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Annual Survey of International & Comparative Law

Volume 14 | Issue 1 Article 4

8-30-2010

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Recommended Citation

Mancuso, Salvatore (2008) "The New African Law: Beyond the Difference Between Common Law and Civil Law," *Annual Survey of International & Comparative Law*: Vol. 14: Iss. 1, Article 4.
Available at: http://digitalcommons.law.ggu.edu/annlsurvey/vol14/iss1/4

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THE NEW AFRICAN LAW: BEYOND THE DIFFERENCE BETWEEN COMMON LAW AND CIVIL LAW*

SALVATORE MANCUSO**

"Africa is too big to be described. It is a separate continent-plant, a varied and lavish universe. It is only to simplify and for convenience that we call it Africa. Apart from its geographical appellation, Africa actually does not exist."

Ryszard Kapuczinski

I. INTRODUCTION: THE CASE OF OHADA LAW AND ITS IMPACT ON AFRICAN COUNTRIES ADOPTING COMMON LAW LEGAL SYSTEMS

For a long time, economic operators have been suspicious toward sub-Saharan African countries due to the juridical and judicial insecurity currently prevalent among them. This juridical insecurity stems from the overall antiquity of the laws in force in almost all sub-Saharan countries,

* The present article is the outcome of the presentations delivered at the International Conferences "*Le droit des affaires en Afrique: l'expérience de l'OHADA*" held in Bujumbura on 15 October 2007 and in Kigali on 17 October 2007, and at the International Conference "*The role of the OHADA Law and the Arbitration to Promote the Economic Development*" held in Cairo on 6 December 2007; and of a paper presented at the International Conference "*The Harmonization of Business Law in Africa and its Advantages for Chinese Investments in Africa*" held in Macau on 27 November 2007. The author is grateful to Mauro Bussani, Paulo Canelas de Castro and Ignazio Castellucci for their kind comments and suggestions.

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Produced by The Berkeley Electronic Press, 2008

the inadequacy of such texts with respect to the needs of the modern economy, and the extreme delay, or even the absence of publication of legal rules. The judicial insecurity mainly comes from the decay in justice due to the slowness of the cases, the unpredictability of the courts, the corruption of the judicial system, and the difficulty in enforcing the judgments.

The current investments into African countries are limited as a result of the judicial and juridical insecurity.[1] As such, there is a strong need to rebuild the respective legal systems in order to enhance investors' reliance and to further attract foreign investment.[2] The idea of the unification of African laws has been considered as the only solution to eliminate obstacles to development amounting from the judicial differences among the varying African nations.[3] Such a change would give the countries joining the process of regional integration the opportunity to assert their interests in a stronger and more confident manner within the international arena.

The Organization for the Harmonization of African Business Laws (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* - "OHADA")[4] was established by a treaty among African countries, mainly within the French-speaking area[5] (and belonging to the Franc zone), signed in Port Louis, Mauritius, on October 7, 1993, and entered into force in July 1995.[6] OHADA's objective is the implementation of a

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1. Kéba MBAYE, *Avant propos du numéro spécial OHADA de la revue Penant*, n. 827, 125, ff (2000).

2. *Id.*

3. The issue of the diversity of laws has been, for a long time, an important (even if indirect) obstacle to economic development in Africa because the African States have not taken the issue into proper consideration. Since attaining independence, the issue of the harmonization of laws in Africa has been addressed: Professor Allott observed that "the move towards integration or unification of laws has been a consequence of independence, of the desire to build a nation, to guide the different communities with their different laws to a common destiny". See Anthony N. Allott, Towards the unification of laws in Africa, 14 Int. Comp. Law Quarterly, vol. 14, 366-378 (1965); Michel Alliot, Problémes de l'unification des droits africains, 11 Journal of African Law (1967), n. 2, 86-98, conducting an initial investigation on the ways to move towards the harmonization of laws in Africa; See also Anthony N. Allott, The Unity of African Law, in Essays in African Law, (1960) London, Butterworths, 69-71, where the issue is dealt with by mainly looking at African customary law.

4. See the OHADA's website at: <www.ohada.com> where the full text of all Uniform Acts, as well as the related case law and a selected bibliography can be found.

5. 14 of the 16 present member countries are French-speaking countries.

6. The 16 countries that have joined OHADA include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo. The Democratic Republic of Congo declared its intention to join the OHADA in 2004 and the accession procedure is underway. Angola, Ghana and Nigeria are also currently debating whether to join OHADA - for a favorable approach on the debate *see* Dany Houngbedji RAUCH, *Ghana may opt for Harmonised Business Law,* in African Business, Feb. 2003, Issue 284, p.36; John Ademola YAKUBU, *Harmonising Business Laws in Africa: How Nigeria Can Benefit*, This Day (Nigeria), 9/29/2004.

modern, harmonized legal framework in the area of business law, in order to promote investment and develop economic growth. The treaty calls for the elaboration of Uniform Acts to be directly applicable in member States notwithstanding any provision of domestic law.

Specifically, uniform law takes concrete form with the adoption of texts called the Uniform Acts. These Acts are prepared by the Permanent Secretariat of OHADA in consultation with the governments of the OHADA member States. The Council of Ministers, a body established under the Treaty, discusses and adopts the acts with the advice of the Common Court of Justice and Arbitration ("CCJA"). It is useful to keep in mind that national parliaments are excluded from the Uniform Acts adoption proceedings. The Council of Ministers has sole competence in this area making it possible to avoid the drawbacks of indirect procedures that could lead to the adoption of conflicting legal texts that would be difficult to implement. The Acts become effective immediately after they are published in OHADA's Official Gazette without the need for additional domestic legislation from the member States. They are directly applicable and binding in all OHADA countries, notwithstanding any contradictory provisions in existing or future national laws.[7] All the domestic legislation that is not in compliance with the OHADA Uniform Acts is repealed by the very enactment of the relevant Uniform Acts.[8]

Generally speaking, the current membership hauls from a common tradition and background. With the exception of Guinea-Bissau and Equatorial Guinea – where Portuguese and Spanish are spoken – and the Anglophone provinces of Cameroon, all the OHADA member countries are Francophone. Moreover, all the OHADA countries have a civil law tradition, with the only exception being the aforementioned English-speaking provinces of Cameroon, where the common law legal system has been adopted. All the member countries have signed up to a legal framework where French has officially been declared "the working

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7. *See* Seydou BA, *How Can Effective Strategies be Developed for Law and Justice Programs? Are There Models for Legal Reform Programs? The Example of the Organization for the Harmonization of Business Law in Africa (OHADA)*, <www4.worldbank.org/legal/legop_judicial/ljr_conf_papers/Ba.pdf>, last viewed 13 October 2005; R.V. Van Puymbroeck, *Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century*, (2001) World Bank Publications.

