

Family Law Transfers from Europe to Africa: Lessons for the Methodology of Comparative Legal Research

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Introduction

Law transfers often have not been successful because they didn't fit with the local legal culture. Of course, such local legal cultures may be stronger in some areas, such as family law, than in others, such as air traffic regulation. This paper will study the effect of legal transfers from Europe to Africa in the area of family law, as this is the area of law which is generally considered to be the most closely linked with local cultures. Examples will be drawn from several African countries, with an emphasis on Nigerian law.²

In the course of history and in all cultures, family law used to be the core of local customary law, applying uniformly and in a compulsory way to the whole community. Ancestors are living in the (invisible) spirit world, which will be connected to the 'real world' through the family. By this, family rules exceeded by far what we are used to calling 'law' today. They were, and largely still are, part of a much broader world view, encompassing metaphysical concepts and views. By not following certain rules, people feared that they may make the spirits angry, or disturb the natural balances, or offend the gods. 'Family law' in those societies cannot be developed as a purely rational set of rules, independent of that metaphysical framework which governs the society.

The societies that have best kept this link are the Islamic ones, where the Qur'an and the Islamic rules, varying as to the schools within the Islamic tradition, remain the basis for the law, including family law.

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Western societies, on the other hand, have completely lost any link between the law and broader metaphysical world views. A strong development of rationalism in the last few centuries and a dramatic loss of religious beliefs, mainly in the course of the last century, have erased any metaphysical dimension from public life and from law, including family law. Moreover, the family itself, as a corner stone of society, has largely been destroyed by an individualistic development during the same period of time.

(Non-Islamic) Asian and African societies take a somewhat intermediate position in this respect. As rightly noted by Werner Menski:

Thus, as for Hindu and Islamic law, an analytical starting point could be that the primary power centre of all African legal activity lies outside the realm of human law-making and somewhere in the area of 'religion' or values. There is a shared assumption in all African legal systems concerning the existence of a superhuman order of some kind, undefinable but ever-present, to which everyone and everything is somehow subject. Everything will be evaluated and in some form judged against that culture-specific backdrop, which is why some writers have proposed that African laws are in essence religious laws. Perhaps that suggestion relates to a simple general principle, a potentially universal pattern which applies all over the world, except in systems where Western liberalism seeks to suggest that God in any form is not involved in law-making.³

Both colonisation and globalisation have partly destroyed the traditional structures of African societies and have created a tension between traditionalism and modernism.

Nowhere have legal transfers, through colonial regulation, had such an important impact on local family law as in Africa, even half a century after decolonisation. Nevertheless, traditional cultures have largely subsisted next to the 'official law', creating two diverging 'legal worlds' within African societies. Parallel to those developments, we are also faced with the process of globalisation at different levels: European human rights thinking in the legal domain; Western free market ideology in the economic domain; mainly American movies, television series, music and the

³ W. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2nd ed. (Cambridge University Press, 2006), p. 402

like in the cultural domain. In Africa, most notably the more wealthy and educated people tend to follow those Western patterns and lifestyles. Imported Western law is not largely considered to be a negative by-product of an imperialistic occupation of African territories, one that wouldn't fit with the local tradition and culture. It is rather seen as part of 'modernisation', together with the import of Western cars, televisions, mobile phones, CD players, and other technology that facilitates a modern lifestyle. From this perspective, the old habits and traditions, including those in the area of law, are looked at as old-fashioned, outdated and ready to be replaced by modern approaches and rules.

In traditional African societies, legal rules were closely linked with religion, the spiritual framework of society. However, in large parts of Africa Christian religions have been successfully imported as well, and largely taken over by Africans. In other parts of Africa, it is the Islamic religion which took the place of the local religious traditions. Islamic cultures in Africa, which are mostly dominant in rural societies, tend to oppose Western modernism and imported Western law. The majority of African people, however, are active members of Christian churches, and practise Christianity much more enthusiastically than in the former colonial powers. The emphasis of Christian religions on monogamy has created a tension with the African tradition of polygamy, without succeeding in suppressing it. Through all those developments, a dual society has been created in which indigenous customs, traditions and world views are still prominent alongside Western influences, both from the past through colonisation and from the present through globalisation.

