this legal epistemicide, Africans, irrespective of the legal system within which they are operating, must start talking to one another across these artificial divides.

There are a number of reasons making it imperative to do so. Globalisation combined with the dramatic scientific and technological revolution of the last three decades has led to greater interaction between states, increased trade in goods and services, and free flow of information across borders, resulting in jurisdictional boundaries losing significance and the emergence of a new internationalised, globalised and post-regulatory environment. The emerging global legal institutions, doctrines and processes are dominated by Euro-American legal thinking, with fairly little contribution from Africa. In other words, the increasing globalisation of the law hardly reflects the pluralistic world in which we live,

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[17] The controversial terms "global south" and "global north" have become popular in fields such as law, political science, international relations and development studies in the last three decades. These terms replace other equally controversial terms such as "Third World" and the "developed", "developing" or "developed world". "Global south" can be understood in at least two senses, one apparently neutral and geographical, and the second critical and indicative of the social status of a group of countries. In the geographical sense, the global south refers to the regions of Latin America, Asia, Africa and Oceania (excluding Australia and New Zealand), which are outside of Europe and North America. In the second sense, "global south" could be regarded as a euphemism to replace the manifestly objectionable terms that had been used previously to refer to these same regions as the "Third World" and the "underdeveloped world", terms that emphasised the developmental and cultural differences between "developed" and "Third World" countries. The term is generally understood today in its geographical sense. See further P Dann "The Global South in Comparative Constitutional Law" https://voelkerrechtsblog.org/the-global-south-in-comparative-constitutional-law/ (last accessed in April 2021); and N Dados and R Connell "The Global South" <https://journals.sagepub.com/doi/full/10.1177/1536504212436479> (last accessed in April 2021).

[18] In "Toward a Constitutionalism of the Global South" <https://www.palermo.edu/Archivos_content/derecho/pdf/Session%201%20-%20Bonillla.pdf> (last accessed in April 2021).

[19] See U Baxi "The Colonialist Heritage" in P Legrand and R Munday (eds) *Comparative Legal Studies: Traditions and Traditions* (2003 Cambridge University Press) at 53 and B S Santos "Three Metaphors for a New Conception of Law: The Frontier, the Baroque, and the South" (1995) 29 *Law and Society Review* 569-84.

nor the peculiar developmental needs of the global south, particularly Africa. It is therefore no surprise when Jacques Ateilli opines that Africa will be the lost continent in this unfolding new world order.[20]

Colonialism seems to have brought with it not only Euro-American legal principles but also the idea that Africa's role is limited to applying them regardless of local circumstances. Perhaps the best example of this dismal failure to capture and theorise the African reality is the Organisation for the Harmonization of Business Law in Africa (OHADA).[21] Created on 17 October 1993 in Port Louis, Mauritius, it is made up of 17 mostly francophone countries in West and Central Africa. However, it includes Comoros, which is from outside the region, Guinea Bissau, which is lusophone, Equatorial Guinea, which is hispanophone, and Cameroon, which has, at least in principle, a bi-jural system.[22] The objective of OHADA, according to article 1 of the founding treaty, is to harmonise business laws in the contracting states through the elaboration and adoption of simple, modern common rules adapted to their economies, which is to be accomplished by setting up appropriate judicial procedures and by encouraging arbitration for the settlement of disputes. Nine Uniform Acts have been adopted.[23]

A close examination of the OHADA regime reveals the strong influence of the Euro-American legacy in the form of French civil law. This raises a number of questions. The first is the issue of its legitimacy, which relates not only to how it originated but how it operates and the nature of its goals. Although a number of international institutions and countries were instrumental in its creation, the main actor was France. The French provided not only most of the funds but most of the ideas. Unsurprisingly, the most significant influence on the OHADA Acts is French law. Possibly to disguise the fact that it was a top-down French-led reform, a distinguished African legal scholar and former Vice President of the International Court of Justice, the late Judge Keba Mbaye, was given the responsibility of driving the process that led to the establishment of the organisation. The early drafts of the main treaty as well as the early Uniform Acts were prepared in France by French experts, while African 'partners' were required only to comment on the drafts.

Secondly, as Hans-Werner Wabnitz rightly points out, many of the Uniform Acts are perfect technical legal texts, at least in France, yet several of the provisions have turned out to be unsuitable for catering to the development needs of the OHADA countries.[24] During its early years, Ghana and Nigeria wanted to become part of OHADA. The stumbling block was the fact that it was unapologetically crafted by the French for mainly francophone Africa, rather than by Africans for Africa, and thus could not accommodate anglophone African countries.