8. Article 10 of the OHADA Treaty provides that "*Les Actes uniformes sont directement applicables et obligatoires dans les Etats parties nonobstant toute disposition contraire de droit interne, antérieure ou postérieure*" The text of all OHADA Uniform Acts are available at <www.ohada.com>. On this issue *see* Joseph ISSA-SAYEGH, *La portée abrogatoire des Actes uniformes de l'OHADA sur le droit interne des Etats-Parties*, in *Revue Burkinabé de Droit*, n° spécial, 39-40, 51.

language."[9] Further, the legal framework provided through the present Uniform Acts is, in general, based on civil law and has, to a certain extent, borrowed from French business law. However, as several substantial differences exist, the Uniform Acts are not a mere transplant of French Law.

The aim of OHADA is to go beyond the original membership and to have other African countries, that are neither Francophone nor belonging to the civil law legal tradition, become member States. The Treaty indeed opens the doors of accession to all countries that are members of the Organization for the African Unity (now replaced by the African Union) and to other non-member States unanimously invited to join OHADA.[10]

The issue of the relationship between OHADA law and the common law is not purely theoretical, as it also has an immediate implication, since some of the English-speaking provinces of Cameroon still apply their common law system within the Cameroonian legal framework.

II. COMMON LAW "VERSUS" OR "AND" CIVIL LAW

There has been general agreement among the comparatists of civil law and common law to refer to the two systems as two different legal families due to both their geographical extension and historical importance.[11] The classic scholarly debate focused on the specification of the distinctive elements of the two legal families in order to classify the legal systems of the world and determine where a given legal system could fit in. The consequence brought by this legal classification was that any legal system that could not match the criteria of one of the two major legal systems of the world, (and until the 1980's to the socialist legal family as well) was relegated into a residual category generically called the "other legal systems."

Such debate becomes quite fruitless considering today's reality: the cultural and geographic limits that have been historically used to distinguish between these two legal families are no longer as important

9. According to Article 42 of the Treaty, French shall be the working language of OHADA.
10. OHADA Treaty, art. 53.
11. *See* René DAVID, Camille JAUFFRET-SPINOZI, *Les grands systèmes de droits contemporains*, (2002) Paris, Dalloz; Konrad ZWEIGERT & Hein KOTZ, *Introduction to Comparative Law*, (1993) Oxford University Press, 2nd edition; René DAVID, *Le droit comparé. Droits d'hier, droits de demain*, (1982) Paris, Economica; Peter DE CRUZ, *Comparative Law in a Changing World*, (1999) London, Cavendish Publ. Ltd. 2nd edition; A G CHLOROS, *Common Law, Civil Law and Socialist Law : Three Leading Systems of the World*, (1978) *The Cambrian Law Review*, at 11-26.

as they once were. Therefore, the scholarly debate has shifted its focus to study the similarities rather than the differences between these two patterns of law, trying to individuate cases where those similarities give rise to the phenomena of convergence.[12]

Traditionally, the distinction between civil law and common law has been founded on the presence, in the former, of a large amount of abstract and general rules that the courts must apply. Specifically, in civil law jurisdictions, courts essentially refer to the principles of law set forth in the codes. The latter, however, depends on the principle of *stare decisis* which utilizes the binding force of judicial precedents where the presence of pre-determined legal rules is limited to include only those that are strictly necessary. As a consequence of such a distinction, civil law legal systems are characterized by the presence of codes and other statutes containing an extensive number of legal provisions forming the entire *corpus* of laws to be applied by the courts. Such a system is assumed to be self-sufficient; encompassing all the rules suited for all possible cases without any need for "external" contributions, leaving the courts without any space to move beyond the application of the pre-arranged substantive rules. On the other hand, the English legal system was conceived as a system with a limited number of statutes and legislative acts, creating wide autonomy for the courts to determine the rule of law applicable to a specific case which would later serve as precedent for future courts. This kind of approach started to show its limits at the end of the second part of the last century.

In civil law legal traditions, an increased importance is being given to case law among both practitioners and scholars. Modern courts tend to make their decisions conform to the principles of law contained in the rules set forth in the codes and statutes, as well as to how other courts, especially the high courts, have interpreted and applied the codes and statutes. Journals and commentaries related to case law have been established with regard to both case law generally and to specific areas of law specifically. Academic teaching is constantly moving from the simple use of doctrinal handbooks, to a more integrated approach - teaching by using case law and incorporating practical classes where the analysis of foreign legal systems is now considered essential to better one's knowledge of a specific legal issue.

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12. H. Patrick GLENN, *La civilisation de la Common Law*, in 45 *Revue International de Droit Comparé*, vol. 3, 559 (1993); Ignazio CASTELLUCCI, *Convergence of Civil Law and Common Law Models of Legal System*, in 6 *Boletim da Faculdade de Direito da Universidade de Macau*, vol. 14, 87 (2002); Craig M. LAWSON, *The Family Affinities of Common-Law and Civil-Law Systems*, 6 *Hastings International & Comparative Law Review*, 85 (1982).*The Family Affinities* cit.

In the area of law-making, the trend is to move to the adoption of codes characterized by "open" rules. Thus, the courts are left to decide between further developments of the single rules (this is the case of the Dutch Civil code of 1992 where even the traditional hierarchy among the different sources of law has been abandoned); the adoption of rules that are the result of principles elaborated both in the civil law and the common law legal traditions (this is the case of the UNIDROIT principles on the International Commercial Contracts or the CISG which greatly influenced the drafting of the rules on contracts in several countries); or the codification of legal institutions elaborated by the common law tradition (like in the adoption of trust law in China).