This chapter will reveal to what extent law and legal practice are influenced by socio-economic developments and by cultural globalisation. However, apparent commonalities in laws may hide underlying tensions between tradition and modernity, and between still fundamentally divergent world views. Cultures change, be it slowly and not always in the same direction. A historical approach, for that reason, seems important for understanding legal transfers, combined with a broad contextual approach focusing not only on the socio-economic context, but also on the larger framework of world views that determine the legal cultures involved and their interaction. We will, for instance, see to what extent urbanisation has changed

the attitude to the family and the concept of 'family' in Africa and has, hence, made an increasing acceptance of legal transfers from Europe possible, despite the fact that originally they didn't fit at all with local cultures.

African developments in family law

In order to have a correct understanding of African law, one has to be clearly aware that

In the African mind, ancestral custom is linked to a mythical order of the universe. To obey custom is to pay respect to one's ancestors whose remains are fused with the soil and whose spirits watch over the living. Violations of custom will release unknown but certainly unfavourable consequences in a world where forces natural and supernatural, man's behaviour and the movements of nature are all linked.⁴

As for family law, more specifically, it is important to note

that the group or community is a continuing, endless succession of generations, a self-perpetuating corporation embracing both the living and the dead. The law of the community, therefore, is conceived and accepted as the possession and heritage of an endless chain of generations. It enjoys the moral support and is the object of jealous vigilance, not only of living contemporaries, but also of departed ancestors.⁵

Traditional family law largely survived colonisation and postcolonial state law. In most African countries, (at least) two types of marriage coexist: marriage according to customary law and marriage according to state legislation. In countries such as Nigeria, there is a third type of marriage, namely a wedding according to Islamic law.

Marriage under customary law creates a relationship not only between a man and a woman but also between the two families involved.⁶

⁴ R. David and J. E.C. Brierley, *Major Legal Systems in the World Today. An Introduction to the Comparative Study of Law*, 3rd ed. (London: Stevens & Sons, 1985), p. 549

⁵ Chukwuemaka EBO, 'Indigenous Law and Justice: Some Major Concepts and Practices' in G. Woodman and A. O. Obilade (eds.) *African Law and Legal Theory*, (Aldershot: Dartmouth, 1995), pp. 38–39. Compare: 'it should be realised that a child is the component which, not only completes a family, but also guarantees its survival and continuity, as well as that of the society and the human race'. (A. A. Adeyemi, 'The Child in the Family' in E. O. Akanki (ed.), *Unilag Readings in Law* (University of Lagos Press, 1999, pp. 19–32, at p. 20)

⁶ 'The wife is regarded by members of her husband's family as having been married not solely to her husband, but into the family and therefore, is herself a member of their family. The husband on the

African customary family law

Just like in any tradition, family law in Africa fulfilled, and still fulfils, many more functions than just formalising the love between two people and offering an 'official' framework for raising children. Solidarity within the family and any community is one such function; solidarity between the generations is another.

Traditional African worldviews implied that the living generation merely held the right to usufruct of any property in their area, passed on from those who were there before them; this right would in turn pass to the next generation.⁷

Given the importance of any marriage for extended families, the announcement of an intention to marry will lead to discreet inquiries, carried out by each of the families, on the personal, social and health qualities, not just of the desired partner but of his or her family as a whole. Impotence, sterility, barrenness, serious diseases, or criminal conduct (especially stealing) of the individual or his or her family members will in many cases be considered as precluding a marriage to take place.⁸

When there appear to be no problems of that kind, the formal engagement or betrothal of the parties takes place, which traditionally is a long process but is somewhat shortened today, especially in an urban context. According to the Nigerian 1977 *Customary Law Manual*, the following steps must be taken⁹:

- (a) Agreement to marry between the prospective spouses;
- (b) gifts in money and sometimes gifts in kind by the woman to the man;

other hand is not so regarded by his wife's maiden family, even though he maintains a continuing relationship with that family.' (M. C. Onokah, *Family Law* (Ibadan, Nigeria: Spectrum Books, 2003), p. 69. For other African countries ruled by the British, see also: Menski, *Comparative Law in a Global Context*, pp. 448–453

⁷ Menski, *Comparative Law in a Global Context*, p. 426

⁸ Onokah, *Family Law*, , 2003. 69–72

⁹ *Customary Law Manual*, p.225–226, quoted by M Onokah, *Family Law*, 2003, 73

- (c) the giving of consents by the parents or the guardians of the prospective spouses;¹⁰
- (d) the giving of formal consents by the families of the prospective spouses;
- (e) a formal visit by the woman to the man's family
- (f) selection of a marriage middleman;
- (g) fixing of the bride price to be paid on the woman.

Traditional marriage in Africa is possible from the age of puberty.¹¹ In a survey carried out in 1973 in the Ebendo village in the Midwest of Nigeria, it was noted: 'The average Ebendo woman marries when she is slightly over 16 years old, and almost all before the age of 20.'¹²

In earlier times the agreement of the prospective spouses was often an imposed agreement. They had to follow the decisions of their families as to their marriage,¹³ Sometimes their agreement was not even required for the wedding.¹⁴ Today a marriage without the free consent of the spouses has become impossible. Also, the agreement of the extended family through the family council or the head of the family has nowadays largely been replaced by the consent of the parents only.¹⁵

The 'bride price' or dowry¹⁶ has always been, up until now, an essential element in customary marriage in Africa.¹⁷ It is a gift made by a husband to his bride's father,

¹⁰ These three elements are the constitutive parts for a complete marriage under Sesotho customary law s.34(1) of Part II of the Laws of Lerotholi, quoted in S. Poulter, 'Marriage, Divorce and Legitimacy in Lesotho', *Journal of African Law*, 21 (1977), p.70

¹¹ Until a few decades ago, child betrothal and child marriages were possible. Marriage promises could even be made by the parents before the child was born. Onokah, *Family Law*, p. , 2003, 78; A. Phillips and H. F. Morris, *Marriage Laws in Africa* (Oxford University Press, 1971), pp. 97–102

¹² F. Mott, *The Dynamics of Demographic Change in a Nigerian Village*, research bulletin, Human Resources Research Unit, Faculty of Social Sciences, University of Lagos (1974), p. 1

¹³ See as to Nigeria: Onokah, *Family Law*, pp. 83–90

¹⁴ As in Lesotho, according to Poulter, 'Marriage, Divorce and Legitimacy in Lesotho', p. 78

¹⁵ Onokah, *Family Law*, p. 83

¹⁶ Onokah, *Family Law*, p. 90. Margaret Onokah has some problems with this concepts, just as with other ones used, such as 'child-price', 'marriage-cattle', 'marriage-payment' and the like. She proposes the term 'marriage-symbol'. This concept, however, is quite vague and it seems preferable to use terms such as 'dowry' or 'bride price', which may not be perfect but at least immediately suggest what it is about. Her criticism that the term 'price' would suggest that the wife would be 'bought' is understandable. However, in old Germanic law, wives were indeed bought from their fathers. See L. J.

eldest brother¹⁸ or guardian, at or before marriage. It is both a price paid for the loss of the girl who will leave her family for her husband's, and a guarantee for the stability of the marriage, as its dissolution will make the dowry repayable. It seems that the payment of a dowry is the most important element in traditional African marriage, which also explains why it is chronologically the first step. After the payment of the dowry in the context of a customary marriage many people may subsequently take part in a second wedding ceremony with the same person, and according to church law or state law.¹⁹ It has been noted that bride-prices have, in recent years, assumed exorbitant proportions.²⁰ Statutory attempts to limit them have not been successful.²¹ After the payment of the dowry, the bride is handed over by her father to the marriage middleman, who in turn hands her over to the bridegroom in the presence of members of both families. The bride is then taken home by the people of the bridegroom.²² Subsequent cohabitation is in most cases also a condition for a valid customary marriage.²³

Van Apeldoorn, *Geschiedenis van het Nederlandsche Huwelijksrecht* (History of Dutch Matrimonial Law), (Amsterdam: Uitgeversmaatschappij Holland, 1925, pp. 15–36). It is, henceforth, not unreasonable to assume that this also may have been the case in the past in Africa. Just because we may not like that idea from our point of view today, we should not deny historical facts by using euphemistic words.