In spite of the growing need for intra-African trade, the multiplicity of inherited legal systems, as the OHADA regime shows, remains an obstacle to effective regional cooperation and integration. This is largely due to the lack of mutual familiarity across legal systems and the absence of a trans-systemic legal dialogue between African countries along the lines of what is taking place in the European Union

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[20] In *Millennium: Winners and Losers in the Coming World Order* (1991 Times Books). The dangers of globalization are aptly captured in U Baxi's ICES Annual Lecture of 1992, "Globalization: A World Without Alternatives" <http://upendrabaxi.in/documents/Globalization_%20a%20world%20without%20alternatives.pdf> (last accessed in April 2021).

[21] OHADA, its French acronym, stands for *Organisation pour l'Harmonisation en Afrique du Droit des Affaires.*

[22] The other countries are Benin, Burkina Faso, Central African Republic, Congo, Ivory Coast, DR Congo, Gabon, Guinea, Mali, Niger, Senegal, Chad and Togo.

[23] See OHADA Uniform Acts, available at <https://www.ohada.org/index.php/fr/actes-uniformes-de-l-ohada> accessed July 2020.

[24] See "Research Paper Series 08-12 Reforming Legal Reform in Francophone Africa: World Bank Project Experience" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093028 (last accessed in April 2021).

(EU). This aside, it has been in the interests of France, through its policy of *françafrique*, to retain overall control and dominance of its former colonies and promote a mono-legal provincialism to ensure their continued use of the inherited French civil law system.[25] Given that this has made dialogue between civil and common law countries in Africa difficult, the question is how such a trans-systemic legal dialogue can be promoted.

TOWARDS AN INTRA-AFRICAN TRANS-SYSTEMIC LEGAL DIALOGUE

In spite of the fundamental differences between the common law and the civil law,[26] which are the two dominant legal systems not only in Africa but the world, the EU has provided an institutionalised framework for their successful trans-systemic legal dialogue in Europe.[27] This is reflected not only in the legislation of member states but also in EU law and, beyond it, in the curriculum of legal studies in the global north. For example, Sjef van Erp argues that a law programme that 'combines intra-systemic, trans-systemic and supra-systemic legal teaching' in our increasingly complex globalised economic environment is a *conditio sine qua non* for becoming a reliable lawyer.[28] Nagy and Perkumiené point out that in almost every law school in Europe there are courses in comparative law that consist of a general introduction to the major legal systems in the world. The law schools go as far as inviting foreign scholars to teach or co-teach courses in order to introduce students to other legal worlds. [29] Moreover, the literature on trans-systemic legal studies in the global north is expanding,[30] and this plays an important role in promoting the north-north legal dialogue. The challenge Africa faces is to be able to respond to the local and remain relevant and engaged with these global developments.

The trans-systemic legal dialogue taking place in the global north has two main features. One is the close legal collaboration between countries in the north, the best example of which are the developments within the EU. The other is modernisation of the curriculum of law schools to take account of the imperatives of globalisation and increasing economic integration, the best example of this being the famous pioneering trans-systemic legal education programme at McGill University in Canada.[31] As

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[25] The expression *'La Françafrique'* was first used by the first Ivorian president, Félix Houphouët-Boigny, in 1955 to define the wish of some members of the African elite to maintain special relations with France after independence. Since then, however, it has acquired a pejorative meaning to describe French neo-colonial dominance in Africa. It now reflects a relationship that symbolises a confiscated and perverted sense of francophone-African self-identification. The contemporary understanding of *Françafrique* is usually associated with François Xavier Verschave, a French anti-neo-colonial activist who investigated practices by de Gaulle and subsequent French regimes to sustain French presence and control in francophone Africa, mainly by supporting dictatorships and resource-pillaging in the different countries. See T Korkmaz "'La Françafrique': The Special Relationship between France and Its Former Colonies in Africa" (INSAMER English, 2 August 2019) <http://insamer.com/en/la-francafrique-the-special-relationship-between-france-and-its-former-colonies-in-africa_2307.html> (last accessed in April 2021); and F Verschave *La Françafrique: Le plus long scandale de la République* (1998 Stock) 21-22.

[26] See, for example, J Dainow "The Civil Law and the Common Law: Some Points of Comparison" (1966-1967) 15/3 *American Journal of Comparative Law* 419-435.

[27] See K Littlepage in note 15.

[28] See S Erp "Teaching Law in Europe: From an Intra-Systemic, Via a Trans-Systemic to a Supra-Systemic Approach" Maastricht Faculty of Law Working Paper No. 2011/10, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1776085> (last accessed in April 2021).