On the other hand, the common law legal tradition is undoubtedly moving towards a more central role for written law. In England, the Parliament is continuously involved in law-making activities covering different aspects of legal relations. In 1998, it approved the new Civil Procedure Rules, which were strongly influenced by the civil law pattern. The legal system of the United States is historically less linked to the classical pattern represented by English common law. The American system incorporates the fundamental elements of such a legal tradition, but also incorporates elements belonging to the civil law tradition as well. This is seen in the presence of a written constitution, the Civil Code utilized in Louisiana, as well as the Uniform Commercial Code. The latter can be considered very close to a code in a "civil law" sense, in that it is used as a reference even when further elaborated upon by the *Restatement*. Further, in the United States, the *Restatements* are widely used on a daily basis in a vast array of legal spheres and, as such, can be assimilated to a "code" of sorts. This is a characteristic of the American system that does not fit within the classic features of common law. Another difference between the American and classic common law system is the increased reliance on written statutes. This trend has continued throughout other common law jurisdiction as well, indicating a departure from the classic common law approach.[13]

A more general observation can be made. Since the Middle Ages, common law and civil law legal systems have been developed from a common fund of Western legal concepts. The historical similarities have endowed both of these legal systems with a single ruling set of assumptions regarding the role of law in the social order, the form to be given to law, and its application and substance.[14] Such Western liberal democratic concepts of law are common only in civil and common law

13. See Ignazio CASTELLUCCI, *Convergence* cit., at 91.
14. Craig M. LAWSON, *The Family Affinities* cit.

legal systems, and effectively differ from the concepts of law proper to the Socialist, the Islamic, the African, the Indian, the Chinese, and the Japanese legal traditions. Comparative analysis discovered a high degree of convergence between single rules belonging to civil law and common law legal traditions, as well as their fundamental categories, legal concepts, and terminology.[15]

Civil and common law seem to converge into a larger and more comprehensive Western liberal democratic family of legal systems, where some common values about law and democracy, as well as general legal principles in the area of public, administrative, criminal and private laws are shared by the legal traditions. Although a general sub-distinction between common law and civil law still persists, the major distinctions between them, however, have been greatly diluted in a continuous convergence between the two legal traditions clearly evident from the current harmonization initiatives taken within the European legal community.

III. THE PLACE OF AFRICAN LAW

Since African countries are generally classified according to the legal system transplanted (and then inherited) during the Colonial Age, it is necessary to determine the place of African law in the ambit of the more general debate regarding the common and civil law traditions.

The current impression is that in Africa, the issue cannot be limited to simply looking at the difference between common and civil law. Indeed, any analysis that is limited to the above mentioned dichotomy would be incomplete, and would not take into proper consideration the reality of African law. The diversity of African law can be examined from three different perspectives: diversity within each country, diversity among the African countries and diversity between African and non-African countries.[16]

The legal stratification within African countries is clear evidence of the possible differences that may exist within the same country. First, the customary laws which have been applied in African countries prior to colonization and are still applied today, present large differences among one another, even within a single country. Second, colonization has

15. The projects related to the study on the feasibility of a future European civil code and to investigate whether the "common core" of European private law can be used as an example of this trend.

16. Gbenga BAMODU, *Transnational Law, Unification and Harmonization of International Commercial Law in Africa*, in 38 *Journal of African Law* (1994), n. 2, 125-143.

brought into the African countries different Western legal systems which were imposed upon the customary laws, and yet, still have to coexist with them. Third, after gaining independence, various African countries made different choices (some to the Socialist pattern, some to the Federal system, and others importing Islamic legal principles) that increased a lack of uniformity within the same country.

Comparative studies have now identified a typical African legal system as a legal structure with specific peculiarities and differences from the legal systems present in the rest of the world.[17] The aforementioned legal stratification shows us how the import of Western legal systems has given a specific imprint to the legal system of each African State, differentiating it from the other African States, and giving rise to a sub-classification of an African legal system rooted in the structure and tradition of the former parent country.[18]

Despite that, even if the African legal systems can be assimilated with that of the respective colonizing country, it must not be assumed that the legal rules in African countries are the same as the European country from which they received their legal system. Since the reception of European laws during the colonial period, there have been several legal developments in the European countries that have not been transplanted into the legal systems of the former colonies. At the same time, the African countries engaged in their own legal developments involving the revaluation of customary law, the development of their own case law, and the transplants from other non-European legislations. The key role still played by customary law, the influence of religious law (Islam) give rise to a hybrid, modern African legal system cannot be found anywhere else in the world.

IV. OVERCOMING THE DIFFERENCES: A CASE STUDY ON OHADA LAW

The case of OHADA is emblematic in considering the issue of the relationship between civil common law legal systems, while also focusing on the present development of African law. The main characteristics of the OHADA legal framework have been briefly outlined in the introductory part of this paper.

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17. *See* Antonio GAMBARO and Rodolfo SACCO, *Sistemi giuridici comparati*, (1996) Turin, UTET; Ugo MATTEI, *Verso una tripartizione non eurocentrica dei sistemi giuridici*, in *Studi in memoria di Gino Gorla*, (1994) Milan, Giuffré, vol. 1, 775-798; with particular reference to African law and its characteristics, *see* Rodolfo SACCO, *Il diritto africano*, (1995) Turin, UTET; Marco GUADAGNI, *Il modello pluralista*, (1996) Turin, UTET.