¹⁷ See e.g. as to Gabon section c hereafter. For other African countries, see A. Phillips & H. F. Morris, *Marriage Laws in Africa*, Oxford University Press, 1971, pp. 91–94 and 113–117. See also: E. Cotran, 'The Changing Nature of African Marriage', in J. N. D. Anderson (ed.), *Family Law in Asia and Africa*, (London: George Allen and Unwin, 1968), pp. 15–33, at pp. 18–19

¹⁸ In matrilineal communities to maternal uncles or other members of the girl's mother's maiden family. Onokah, *Family Law*, p. 92

¹⁹ The so-called 'double-deck' marriage. Onokah, *Family Law*, pp. 143–161

²⁰ Nigeria: Onokah, *Family Law*, p. 96; Gabon: J. J. Nambo, 'Le droit et ses pratiques au Gabon' (Law and its practice in Gabon) in C. Kuyu Mwissa (ed.), *Repenser les droits africains pour le XXIème siècle* (Rethinking African Law for the 21st Century), Bibliothèque de l'Académie Africaine de Théorie du Droit, Yaoundé (Cameroon): Editions MENAIBUC (2001), pp. 89–103, at p. 93. Other African countries: E. Cotran, 'The Changing Nature of African Marriage' p. 21

²¹ Onokah, *Family Law*, pp. 96–98. It is interesting to note that dowries also belonged to the European marriage tradition. In practice it slowly declined as from the nineteenth century. In Greece, in 1983, the institution of dowry has been explicitly abolished 'as inconsistent with the development of the status of the wife from a subservient member of the family to an equal partner' and a transitional rule provided that dowries given before 1983 had to be returned to the wives (E. Kounougeri-Manoledaki, 'Greece' in C. Hamilton and A. Perry (eds.), *Family Law in Europe*, 2nd ed., (London: Butterworths, 2002), pp. 324–58, at p. 333

²² Nigerian Customary Law Manual 1977, p. 256

²³ In Nigeria: Onokah, *Family Law*, p. 104. In Lesotho, for example, it does not seem to be a necessary condition. Poulter, 'Marriage, Divorce and Legitimacy in Lesotho', p. 70

State family law

It is interesting to see how postcolonial African public authorities have incorporated the Western family model into their legislation. All Acts on family law accept only monogamous marriages, which are defined as ‘the voluntary union for life of one man and one woman, to the exclusion of all others’.²⁴ Once married according to state law, any second wedding is excluded before the first one has been dissolved.

Colonial laws, despite being further removed in time, have an even stronger influence on African societies, as the African courts continue to regularly refer to, and heavily rely on, the postcolonial law and judicial decisions in the countries of their colonisers.²⁵ Lower courts in Nigeria seem to consider themselves bound by the decisions of the English courts, even though the higher Nigerian courts have regularly emphasised that English courts’ decisions have mere persuasive, rather than binding, authority over Nigerian courts.²⁶

Tensions between state law and customary family law

The French Revolution and the subsequent policies of French and Belgian governments in the nineteenth and twentieth centuries didn’t eradicate, and hardly even influenced, the tradition of primarily marrying in church. Neither the policy of the same public authorities in their colonies, nor the similar postcolonial governmental policies could stop the population following their customary family traditions. Belgian attempts to forbid polygamy by law in the Belgian Congo from 1950²⁷ have hardly influenced social reality. The weakening of many public authorities because of civil war, military coups, bribing, impunity of crimes

²⁴ Onokah, *Family Law*, p. 69, interestingly enough referring not to some Nigerian text, but to a nineteenth century decision of the House of Lords.