[29] See Z Nagy and D Perkumiene "Principles of Harmonization of Legal Education in the European Union" <https://cyberleninka.ru/article/n/principles-of-harmonization-of-legal-education-in-the-european-union> (last accessed in April 2021). The same is happening in the Americas. In this regard, see P Strauss "Transsystemia – Are we Approaching a new Langdellian Moment? Is McGill Leading the Way?"(2006) 56 *Journal of Legal Education* 161-171; and C Menkel-Meadow "Why and How to Study 'Transnational" Law'" Legal Studies Research Paper Series No. 2011-19 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851634 (last accessed in April 2021).

[30] Many of these can be found at "Selected Scholarly Writing about Trans-systemic Legal Education" <https://www.mcgill.ca/centre-crepeau/projects/trans-systemic/articles> (last accessed in April 2021).

[31] See H Dedek and A Mestral "Born to be Wild: The 'Trans-Systemic' Programme at McGill and the De-Nationalization of Legal Education," (2009)10/6-7 *German Law Journal* 889-12.

a result of this trend, some law schools now refer to themselves as global law schools based on a global curriculum taught by a global faculty in global partnership with foreign institutions.[32]

Although several measures are needed in Africa to provide a basis for sustainable intra-African trans-systemic dialogue, two are of critical importance. The first, at the national level, is the modernisation of the curriculum of law schools and faculties in Africa – the campaign over the last few years for the decolonisation and Africanisation of the curriculum of tertiary institutions has provided an excellent opportunity for this. The second measure, at the supranational level, relates to the proactive role the AU and its RECs can play. It is to these two issues that we now turn our attention.

At the national level: Curriculum modernisation

Two contemporary imperatives should have made trans-systemic legal studies in African law faculties inevitable. The first is the fact that jurisdictional boundaries are losing significance in an increasingly internationalised and globalised world. As a result of increasing globalisation, regional integration and cooperation, the true framework in which modern law is developing has ceased to be only national law and now extends as well to supranational law. This means a mono-legal-epistemic programme which assumes that national law is the foundation for everything will no longer suffice; instead, law students must be prepared for the transnational challenges that are inherent in an increasingly legally pluralistic world. If we take South Africa as an example, it is to be noted that many of the students in its law faculties are immigrants from civil law countries such as Angola, DR Congo and Mozambique. In addition, many of its large firms have a strong presence across the continent,[33] where they operate under different legal systems – some knowledge of foreign legal systems would hence be useful.

The second issue that has been lingering since independence was put firmly on the agenda by the 'Rhodes Must Fall' (#RhodesMustFall) student protests of 2015 in South Africa and the campaign for the decolonisation of academic curricula. This appears to have been a watershed moment not only for South African universities but those all over the continent.[34] Building on the ideas of critical postcolonial scholars, the campaign to decolonise and Africanise university curricula marked a tectonic shift in the university system by seeking to arrest the process of simply copying and pasting scholarly approaches from the global north without due regard to Africa's laws, history, politics, society and challenges.[35] This raises the question of whether the law curriculum in African universities reflects the continent's pluralistic context, history, political economy, development needs and options and takes into account Africa's place within the global legal dialogue brought about by internationalisation and globalisation.

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[32] See H Arthurs "Law and learning in an era of globalization" (2009) 10/7 *German Law Journal* 630-31.

[33] An example is one of its biggest law firms, Adams and Adams Attorney. It portrays itself as an internationally recognised and leading African law firm that specialises in providing intellectual property and commercial services with branches and associate offices in a number of African countries. See, https://www.adams.africa/ (last accessed in April 2021).

[34] See A K Ahmed *The Rise of Fallism: #RhodesMustFall and the Movement to Decolonize the University*, Columbia University thesis, 2019 https://academiccommons.columbia.edu/doi/10.7916/d8-n7n3-e372(last accessed in April 2021); R Chantiluke, B Kuoba and A Nkopo *Rhodes Must Fall: The Struggle to Decolonise the Racist Heart of Empire* (2018 Zed Books); and A Mbembe "Decolonising Knowledge and the Question of the Archive"<https://wiser.wits.ac.za/system/files/Achille%20Mbembe%20-%20Decolonizing%20Knowledge%20and%20the%20Question%20of%20the%20Archive.pdf > (last accessed April 2021).

[35] See J Muldoon "Academics: It's time to get behind decolonizing the curriculum"<https://www.theguardian.com/education/2019/mar/20/academics-its-time-to-get-behind-decolonising-the-curriculum> (last accessed in April 2021); R Werbner and T Ranger (eds) *Postcolonial Identities in Africa* (1996 Zed Books); and R Oelofsen "Decolonisation of the African Mind and Intellectual Landscape" <http://www.scielo.org.za/pdf/phronimon/v16n2/08.pdf> (last accessed in April 2021).