18. Gbenga BAMODU, *op. ult.cit.*

The current debate reflects the needs of the harmonization process to fully implement the idea of OHADA: on the one hand, to reinforce the membership with other countries belonging to the French area of influence; on the other hand, to open the doors of accession to other African countries belonging to different legal and cultural experiences.[19] Only a few scholars have dealt with the issue of the relations between the OHADA legal system and common law, and it is not surprising that they are almost all from Cameroon, the country where the question is more pressing.[20]

Those studying the possibility of African countries with a common law legal system joining OHADA have highlighted a number of problems standing in the way. One problem deals with the principle set forth in Article 10 of the Treaty, according to which:

> *"Uniform Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws."*[21]

As it may be easily noted, not only do the new Uniform Acts automatically repeal any piece of contradictory legislation, but also, once a matter falls within the competence of OHADA, under the provisions of Article 10, any new domestic legislation on the same issue would be null and void. Moreover, the Uniform Acts can only be modified under the

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19. Apart from the next accession of the Democratic Republic of Congo, some efforts have been made to increase the knowledge of OHADA both in the Anglophone African countries and in the Portuguese-speaking countries. In Ghana, both conferences and an OHADA resources centre have been set up and under an initiative of the Attorney General and Minister of Justice at the time, Mr. Nana A.D. Akufo-Addo, in 2002, Ghana's Government established a 5-panel National Committee of legal experts under the aegis of the Ministry of Justice to review the prospect of joining OHADA. The results of the initiative have never been rendered public. In Paris, on March 9, 2006, in the course of an official luncheon, Ms. Ellen Johnson-Sirleaf, President of Liberia, stated that she was strongly supportive of Liberia joining OHADA's common system of business laws. Nigeria has also organized conferences and opened a centre to promote OHADA law. A handbook on OHADA business law in Portuguese is under publication in Angola where discussions about the possibility to join OHADA are ongoing.

20. *See* Fidèle TEPPI KOLLOKO, *Droit et pratique de la common law à l'épreuve du droit OHADA*, in *Recueil Penant*, vol. 116, 353 (2006); Akere T. MUNA, *Is OHADA "Common Law Friendly"?*, 3 *International Law FORUM du droit internaional*, no. 3, p. 172-179 (2001); *See also* Nelson ENONCHONG, *The Harmonization of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?*, in 51 *Journal of African Law*, n. 1, 95-115; and – even if incidentally – Samuel KOFI DATE-BAH, *The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of the Principles of Commercial Contracts in West and Central Africa. Reflections on the OHADA Project from the Perspective of a Common Lawyer from West Africa*, in *Uniform Law Review*, vol. 9, p. 269-273 (2004); and Richard FRIMPONG OPPONG, *Private International Law in Africa: The Past, Present and Future*, 55 *Am. J. Comp. L.*, 713 (2007).

21. OHADA Treaty, art. 10.

conditions provided for at their adoption, and the possibility to intervene in such matters at a municipal level is completely removed. In this respect, the Common Court of Justice and Arbitration (CCJA) has clarified that the repealing effect set forth in Article 10 of the OHADA Treaty refers to the abrogation and prohibition against enacting any internal norm of law or regulation (regardless of whether it is an article of the text, a paragraph or a sentence of it), either present or future, contrasting a rule from the Uniform Act.[22]

This feature of the OHADA legal framework does not clash, at least in principle, with the basic feature of common law, where the lawmaker intervenes when there is a need to determine some fixed point of a specific issue. The OHADA legal system should fit well within this framework because it brings in a set of specific rules to a legal area that is extremely critical for African countries and, thus, possibly overrules legal precedent that potential investors could perceive as potentially harmful.[23]

Another problem is that of language. Since the current members of OHADA are predominantly French-speaking States, it would be difficult for English-speaking States to join. The provision of Article 42 of the Treaty, where French is provided as the sole language of OHADA and its Uniform Acts, has been considered a barrier to prevent the adhesion of English-speaking countries. Up to now, very little has been done to address such an important issue: no Portuguese or Spanish versions of the Uniform Act have been officially published[24] and the English versions of the same Acts are neither the best quality nor have any official value.[25] A further consequence could also be that the lack of authoritative information on OHADA laws in English and the provisions of Article 42 of the Treaty, would result in discrimination of English-speaking citizens (and this issue could be applied *mutatis mutandis* to Spanish and Portuguese-speaking countries as well) with respect to the right of access

22. *See* Opinion n. 001/2001/EP of 30 April 2001 rendered by the Common Court of Justice and Arbitration upon demand of the Ivory Coast and available in Felix ONANA ETOUNDI and Jean Michel MBOCK BIUMLA, *Cinq ans de jurisprudence commentée de la Cour Commune de Justice et d'Arbitrage de l'OHADA (CCJA) (1999-2004)*, (2006) Abidjan.

23. See Fidèle TEPPI KOLLOKO, *Droit et pratique* cit., 348.

24. Unofficial translations are available on the net. *See*, for example, the website <www.jurisint.org>.

25. It should be noticed that a handbook on OHADA business law in Spanish has been published under the auspices of the Spanish Ministry of Justice: see José M. CUETO, Sergio ESONO ABESO TOMO, Juan Carlos MARTÍNEZ, *La armonización del Derecho Mercantil en África impulsada por la OHADA*, (2006) Madrid, Ministerio de Justicia; while one in Portuguese language is now under publication in Angola.

to justice, since they would not be able to present their cases to the CCJA due to the inability to manage their affairs in French.[26]

Although the language issues currently present in Article 42 could be solved by revising the provision accordingly, it is nevertheless necessary to explore the kinds of solutions that can be reached using the present wording of the Article. Articles 7 and 8 of the OHADA Treaty may be quite useful tools as they set forth the procedure to approve the Uniform Acts. Article 7 gives the Member Countries a term of 90 days from the date of reception of the draft versions to submit their written observations to the Permanent Secretary Office. Article 8 prescribes the unanimity of the representatives of the member States to approve a Uniform Act. These tools can give any State the opportunity to request insertion in the draft Uniform Act those elements which are deemed necessary with respect to its legal system and to refuse approval if unsatisfied with the proposed text. The Articles also allow for the possibility of expressly requiring the adoption of an English text of the new act, (as well as Spanish or Portuguese) together with the French one, to address the issue of language. If we examine Article 42, it speaks about French not as the "official language" but as the "working language" of OHADA. Therefore, this element should mean that "works" are done in French, but texts in other languages are admitted, with none of the languages being the "official" one.

Such an interpretation opens the door to the adoption of Uniform Acts "worked on" in French but enacted in more than one language (obviously keeping in mind and working through the relevant problems of different meanings of legal terminology in different legal systems, and the consequent difficulties in translation of legal texts).[27] An example

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26. The issue is raised with reference to Cameroon again by Nelson ENONCHONG, *The Harmonization* cit. Here the discussion is widened also to Equatorial Guinea and Guinea-Bissau. The argument proposed by the author poses the issue at a domestic level ("*A Cameroonian is constitutionally entitled to speak English in a court set up by the state, including the OHADA court*") and does not seem convincing since the CCJA was not set up by Cameroon who rather assigned the CCJA with the competence to judge OHADA business law, on final appeal. In doing so, the Court renounced a commitment to part with its domestic jurisdictional competence in favor of a supranational court, as the other Member States have.