²⁵ For Nigeria in relation to English law: Onokah, *Family Law*, p. 40. Also, when glancing through the published judgments of the Supreme Court of Nigeria, there will be almost always at least one foreign judgement mentioned that has been taken into account, and that will virtually always be English (see the *Monthly Judgments of the Supreme Court of Nigeria*, M.J.S.C.). For the Congo in regards to Belgian law, see, for example, the judicial decisions published in the journal *Revue Africaine de droit*.

²⁶ Onokah, *Family Law*, p. 40, with further references to court decisions.

²⁷ Decree of 4 April 1950 concerning the prohibition of polygamy in the Belgian Congo

committed by officials,²⁸ etc., together with the inappropriateness of state law in view of local traditions, has led to social life being governed by other rules than those of state law. Professor Camille Kuyu notes that real legal life in Kinshasa is organised completely outside the state and its institutions.²⁹

In Gabon, from 1963, dowries have been forbidden.³⁰ Joseph John Nambo, at that time assistant professor at the University Omar Bongo in Gabon, made an inquiry among his students, asking them whether they would agree to marry without a dowry. Seventy-five per cent of the female students and up to ninety-five per cent of the male students gave a negative answer. To them a dowry was necessary for the credibility and stability of a marriage.³¹ The law of 1963 doesn't work in practice and, although formally still valid, has become completely obsolete. In Gabon, the dowry is today more present than ever.³²

In the case of the import of European law into African countries, the colonisers – but also the generations of politicians, lawyers and academics³³ too strongly acculturated after independence – have obviously strongly underestimated the strength of the customary rules of African ancestors, and especially their spiritual and mythical framework.³⁴ Aside from this, the strong communitarian tradition in

²⁸ See on this example in regards to Nigeria: V. Ighorodje and O. Bamidele (eds.), *Reporting Impunity: Giving Voice to the Voiceless* (Lagos: Nigerian Coalition on the International Criminal Court, 2007)

²⁹ C. Kuyu Mwisaa, *Parenté et famille dans les cultures africaines* (Kinship and family in African cultures), (Paris: Editions Karthala, 2005), p. 10

³⁰ Act 31 May 1963, enacted by President Léon Mba, first president of the Republic of Gabon. For other attempts in Africa to forbid the payment of a bride price in the course of the twentieth century, see Phillips and Morris, *Marriage Laws in Africa*, pp. 91–94. However, they also give examples of implicit or explicit official recognition of the payment of a bride price in several African countries.

³¹ Even higher figures (98%) appeared from a Nigerian survey. Onokah, *Family Law*, p.97–98

³² J. J. Nambo, 'Le droit et ses pratiques au Gabon' (Law and its practice in Gabon) in C. Kuyu Mwisaa (ed.), *Repenser les droits africains pour le XXIème siècle*, Bibliothèque de l'Académie Africaine de Théorie du Droit, Yaoundé (Cameroon: Editions Menaibuc, 2001), pp. 89–103, at pp. 92–93

³³ 'Dans le monde universitaire, nombre d'enseignants restent encore séduits par la tentation de l'Occident et inaptes à procéder à une décolonisation mentale', M. Mebenga, 'Le droit et ses pratiques: expérience camerounaise' in C. Kuyu Mwisaa (ed.), *Repenser les droits africains pour le XXIème siècle*, pp. 69–87, at p. 74

³⁴ C. Kuyu Mwisaa, *Parenté et famille dans les cultures africaines* (Paris: Editions Karthala, 2005), p.

Africa could hardly fit with the rather individualistic European approach to law, including to family law³⁵.