We can gain some insight into this by looking not at how the legal curriculum is changing in African universities generally, but rather at whether it is evolving in a manner that paves the way for a trans-systemic intra-African legal dialogue. Promoting an interest in the study of the diverse legal systems in operation on the continent as a foundation for encouraging cross-systemic legal dialogue depends to a large extent on the content and scope of the curriculum of law faculties in the different countries. Law curricula, especially those of the first generation of post-independence universities, were designed by the colonial powers and simply replicated their academic programmes. Although there have been changes, the basic philosophy of the inherited curriculum has been retained, along with many of its anomalies.[36] The mono-systemic and parochial nature of the programmes did not provide much scope for learning about legal traditions other than those of the previous colonial rulers.

A number of previous studies have revealed the weaknesses and anomalies of many of the law curricula in African law faculties.[37] To gain some insight into recent developments, a survey was conducted of several law faculties on the continent to see to what extent some of the changes that have been or are being introduced are likely to prepare the law students of today for a globalised working environment in which knowledge of African realities will be critical. Three preliminary points need to be made. First, trans-systemic study is conceptualised in this paper in a narrower way than it was when developed in the law faculty of McGill University. Rather than advocating for a McGill-style trans-systemic legal education, this paper argues for a curriculum that will expose students to, and provide them with knowledge of, the diverse legal systems in the world but with an African focus. Whilst the overriding objective must be to enable them to develop a pluralistic legal mind, the aim should be to pave the way for creative and original thinking about transforming the colonial and Eurocentric heritage of universities. The major weakness of the Europeanised legal curricula that were adopted shortly after independence in many African countries and that have not substantially changed over the decades is that they provide little space for studying and understanding the legal systems of other African countries and therefore make intra-African trans-systemic legal dialogue difficult. The effect is that there might not be much difference between an African student who does his or her legal studies in London or Paris and one who studies in Lagos or Dakar. Whilst the student who studies in Africa would inevitably have an African focus, the Westernised nature of the programme is still manifest whether the studies were in Africa or in the West.

The second point to note is that the emphasis in this paper is on those modules within the law curriculum that enable the student to develop a pluralistic mind as well as which create an understanding of global diversity and form the basis for a meaningful and constructive engagement with otherness. Narrow mono-systemic learning and thinking have been the main reasons that African legal

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[36] Savo Heleta, commenting on the situation in South Africa in 2016, wrote: "Since the end of the oppressive and racist apartheid system in 1994, epistemologies and knowledge systems at most South African universities have not considerably changed; they remain rooted in colonial, apartheid and Western worldviews and epistemological traditions. The curriculum remains largely Eurocentric and continues to reinforce white and Western dominance and privilege.'"See "Decolonisation of higher education: Dismantling epistemic violence and Eurocentrism in South Africa" <https://files.eric.ed.gov/fulltext/EJ1187109.pdf> (last accessed in April 2021).

[37] See, for example, CM Fombad "Africanisation of Legal Education Programmes: The Need for Comparative African Legal Studies (2014) 49/4 *Journal of Asian and African Studies* (383-98; C Himonga and F Diallo, "Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law"(2017) *Potchefstroom Electronic Law Journal* <http://www.saflii.org/za/journals/PER/2017/51.pdf> (last accessed in April 2021); and A E Tshivhase, L G Mpedi and M Reddi, *Decolonisation and Africanisation of Legal Education in South Africa* (2019Juta & Co).

scholars trained in one or the other of the two dominant legal systems talk past each other rather than engage in constructive debate aimed at developing legal solutions for Africa's distinctive problems.

Thirdly, the Rhodes Must Fall campaign provided the impetus for reviewing university programmes to see to what extent they reflect and strive to address Africa's realities. In this respect, decolonisation has become a buzzword for advocates of reform. Although the concept of decoloniality has been defined in diverse and sometimes controversial ways, for our purposes here the decolonisation of legal education in Africa is conceptualised from the broad perspective of democratising legal knowledge and ensuring its de-hegemonisation and de-westernisation.[38] It is premised on a recognition of ontological legal pluralism as a reality. At the heart of decolonising legal education is the need to eradicate a system that has socialised Africans into hating what is produced in Africa and blindly accepting and adopting everything that is produced in Europe and America.

It is contended that the pluralistic mind-set that is needed to facilitate a serious trans-systemic legal dialogue amongst Africans, especially its university academics, judges and legal advisers, depends on the legal education they receive. The development and modernisation of law in Africa can no longer depend merely on hanging onto ready-made Western laws that, given their mono-systemic form, often have not been adjusted to address local circumstances.