27. *See* on the issue of legal language and translation Antonio GAMBARO and Rodolfo SACCO, *Sistemi giuridici* cit.; Rodolfo SACCO, *Riflessioni di un giurista sulla lingua (la lingua del diritto uniforme, e il diritto al servizio di una lingua uniforme)*, in *Riv. dir. civ.*, 1996, I, 57; ID., *Language and Law*, in Barbara POZZO (cur.), *Ordinary Language and Legal Language*, (2005) Milan, Giuffré; Lorenzo FIORITO, *Traduzione e tradizione giuridica: il Legal English dalla Common Law alla Civil Law*, available at <www.translationdirectory.com/article572.htm> last viewed on 15 October 2005; Nicholas KASIRER, *Bijuralism in Law's Empire and in Law's Cosmos*, 52 J. Legal Ed. 29-41 (2002); ID., *François Gény's libre recherche scientifique as a Guide to Legal Translation*, 61 Louisiana L. Rev. 331-352 (2001); Jean-Claude GÉMAR, Nicholas KASIRER (eds.), *Jurilinguistique: entre langues et droits/Jurilinguistique Between Law and Language*, (2005)

helping to address the problem of language within OHADA and its Uniform Acts, is that of Quebec, where legislation is now issued in both English and French.

But if we move to the role of the CCJA, we can argue that there is not such a big difference between OHADA (intended as a legal framework based on the civil law pattern) and the common law pattern. Specifically when dealing with the rule of precedence, one of the pillars of the common law legal system.

In describing the function of the CCJA, Article 14, paragraph 1, of the Treaty states:

> *"[T]he Common Court of Justice and Arbitration will rule, in the Contracting States, on the interpretation and enforcement of the present Treaty, on such Regulations as laid down for their application, and on the Uniform Acts."*[28]

According to paragraph 2, to realize such a function:

> *"[T]he Court may be consulted by any Contracting State or by the Council of Ministers on all questions falling within the field of the preceding paragraph. The right to request the advice of the Court, as herein before mentioned, is recognised to the national courts [...]"*[29]

when hearing a case in first or second instance where the application of OHADA law is concerned. With reference to the authority of the CCJA jurisprudence Article 20 states:

> *"[T]he judgments of the Common Court of Justice and Arbitration are final and conclusive. [...] In no case*

Brussels/Montreal, Bruylant/Thémis; Alain A. LEVASSEUR, *La guerre de Troie a toujours lieu en Louisiane*, in *Écrits en hommage a Gérard Cornu*, (1994) Paris, PUF, 278. In any case the work on the language and legal translation is to be considered highly demanding but possible, not agreeing with the stark extreme position of Pierre LEGRAND who considers translation between differently socially embedded legal mentalities as quite impossible (see: Pierre LEGRAND, *Fragments on Law-as-Culture*, (1999) Deventer, Willink) and language as "insurmontable" (see: Pierre LEGRAND, *Word/World (of Primordial Issues for Comparative Legal Studies)*, San Diego Legal Studies Paper No. 07-114). From the same author see also: *Issues in the Translatability of Law*, in Sandra Bermann & Michael Wood (ed.), *Nation, Language, and the Ethics of Translation*, (2005) Princeton University Press; and *The Impossibility of Legal Transplants*, in Maastricht J. Eur. Comp. L., 1997, 111.

28. OHADA Treaty, art. 14.

29. *Id.*

> *may a decision contrary to a judgment of the Common Court of Justice and Arbitration be lawfully executed in a territory of a Contracting State."*[30]

The most significant characteristic of the CCJA can be found in the last paragraph of Article 14 which state, "*While sitting as a court of final appeal, the Court can hear and decide points of fact.*"[31]

This peculiar role assigned to the CCJA seems to closely relate to the concept of the rule of precedent, the main characteristic of the common law legal family. To better understand the significance of this notion the uniform practice of following precedent and the rule of *stare decisis* must be distinguished. The latter is the real characteristic of the common law rule of precedent, as it creates a legal obligation for a judge to follow preceding law. This practice is also recognized in civil law jurisdictions, where courts adjudicate cases by following the decisions made in prior similar ones.[32] The doctrine of *stare decisis* is essentially grounded in the distinction between *ratio decidendi* and *obiter dictum.* Not everything which a judge states in his judgment creates a precedent, but only his statement of law in relation to the facts brought to his attention: this statement is the *ratio decidendi* of the case.[33] Judges can also (and they often do) pronounce *obiter dicta* in the ambit of their judgments related to issues of law that are not directly relevant to the case. Those principles are never binding, and other judges have no duty to follow them, although, they can be of guidance especially when coming from judges with a high reputation.[34] Thus, a precedent is a judicial decision that contains a principle with an authoritative element which is often called *ratio decidendi.* The decision is binding between the parties, but it is the *ratio decidendi* that is legally binding on latter judges.[35]

Moving back to the functions of the CCJA, it is clear that when the Court is called to interpret the Treaty, it gives an interpretation of the OHADA rules that will be binding for the judges of the member countries (like the *Court de Cassation* in French or *Corte di Cassazione* in Italy, the *Tribunal Supremo* in Spain or the *Bundesgerichtshofes* in Germany). But what happens when the Court will judge on the facts as the court of

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30. OHADA Treaty, art. 20.
31. OHADA Treaty, art. 14.
32. Ugo MATTEI, *Common law. Il diritto anglo-americano*, (1992) Turin, UTET; Philip S. JAMES, *Introduction to English Law*, (1979) London, Butterworths.
33. John WHEELER, *The English Legal System*, (2002) London, Longman; Catherine ELLIOTT and Frances QUINN, *English Legal System*, (2002) London, Longman.
34. Philip S. JAMES, *Introduction* cit., at 19.
35. See John William SALMOND, *Jurisprudence*, (1966) London, Sweet & Maxwell.

last instance in the system? It is well known that courts of last instance in civil law legal systems are not called upon to decide on points of fact. The CCJA will solve the case by applying a rule, which it will interpret by providing something very similar to what has been identified as *ratio decidendi* in the common law system. Judges of member countries will then follow that interpretation and resulting decision when a similar case is presented.