In the British colonies, legal regulations were better adapted to local traditions. Although the monogamous marriage was introduced³⁶ and promoted, especially by missionaries, colonial legislation left the possibility for native people to marry according to their traditions, including polygamous marriages: ‘Nothing shall deprive any person of the benefit of any existing native law or custom, such law or custom not being repugnant to natural justice, equity and good conscience, ...Such laws and customs shall be deemed applicable in causes and matters relating to marriage ...’³⁷

However, the inevitable interference of courts in the application of customary law in cases of conflict has led to the application of ‘customary rules’ that ‘sometimes diverge from the social norms which people customarily regard as binding upon them... Thus, there is divergence between “lawyers’ customary law” and “sociologists’ customary law”, or, ... between “judicial customary law” and “practised customary law”’.³⁸

An attempt by the British rulers to ‘liberate women’ by treating them as equals to men and by allowing divorce when requested led to decisions by the Nigerian ‘Native Court’ that disturbed the local customary law considerably. According to the traditional rules, divorce was, in practice, excluded. Nevertheless, divorce was almost automatically awarded by the colonial courts. For example, in 1924, in the Ondo region, divorce was granted in 123 cases out of a total 125 petitions.³⁹

³⁵ However, it is interesting to note that, after the collapse of the Soviet Union, one of the Baltic States, Latvia, in 1990 reintroduced the dowry (s.111 Latvian Civil Code). However, here it means that the money or property given to the couple by the wife’s family remains the property of the wife.

³⁶ For Nigeria: the Marriage Act 1884

³⁷ s.20 Nigerian Supreme Court Ordinance 1914

³⁸ G.R. Woodman, ‘Judicial Development of Customary Law: A Case of Marriage Law in Ghana and Nigeria’, *University of Ghana Law Journal*. 14 (1977), pp. 115–136, at 115

³⁹ NAI Ondo Division 7/3: Native Court Judgement Book, 1924, cited in: Onokah, *Family Law*, p. 44

British colonisers increasingly attempted to control African customary law through courts with English judges.⁴⁰ This basically did not change after independence, and has led to a similar situation as in other African countries such as the Congo, namely the increasing segregation between 'official law' and 'real law'.

Indeed, up until now a dual judiciary system, such as that in Nigeria, gives space to apply customary law and Islamic law to official courts up to the level of Appeal (Customary Court of Appeal and Shari'a Court of Appeal). But when the case goes to the higher courts (Court of Appeal and Supreme Court), it will be decided by judges who are not acquainted with either customary law or Islamic law, or both. Hence, Margaret Onokah concludes that '[t]o say that the dual court system in Nigeria is unsatisfactory is to merely put the matter lightly'.⁴¹

Generally speaking, religious pluralism has, as such, created a tension between the state law on one hand, and the religious or customary rules on the other. Introducing the Shari'a as State Penal Law in the Northern states of Nigeria has created problems because of the personal instead of territorial application, which is typical for penal law.⁴² Also, the the fact of limiting, for example, the principle of monogamy to Christians created some tensions in society in relation to the crime of 'adultery' in Uganda:

...if the Christian churches required their converts to follow rules of monogamy or other rules of moral behaviour, then, according to this argument, it was up to them to enforce this discipline by their teaching and precept without having to rely upon penal sanctions prescribed by the state.⁴³

⁴⁰ See on this development in Nigeria: Onokah, *Family Law*, pp. 40–50. For Lesotho, see Poulter, 'Marriage, Divorce and Legitimacy in Lesotho', pp. 66–78

⁴¹ Onokah, *Family Law*, p. 66

⁴² See J. A. Yakubu, *The Dialectics of the Sharia Imbroglia in Nigeria* (Ibadan: Demyaxs Law Books), p. 2003

⁴³ H. F. Morris, 'Marriage Law in Uganda: Sixty Years of Attempted Reform', in: J. N. D. Anderson (ed.), *Family Law in Asia and Africa* (London: George Allen and Unwin, 1968), pp. 34–48, at 42

Communitarianism vs. individualism

Since time immemorial, men and women in Africa have lived in large communities. From birth, a child already belonged to two communities: the family on the mother's side and a family on the father's side. The security of each community was guaranteed by the structure itself, in which there was solidarity among its members, who also complemented each other in their differences. Until colonisation partly destroyed all this, societies, in this way, guaranteed their biological, social and ecological reproduction. During colonisation – and also after decolonisation, by (Westernised) public authorities – those large family structures were considered to be blocking economic development and, thus, were destroyed to a large extent, and replaced by European structures.⁴⁴