Going by the literature on trans-systemic and transnational legal studies, at least two courses can be considered crucial for the intellectual and cultural foundation needed to achieve this. These are comparative law and legal history; to emphasise the African perspective, customary law is equally important. A law student is unlikely to gain any insight into the diverse legal systems of the world, how they differ from each other, and what their underlying philosophies are without studying either or both comparative law and legal history. Aspects of these may be studied in other courses, such as ones on the introduction to law and legal methods or legal research.

Customary law as a source and form of law in Africa is unlikely to develop or survive without its being taught formally. This is of especial importance not only because it was marginalised in the colonial period but because certain post-independence governments tried to abolish it.[39] In Ethiopia, Professor David, the drafter of the Ethiopian Civil Code, recommended that customary law be abolished because it varied too much from area to area, was unstable and, in his opinion, often lacked true juridical characteristics.[40] He, like some European scholars, argued that it impeded development and was responsible for the undeveloped nature of African society.[41]

To gain some insight into the status of these key courses in the law curriculum of African law faculties today, a survey using a questionnaire was administered in 10 universities in anglophone

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[38] For a general discussion of views on decoloniality, see Sabelo Ndlovu-Gatsheni, "Decoloniality as the Future of Africa" (2015)13/10 *History Compass* 485-96.

[39] See T Verhelst "Safeguarding African Customary Law: Judicial and Legislative Processes for its Adaptation and Integration" https://bit.ly/3oOJ2UZ (last accessed in April 2021).

[40] "*La refonte du code civil dans les états africaines*" (1962)72/692 *Révue de Droit des Pays d'Afrique* 352-64.

[41] T Verhelst, in note 39 at 5. In this 1968 paper, the authors put it thus: "A number of statesmen and legal scholars entertain a deliberately negative approach to customary law. Customs are viewed as hindrances to development and their replacement by modern legislation or modern common law, on western patterns, is urged as a prerequisite to economic and social development."

Africa,[42] six in francophone Africa,[43] and in two other countries.[44] The findings serve merely as an indication of current trends; a more detailed empirical study is needed before any firm conclusions can be drawn. Such a future study should undertake a comparative analysis and evaluation of the breadth of coverage provided in the law curriculum to the three courses or closely related courses highlighted above with a pluri-systemic approach. It should also make a clear distinction between instances where any of these courses or related courses deal with issues of legal diversity in a superficial or incidental manner or where it is given a prominent place in the curriculum, for example by being made a compulsory course.

Comparative law is critical to fostering an intra-African trans-systemic legal dialogue because it usually introduces students to the different legal cultures in the world. From the survey, only four of the 10 anglophone universities offer comparative law as a course. With the exception of the University of Botswana, it is available only as an elective course. In francophone Africa, only two of the six universities offer comparative law on their programme, and this is a compulsory course for all students. It does not feature in the curricula of the four universities in DR Congo and Ethiopia covered in the study. An equally important course that was investigated is the teaching of legal history. Only two of the 10 anglophone universities offer legal history, as compared to five of the six francophone universities. All four of the universities in DR Congo and Ethiopia offer this course.

Insofar as the teaching of comparative law and legal history in these institutions is concerned, two points need to be noted. First, aspects of both comparative law and legal history are covered in some of the other courses taught in these universities, such as introduction to law and legal methods and contemporary legal systems and institutions. Secondly, the status of comparative law and legal history in these programmes – whether as stand-alone courses, in the few instances where this is the case, or as part of other courses – strongly suggests that it is unlikely that the African perspective in this course is emphasised. In fact, most of the standard textbooks, even recent ones, barely mention Africa and African law; when they do, the topic is viewed through an essentially Western prism as incidental and unimportant. This underlines the need for an African legal system course in the curriculum of African law faculties.[45]

In contrast to comparative law and legal history, it is the status of customary law today in the curriculum of African law faculties that is baffling. In an era where decolonisation and the Africanisation of law in Africa have become mantras, the future of customary law, the only original source and form of law that pre-dates the intrusion of the colonial interregnum, remains uncertain. It is taught as a compulsory course in only three of the 10 universities in anglophone Africa; in the other universities, it is taught either as an elective or an aspect of other courses, such as introduction to law, law of succession, and family law. By contrast, it is taught as a compulsory course in four of the six universities

[42] Responses to the questionnaire were obtained from colleagues in the law faculties of the following universities: University of Eswatini; University of The Gambia; University of Nairobi and Riara Law School in Kenya; University of Namibia; University of Enugu and University of Ilorin in Nigeria; University of South Africa (UNISA); Moshi Co-operative University, Tanzania; and University of Botswana.
[43] Information was obtained from colleagues at the University of Joseph Ki-Zerbo, Burkina Faso; University of Nazi Boni de Bobo-Dilulasso, Burkina Faso; University of Djibouti; University of Gabon; University of Saint Louis, Senegal; and University of Abdou Moumouni Niamey, Niger.
[44] Besides universities in anglophone and francophone Africa, information was obtained from colleagues at the Wollo University and Bahir Dar University of Ethiopia and the universities of Lubumbashi and Goma of the DR Congo.
[45] See CM Fombad in note 37.

in francophone Africa. In the DR Congo and Ethiopian universities covered in the survey, it is taught as a compulsory course.