The analysis of the above issues reveals that even in Africa there is competition – and in some cases conflict – between the need of regionalization as an instrument of development in view of globalization and the need for reform within their respective legal models.[36] This is nothing more than the general debate about the assumption that common law is more inclined than other legal patterns to sustain economic growth and wealth and that countries belonging to the civil law system (and in particular the French model) tend to have a weak enforcement of law and are less economically successful than countries who adopted common law.[37] This theory is based on the assumption that civil law legal systems create an environment more *dirigiste* (the Napoleonic Code empowers the executive over the judiciary) and less developed and efficient[38] as opposed to the common law jurisdictions, which are more oriented towards the free market and the protection of property rights, resulting in inefficiencies.[39] Such a theory has been strongly criticized by scholars belonging to the civil law world.[40]

The discussion on the present convergence between civil law and common law should bring us to no longer consider the two systems as wholly separate, but rather as two possible aspects of the Western legal

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36. See Akere T. MUNA, *op. cit.*, at 177.

37. The assertion was originally made by Friedrich A. HAYEK, *The Constitution of Liberty*, (1960) London, Routledge & Kegan Paul; ID. *Law, Legislation and Liberty. A New Statement of the Liberal Principles of Justice and Political Economy*, (1973) London, Routledge & Kegan Paul; and more recently has been resumed and re-elaborated by R.afael LA PORTA, Florencio LOPEZ-DE-SILANES, Andrei SHLEIFER and Robert W. VISHNY, *Law and Finance*, 106 *J. Pol. Econ.* (1998), 1113, and is the founding issue of the "Law and Finance" theory.

38. Paul G. MAHONEY, *The Common Law and Economic Growth: Hayek Might Be Right*, in 30 *J. Legal Studies* (2001), 503.

39. Thorsten BECK, Asli DEMIRGÜÇ-KUNT and Ross LEVINE, *Law, Endowments and Finance*, in 70 *J. Fin. Econ.* (2003), 38.

40. The theory affirming the inadequacy of the civil law pattern for producing economic development (recently newly recovered by the World Bank in its *Doing Business 2007* after having been affirmed in the previous ones) has been firmly contested by the countries belonging to the civil law family. The famous French legal association "Henri Capitant" produced in 2006 two volumes titled *Les droits de tradition civiliste en question. À propos des rapports Doing Business de la Banque Mondiale* where scholars belonging to the civil law countries criticized the approach of the World Bank. The first volume includes studies from French scholars, while in the second volume includes studies coming from scholars of other civil law countries.

tradition. Further, demonstrated above, the OHADA legal framework already contains principles that can be handled with the lens of a common law lawyer, and should bring us to affirm that the problem of the relation between OHADA and common law is considerably less significant than the way it is currently viewed and presented. Surely the language issue exists, but the need to change Article 42 of the Treaty driven by the same OHADA member States who believe English, Spanish and Portuguese as languages carry the same value as French and the fact that a proposal to proceed with this change has been elaborated shows that there is a will from these countries to solve the central problem potentially preventing the accession of countries belonging to a different legal system. Moreover, the experience of the European Union shows that it is possible (at least in principle) to bring civil law and common law systems within the framework of a harmonized legal system.[41]

V. WHAT LAW FOR TOMORROW'S AFRICA?

What is the outcome of the above discussion?

The first deduction may be that the conflict between OHADA as an expression of the civil law legal system conflicting with the common law is perhaps non-existent. In fact, it is more a political than a juridical issue, a sort of apparent problem, seen only by elite jurists rooted on old Western approaches which fail to see the African reality. For the African States, the important issue is not "common law vs. civil law," but rather it is to establish an easy, effective, and reliable instrument to rule its commercial activities, *latu sensu* intended.

Therefore maybe it is the approach that should change.

Law (*droit, recht, diritto, direito, pravo, ius*) is a notion that is applied differently under specific circumstances, but follows the general concepts of Western legal thought. This concept may not have – and does not have – the same meaning everywhere in the world: the Islamic *šarī'a*, the Soto *mulao*, the Chinese *fa*, the Indian *dharma*; they all do not fully correspond with the Western concept of law. We shall therefore be

41. For a comparison between EU and OHADA see Marie Joseph COFFY DE BOISDEFFRE, *Le rapprochement des normes de l'OHADA avec la législation des Pays de l'Afrique anglophone à la lumière de l'expérience de l'harmonisation du droit des affaires des Pays de l'Union Européenne*, in 114 *Recueil Penant*, issue. 849, 425 (2005).

aware that the Western concept of "law" does not exist everywhere, and that the word can have a unique meaning to different legal cultures.[42]

We are used to a law where the lawmaker (in all his possible forms) plays a central role. Although the historical analysis of law made by the comparatists shows that this figure did not exist anywhere before emerging in France by the end of the 18th century, the very figure of "the jurist" is not present everywhere. He is active in the Romanist, common law, Socialist, and Islamic areas of influence, but not in other legal cultures such as classical Greece, ancient India, traditional China, Japan and Africa. Today, the concept of "jurist" in these cultures is one that has been created in legal institutions based on a Western model that pays attention to those areas of the legal system where a consistent Western pattern of thought has penetrated.[43] However, for a long time the law existed and worked perfectly without lawmakers and jurists, both in societies with centralized power and in societies with diffused power.[44]

The texts of legal anthropology show us how the law has evolved, keeping pace with the human evolution. Further, the African legal model has evolved in a completely different way than other legal systems. The Western jurist – for whom the pattern(s) is, frequently, to see only one perfect way of law existing – simply ignores its existence or considers it impossible. The African jurist is instead brought to a natural imitation of the Western model, since for him, it can lead to wealth and prosperity and tends to set aside the African pattern; and when he tries to defend it, he goes unheeded not having the cultural (and often the economic) strength to shield it.[45] Many times the same (learned) African undervalues his own legal institutions[46], feels ashamed of its customs, of its being "traditionally" African. This is often due to the erroneous belief that tradition represents something out-of-date, and that complying with it will put Africa and Africans out of modernity.

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42. Hints in Rodolfo SACCO, *Antropologia giuridica*, (2007) Bologna, Il Mulino.

43. Rodolfo SACCO, *Antropologia* cit.

44. On the concepts and differences between societies with centralized power and in societies with diffused power see mainly Rodolfo SACCO, *Antropologia* cit.; ID., *Il diritto africano* cit.

45. The western concept of democracy – for example – is based on the power of a majority coming out form a people's consultation that can impose its decisions over the minority. But there is a different concept not enough "publicized" through scholarly research but strongly alive in the African culture, according to which only the unanimous decision is binding because no reasoning can justify the submission of the minority to the majority will: it is allowed to persuade, not to impose.

46. Anthony N. ALLOTT, *The Unity* cit., at 56.

The African legal culture has followed a development path based on a creation of a legal rule that has been called "customary law," whose peculiarity is to set itself up and to evolve without the intervention of a central power, as a type of spontaneous law. Africa and its culture did not live through the events that created the legal culture seen in Europe. The African legal culture was based on the notion that the tribal or local chief's power was often absolute and legitimized by the supernatural. However, the culture did not memorialize this power through either writing or data memorization, which were the central mechanisms granted to legal professionals and contributed to the development of the Western legal cultures.[47]

The classic idea of the Western scholars with regard to how slow customs evolve (as a result of the requisite elements of change) proves misleading when applied to Africa. The customs studied in Africa revealed an ability to be both created and changed very quickly.[48] Besides its ability to mutate, the custom is also fluid and flexible; it, as compared to a lawmaker, can consider a much higher number of circumstances as relevant. In Africa, the urbanization of several areas on the fringes of major cities has brought about a formation of new customs. The inhabitants of these areas abandon the traditions of their ancestors when they appear non-sensical in a new and modern situation.[49] This has led to the formation of a new spontaneous law that sometimes is unrecognized (or simply ignored) by the official power living side by side with the official (and quite often unapplied) law, and is still sometimes the only instrument available to rule peoples' daily lives.[50]

Further, neither the traditional African rule nor its application is written.[51] The entire juridical process, rule – decision – legal reasoning, lacks not only written enunciation, but also a technical formulation, since in Africa, traditionally, there has been no need to have a verbalization of

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47. The bibliography on African customary law is enormous. On its characteristics see Norbert ROULAND, *Anthropologie juridique*, (1988) Paris, PUF; Rodolfo SACCO, *Antropologia* cit.; ID., *Il diritto africano* cit.; Marco GUADAGNI, *Il modello pluralista* cit.

48. See Francis SNYDER, *Droit non-étatique et législation nationale au Sénégal*, in Gerard CONAC (ed.) *Dynamiques et finalités des droits africains*, (1980) Paris, Editions Economica, pp. 259-278.

49. An example in Jacques VANDERLINDEN, *Villes africaines et pluralisme juridique*, in 42 *Journal of Legal Pluralism* (1998), 245.

50. This is the case, for example, of today's Somalia, where in the total absence of a centralized power, a thriving commercial system developed governed by a system of usages and practices based on the Somali traditions. See for further developments Marco GUADAGNI, *Il modello pluralista* cit.

51. Generally, the unwritten law is the norm in Africa. What Western thought considers "doctrine," is in fact a verbal transmission of legal rules from one generation of knowing wise men to another.

the legal norm (prior to the presence of European influences). The African cultures ignore the role of the jurist and African languages do not have legal terminology.[52] It should be taken into consideration that any attempt to verbalize the legal standard will be done with the use of a language whose terminology implies legal concepts often extraneous to the verbal system, thereby running the risk of misunderstanding its meaning. Yet, the customary African law gives significance to those elements and factors that are legally irrelevant to a Western jurist. This is because, traditionally, the application of the rule is not directly intended to punish the guilty, but to consolidate the cohesion and to restore accord within the group.

Many times jurists have tried to write down customary mandates. The writing in itself changes the nature of its creation, since its validity is in the factuality and not in the written paper. The mistake is to give authority to the text where the custom has been reported, without considering all those external circumstances that are important for the elaboration of a single rule; thereby, giving value to the text and depriving the custom itself of its aforementioned adaptability and flexibility. By nature, spontaneous law is not linked to any fixed idea, and can change whenever the circumstances render it necessary; any written law, by its nature cannot change until it is re-written.

So far, the African lawmaker has simply adopted rules (especially in the area of commercial law) approved in the former colonizing country and utilized the same lawmaking tools. He has basically transplanted texts elaborated by a European lawmaker, making only a *maquillage* that left the substance unvaried. But the logic behind the rule corresponds to the vision of the law of that Western country, where the individual is preferred to the group, and it is completely opposite to the African vision where the group prevails over the individual. The same African jurists who adopt the Western pattern do so because they are trained under a different, Western, way of thinking and tend to copy the model to which they have been introduced, perhaps, thinking it is the best one.

The problem of African traditional law is not for the African but for the Western jurist that cannot – and does not know how to – understand its essence. Specifically, without having been educated in an anthropological approach trying, without consideration, to convince the African, in vain, that it is useless. All the attempts to "codify" have substantially failed and the crystallization that resulted has not prevented

52. See Rodolfo SACCO, *Antropologia* cit., at 196; Anthony N. ALLOTT, *The Unity* cit., at 61.

customary law from continued evolvement. The experience showed us that in the areas where customary law has been traditionally stronger, the laws enacted by the State have been simply ignored by the people who prefer to continue having their life ruled by tradition and to solve any related dispute using the customary ways of dispute resolution. Africa is certainly an area where authoritative legal rules lack real legitimacy: they have been largely ignored by the citizens, and have been used by legal anthropologists as typical examples of inefficient law.[53]

The above observations confirms that it is possible to have different approaches and experience to what we identify as "law", and, even more, that the "official" law can coexist with the traditional one.

If we go back to our case study – OHADA law – it seems quite unlikely that the parties of a case related to the sale of a photocopy machine in the Comoros, or a purchase of fish in Senegal, will deal with their issue in Abidjan with a lawyer[54] that they do not likely know, since there is no provision in the OHADA system related to financial help for the poorest people to have access to justice.[55] Moreover, it should be noted that as we have the official law and the unofficial law in Africa, we also have an area of official commerce as well as a wide area of "informal" commerce which is just as important for a particular State's economy. Those two types of commerce co-exist in most African countries.