A closer analysis shows that even where it is taught as a compulsory course, it usually has lower credits than most other courses. Customary law not only reflects the daily realities of the millions of people who live in rural areas but also regulates their lives. It has the potential to advance social justice in a manner consistent with decolonisation and, more than anything else, is one common cord of justice that unites all Africans. Arguably, customary law's growth was truncated because colonialism cut short the possibility of its intellectual development. Efforts to marginalise it by Western scholars have not ended. For example, two eminent and erudite contemporary comparatists, Basil Markesinis and his collaborator, Jorg Fedtke do not only dismiss customary law in strong derogatory language reminiscent of the colonial architects of the imposition of western laws and culture in Africa, but go further to argue that it belongs to a 'primitive' system and should more appropriately be left to anthropologists and sociologists rather than lawyers.[46] It is clear that unless customary law is taught in every law faculty as a compulsory course, it is likely to die. As Cowen rightly points out, no legal system can survive unless it is taught scientifically.[47]

Apart from curricular reforms designed to develop a pluralistic mind-set geared towards legal modernisation, the AU could play a role in paving the way for an intra-African legal dialogue.

At the continental level: The AU, RECs, and the promotion of an intra-African trans-systemic legal dialogue

The AU and its RECs could play a role in fostering the mobility and compatibility of the diverse legal systems on the continent. This would not only enhance unity and understanding between countries belonging to the two dominant legal traditions but also facilitate the process of negotiating and adopting AU legal instruments such as declarations, treaties and conventions, given that it is in this process that the conflicting approaches of the two legal traditions usually come to the fore.[48] The AU could take a leaf from the strides made by the EU in developing a legal *lingua franca* in Europe, even if this is mainly due to its more advanced supranational framework. In this regard, the EU is an exemplar of what is happening in other regions in the world.[49]

Although the AU Constitutive Act of 2002 has as one of its objectives the establishment of the 'necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations', the organisation and its RECs have not taken any direct steps to promote an intra-continental trans-systemic legal dialogue. Even *Agenda 2063: The Africa We Want,* which contains the blueprint and master plan for transforming Africa into the global powerhouse of the future,

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[46] See, BS Markesinis and J Fedtke, *Engaging with foreign law* (2009 Hart Publishing) at 48. They reduce the whole issue to this question: 'Is our life span so long and are our library resources so unlimited to allow us the luxury suddenly to shift direction and start studying, say, African law, Native American law, or religious law as a first priority?' If authors of such repute can express such absurd and archaic views about African law, in spite of the fact that one of the authors was born in Tanzania and studied and worked in South Africa, it underscores the need to revive research into customary law.

[47] See D Cowen "Early Years of Aspiration to the 1920s" in D Cowen and D Visser (eds) *The University of Cape Town Law Faculty: A History 1859-2004* (2004 Siber Ink) at 8.

[48] See ISS/PSC Report, "It's Shakespeare vs Molière in the African Union" <https://issafrica.org/pscreport/psc-insights/its-shakespeare-vs-moliere-in-the-african-union> (last accessed in April 2021).

[49] See H Dedek and A Mestral "Born to be wild: The 'rans-systemic' programme at McGill and the de-nationalionization of legal education" (2009) 10/6-7 *German Law Journal* 892-95.

does not say anything about promoting better understanding and interaction between different legal traditions.[50] Arguably, this would have provided a means of accomplishing Agenda 2063's aim of promoting inclusive and sustainable development and of concretising the pan-African drive for unity, self-determination, freedom, progress and collective prosperity pursued in the name of Pan-Africanism and the African Renaissance.

Nevertheless, two of Agenda 2063's flagship programmes – the creation of a Pan-E University and the Pan-African Virtual University – may provide an opportunity for, inter alia, introducing innovative legal studies programmes of a trans-systemic nature that offer a medium for better understanding of the diverse legal systems on the continent and also facilitate research on the Africanisation of laws. This would depend, however, on the AU's recognising the importance of promoting intra-systemic legal dialogue by creating opportunities for it to take place.

One way of doing this is suggested by the OHADA project which harmonises the business laws of a number of African countries. Such harmonised laws would not only promote intra-African trade by reducing the costs of doing business – costs which are increased by the diversity of legal rules among different countries – but also unlock the continent's potential for economic growth. However, as noted, OHADA perpetuates the inherited Eurocentric legal tradition, so it is unsurprising that it has done little to facilitate an African cross-systemic engagement.[51] Some recent developments may well pave the way for this, though.

Since 2013, the African Court on Human and Peoples' Rights has organised, under the auspices of the AU, biennial judicial dialogues bringing together chief justices, presidents of supreme and constitutional courts, as well as representatives of regional and international judicial bodies and other relevant stakeholders from the 55 AU member states. The fourth such dialogue took place in Uganda in 2019 and brought together more than 300 delegates. The objectives of the dialogue are to improve networking among judicial officers and provide a forum for exchanges of information on best practices and the administration of justice.[52]

The dialogues usually discuss issues relevant to promoting a cross-systemic judicial conversation in Africa. For example, during the third African Judicial dialogue, held in Arusha, Tanzania, in 2017 on the theme, 'Improving judicial efficiency in Africa', some of the key issues discussed dealt with the state of judicial education in Africa, proposals to launch an online human rights course for judiciaries, and proposals for setting up an African judicial network and an African Centre for judicial excellence. Although the focus is on improving the judiciary and therefore concerns mainly judicial personnel and bureaucrats, it is an important starting-point for bringing together judicial officials from the different legal traditions to work towards enhancing the quality of justice on the continent. Such transnational dialogue could also enable judges to learn more about these legal traditions. However, the AU and the African Court could do more to make these dialogues more productive.

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[50] See *Agenda 2063: The Africa We Want*, available at <https://au.int/en/agenda2063/overview> last accessed in April 2021.
[51] These problems will not go away as a result of the coming into effect of the Agreement Establishing the African Free Trade Area of 2018. Article 30 of its Protocol on Rules and Procedures on the Settlement of Disputes only deals with disputes concerning the interpretation of the Agreement meaning that disputes between individual business persons and entities will still be subject to the vagaries of national law.
[52] See "4th African Judicial Dialogue opens in Kampala", <https://au.int/en/pressreleases/20191030/4th-africa-judicial-dialogue-opens-kampala> (last accessed in April 2021).

In spite of their narrow mandate, the biennial African judicial dialogues could still facilitate an intra-African cross-systemic conversation at two levels. The first is at a vertical level, with the African Court on Human and Peoples' Rights at the summit of the hierarchy followed by the different regional courts in the middle[53] and ending with the national courts at the bottom. Through this, there could be a cross-systemic fertilisation of principles and values in areas of common interest where there are continental standards, such as on issues of constitutionalism, the rule of law, good governance and human rights. Secondly, at a horizontal level, national courts making decisions on issues similar to those decided by other national courts could borrow from each other. In this regard, judges across the common law/civil law divide in Africa could draw freely upon each other's experiences.[54]

Judicial cross-systemic dialogue at both levels could persuade national courts to take account of the domestic interpretation and application of AU and RECs treaties, charters and other similar instruments in a manner that prevents variances in interpretation as well as paves the way towards greater convergence in legal rules, concepts and principles in the continent. There is no reason why an African legal system cannot eventually emerge from the present interaction between the diverse legal systems. This has already happened with the imposed languages. The emergence of a distinctive Afrikaans language in South Africa from European languages represents one of the most successful decolonising initiatives on the African continent.[55] The same can be said of Swahili spoken in East Africa and, to a lesser extent, pidgin English spoken in West Africa.

However, the absence of any specialised institutional arrangements within the AU or the RECs to coordinate and facilitate discussions on law reform is a drawback. As Africa's premier institution for promoting socio-economic integration and economic development, the AU should take the lead in facilitating trans-systemic legal dialogue. The only AU organ that conceivably could do this is the AU Commission on International Law (AUCIL). Although its mandate appears to be focused on strengthening and consolidating common approaches to international legal developments, article 4(d) of its statute allows it to 'conduct studies on legal matters of interest to the Union and its Member States'.[56] This provides it with some powers to do what the African Court on Human and Peoples' Rights is now doing with its biennial judicial dialogues. It may be time for the AU to widen the scope of this dialogue by bringing together the AUCIL and other stakeholders such as academics and legal researchers. There is no better time than now for the AU and RECs to take steps to cast off the yoke of the colonialist legacy that continues to retard the collaboration and cooperation that are needed to facilitate Africa's development.

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[53] Examples of the regional courts are the East African Court of Justice, the Southern African Court of Justice, and the Court of Justice for the Economic Community of West African States.