The opening of OHADA to countries belonging to the common law (or mixed) tradition will surely open the debate to several semantic, conceptual, and procedural questions,[56] and give way to scholarly debate on issues that will not interest the African. Any law is good law only if and when it becomes easily understandable and accessible to the people. Sometimes the African jurists have a sort of "purist" approach, looking at the law through that Western view they learned in the universities, while law is better viewed as a social phenomenon that is strictly linked to the environment where it is created and lives.[57]

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53. Rodolfo SACCO, *Antropologia* cit.

54. According to Article 19 of the Treaty, the assistance of a lawyer before the CCJA is compulsory.

55. This fact is witnessed by the fact that most of the cases ruled by the CCJA relate to the Ivory Coast.

56. See Laurent BEN KEMOUN, *Plaidoyer tempéré pour l'OHADA, onze ans après le traité de Port Louis*, in Etienne LE ROY (cur.), *Juridicités. Témoignages réunis à l'occasion du quarantième anniversaire du LAJP*, (2006) Paris, Khartala.

57. Constantin TOHON, *Le traité de l'OHADA, l'anthropologue du droit et le monde des affaires en Afrique et en France*, in Etienne LE ROY (cur.), *Juridicités. Témoignages réunis à l'occasion du quarantième anniversaire du LAJP*, (2006) Paris, Khartala.

African society is characterized by a vision of life where everything is linked; life and the supernatural, human behaviors and natural phenomena, power and that which is sacred. African traditions are essentially based on the central role played by the group in all its possible forms (family, tribe, village, community) where solidarity within the members of the group is a key factor that renders it difficult to distinguish – for example – between juridical and moral obligations, and obligations towards another individual party and the group as a whole. These kinds of distinction have no grounds under African traditions, since the distinction itself does not exist and these elements comprise and define "obligation." As some legal concepts are typically Western, only a jurist trained with Western concepts can understand them because these concepts are not contemplated in traditional African legal culture.[58]

Legal systems are no longer independent and isolated. They are continuously influenced by various external factors adapted from other legal systems. Scholars today have noticed and started studying this new trend of an increasing *flux de globalization juridique* (also defined as a constant exchange of influence).[59]

Due to its unique peculiarities, African law should go beyond today's "sterile" debate of *common law vs. civil law*, and ground its development on the essential characteristics of each system. It is important to respect the African vision related to law based on practices, and to introduce those Western concepts and peculiarities that are common within the African traditions. Further, it is necessary to arrive at the creation of an "African" law,[60] and to avoid a fracture among the different legal actors causing this new epiphany of "African" to become yet another example of inefficient law. The main requirement is to avoid the conflict in order to avoid rejection.

The principle of unanimity set forth in Article 8 of the OHADA Treaty to adopt new Uniform Acts binding on all the member States, is a transposition (nobody knows to what extent it was deliberate or not) of the more general – and purely African – traditional principle of unanimity in making decisions within the group: in Africa long

58. Constantin TOHON, *Le traité* cit.

59. Jean-Bernard AUBY, *Globalisation et droit comparé*, in 8 *European Journal of Law Reform* (2006), 43.

60. Moreover Michel ALLIOT, in *Problémes* cit., already pointed on the "*désoccidentalisation des règles juridiques*" and on the adoption by African lawmakers of common legal classifications and concepts as the main instruments necessary to pursue an objective of legal harmonization in Africa

discussions are made within the group to reach a final agreement among its members because in Africa it is legitimate to persuade, not to impose.

How can this goal be reached?

The success of this African juridical revolution inevitably passes through the acknowledgement of the African legal pluralism.[61] It cannot be hidden that African tradition, in its full meaning, is a source of law equal to state law, the jurisprudence, the revelation, and the doctrine[62]; and after a period where they refused to recognize the role of traditional law, African countries are now starting to realize its importance within African law as a whole.[63]

The possibility of an investigation to research the "common core" of African law should be examined in order to extract common features from different African traditions.[64]

It is useful to approach this issue with a pluralistic view: the jurist should not approach the study of African traditional law from the legal point of view only, but he should be ready to conduct an interdisciplinary analysis interacting with specialists in other fields (sociologists, anthropologists, linguists, economists, historians) that can give him an idea of the different aspects involved in the creation and application of a legal rule.[65]

In the commercial sector, this objective can be pursued by finding a way to consider the existence of the "informal" sector of commerce that constitutes a relevant part of the African economy, yet is presently ignored by OHADA law. Finally, a system of dispute resolutions should

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61. The idea of African legal pluralism presupposes the concept of legal pluralism itself, defined by Jacques VANDERLINDEN, in *Villes africaines* cit., as the situation where a person is in presence of different autonomous legal orders and with his choice he steers the solution to have a possible conflict both with regard to the competent jurisdiction and the applicable law.

62. Jacques VANDERLINDEN, *op. cit.*

63. For example, Article 4 of the Mozambican Constitution of 16 November 2004, titled "*Legal Pluralism*" says: "*The State recognizes the different systems of law and settlement of disputes that coexist in the Mozambican society, insofar as they do not contravene the fundamental values and principles of the Constitution*". The situation here is different from Egypt or Pakistan where the constitutions set forth a hierarchy among the different legal orders operating within the same legal system that – therefore – remains unique.

64. For the methodology, reference can be made to Mauro BUSSANI and Ugo MATTEI (eds.), *The Common Core of European Private Law*, (2003) The Hague, Kluwer, with the necessary – and obvious – adaptations to African law and reality. Moreover, with regard to the needs and problems of the initiatives aiming at a legal integration in Europe see Mauro BUSSANI, *'Integrative' Comparative Law Enterprises and the Inner Stratification of Legal Systems*, in *European Review of Private Law* (2000), vol. 8, Issue 1 85-99.

65. The work of Anthony N. ALLOTT, in *The Unity* cit., can be viewed as an embryonic step towards this research of the "common core" of African law.

be established by taking into consideration the lower level of education in Africa, as well as the logistical difficulties for the poor to reach places where justice is administered, even within the same country.[66]

66. Constantin TOHON, *Le traité* cit. The research on the *common core* of African law could explain the way to reach the "integration" he simply wishes.