[54] As A Buyse "Tacit citing: The scarcity of judicial dialogue between the global and the regional human rights mechanisms in freedom of expression cases" in T McGonagle and Y Donders (eds) *The United Nations and Freedom of Expression and Information: Critical Perspectives* (2015 Cambridge University Press)at 443-65) rightly points out, courts may have a greater inclination to make use of external jurisprudence for inspiration when they themselves do not yet possess a large corpus of case law, when they have been trained in law schools in other legal systems, or when they are well-versed in legal comparativism.

[55] See, P Mbude "Decolonising education: Lessons from Afrikaans language" available at https://www.news24.com/citypress/news/decolonising-education-lessons-from-the-afrikaans-language-20180517 (last accessed in April 2021).

[56] See "Statute of the African Union Commission on International Law" available at <https://bit.ly/3niCn5p> (last accessed in April 2021).

CONCLUSION

Unshackling the colonialist legal inheritance does not necessarily mean that the colonial legal edifice must be dismantled and abandoned, nor does the decolonisation and Africanisation of the law imply such an outcome: there is no pure legal system. As Roscoe Pound once put it, 'History of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law.'[57] The problem in Africa is caused not merely by the inheritance of the Euro-American-centric laws and traditions but by the fact that these have been allowed to dictate *holus bolus* the patterns of life and development on the continent, regardless of their suitability, relevance and opportunism. Little effort has been made to adapt and adjust these laws to address the continent's contemporary challenges. Africa would have been in a better position to solve its problems if the experiences of the last seven decades of independence had been understood, analysed and used as a basis for crafting the solutions needed to address its present governance problems.

The inherited legal systems that could have served as a basis for creative change have been left to become dysfunctional. Trapped in the mono-legal system culture of the past, Africans now need to catch up with the pluri-legal system culture rapidly emerging as a result of increasing internationalisation and regional integration. If we work from the fact that the true framework within which modern law is developing has ceased to be the single jurisdiction and that the sources of legal rules are increasingly multinational and trans-systemic in nature, then the future of progressive legal development in Africa depends on how efforts in this regard can strive to harvest the best of the continent's diverse inherited legal traditions and combine it with its indigenous customary laws. It is from this perspective that it is argued that the legal foundation for training Africa's jurists, whether they be academics, judges, lawyers or legal advisers, must have a broader frame of reference from which to work.

Colonialism appears to have brought along not only the theory that scholarship from the West was the best but also the assumption that Africans should limit themselves to applying such scholarship. To explode the myth of the inherent superiority of what comes from the West and to effectively decolonise and Africanise the law, African scholars not only need to start learning more about what is happening in their own neighbourhood but also need to invest resources in developing academic units that can study, conduct research in, and teach non-Western legal traditions, especially African customary law.

Over the years, as this research into the curricula of some African universities has shown, there has been a progressive marginalisation within the mainstream law curriculum of critically important courses such as comparative law, legal history and customary law. These are courses that are necessary for creating a better understanding of the legal systems on the continent and facilitating an intra-African trans-systemic dialogue that could position the continent to play a better role in the general global legal dialogue. It is from the perspective of the increasing need for theorising African realities that the argument for curriculum change has been made. If African legal experts from the different countries have to understand each other and have to engage in constructive trans-systemic dialogue, all of which

[57] In *The Formative Era of American Law* (1938 Brown & Co, Boston) at 94.

would enable them to craft common solutions for common problems, then the foundation for this must be laid in law faculties on the continent. Students must be made to know not only that there are different legal systems with different approaches to dealing with similar problems but also to know the historical, social, economic and political context in which these developed and, importantly, evolved over time by borrowing from other legal systems.

Similarly, if inherited legal systems have to be modernised and Africanised, then Africans, regardless of legal background, must work together. To do so with the depth of understanding that is necessary to advance the law on the continent, it is no longer adequate to limit oneself to one or the other of the main legal traditions on the continent.[58] Adjusting legal education programmes on the continent will not only prepare students for the changing market for legal services but also create the mental disposition and open-mindedness needed to prepare them for the trans-systemic legal dialogue that is necessary to move the legal modernisation process forward both at national and continental level. It will also enable graduates from African law faculties to perform in an optimally competent, effective and responsible manner in the diverse roles they are required to play in society.

[58] Mutual suspicion and differences of opinion amongst legal experts from Anglophone and Francophone Africa has often played out during the drafting of AU treaties and in many cases, compromises made have diluted the treaties of their effectiveness. An excellent example of this is the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development 2014. To accommodate the civil law traditional approach to decentralization, it set standards that were too low to make it a "catalyst" and "cornerstone" for decentralization, as its designers intended. See further, CM Fombad "Regional and continental frameworks for decentralization in Africa: The African Charter on Decentralisation" in C M Fombad and N Steytler (eds) *Decentralisation and constitutionalism in Arica* (2019 Oxford University Press) 70-97.