On the basis of extensive research in many African countries, the Paris research centre on legal anthropology (*Laboratoire d'anthropologie juridique* at the University of Paris 1- Sorbonne) has defined six criteria for determining kinship or membership of a family⁴⁵

- (1) There is a central idea of sharing goods and relationships within the community
- (2) It is a community of life, not just of common interests or beliefs
- (3) It is an affective community, not just a legal one
- (4) The strength of the intimate relationships depends on the kind of 'good' one is sharing; the community determines the structure of the relationships among its members
- (5) Parenthood is not only defined through the kind of shared good, but also through the integration process in the community and modes of parentalisation, which are not static

⁴⁴ Kuyu Mwissa, *Parenté et famille dans les cultures africaines*, p. 19

⁴⁵ *Ibid.*, pp. 22–24

(6) There is not only a social link to people, but also a local, spatial link to some land

The most essential things such a community is sharing are: ancestors, residence and religious or spiritual beliefs.

Like in all other societies, the African family is primarily defined by common ancestors. Less like Europe in the recent past, but comparable to the *pater familias* in Roman times, this large family had a head who, in the African tradition, would protect the territorial integrity of the community's land and who would also exert legal, political, religious⁴⁶, economic and cultural functions.⁴⁷ The land of the family (including woods and rivers) would be for the use of all its members for living, hunting, fishing and agriculture. Land could not be transferred to anybody outside the community. The status of men and women was determined on the basis of their respective economic roles.

Those family ties have, in the course of the last century, been weakened. In 1968, Eugene Cotran notes:

The first [development] is what may be termed the gradually dying influence of the family or kinship group in the marriage relationship, and the movement towards individualism. It is now true to say that generally speaking the choice of partner is left to the spouses. The custom of infant-betrothal is on decline and, even where practised, would now be subject to the consent of the spouse upon reaching majority. Furthermore, since young men can now often provide their own brideprice, the hold that their family previously had in refusing to pay the brideprice in respect of a bride of whom they did not approve has gone.. Nowadays men often marry without the consent of their family. Secondly, since brideprice is in many instances today a cash transaction, the significance of its traditional nature as a continuing bond between the spouses' families is no more. Thirdly, in regard to dissolution, spouses, especially wives, are no longer satisfied with family arbitration, and in many areas have defeated the family's traditional function in this respect by resorting to judicial divorces by the courts.⁴⁸

⁴⁶ In Europe, especially since the rise of Christianity, this religious function has been lost from the 3rd century, but the other functions were also to a large extent fulfilled, at least until modern times.

⁴⁷ Kuyu Mwissa, *Parenté et famille dans les cultures africaines*, p. 25

⁴⁸ Cotran, 'The Changing Nature of African Marriage', pp. 15–33, at 21

Those developments may have been a bit too strongly worded by Cotran⁴⁹, but overall they seem to be confirmed by later studies. Migration especially, mainly to towns and cities, has played an important role in the weakening of the extended family as a coherent whole:

The extended family unit has not been unaffected by migration which has led to the dispersal of the members across space. Members now build houses outside the family compound. The number of people over whom the head now exercises control has declined. The common practice is now for each married male adult to cater for his wife or wives and their children.⁵⁰

This, however, doesn't mean that the relations with the extended family would have disappeared. Even if weakened by spatial separation, the ties are there, sometimes also for reasons of self-interest, such as the opportunity to go back to the village from time to time to help with farming when urban income doesn't suffice, or to go back to the village in old age, in view of being taken care of by family members.⁵¹

Polygamy vs. monogamy

Polygamy has always been the rule rather than the exception in the African tradition, including North Africa.⁵² This means that a man could have more than one wife at the same time, but a woman could never have more than one husband. Islamic rules

⁴⁹ Cotran doesn't sufficiently take into account differences in education, geographical spread of the family, the urban-rural differences, and the differences among the regions. For example, what Cotran wrote in 1968 probably applies, in 2010, to well educated Yoruba people living in Lagos, far away from their respective families, but certainly not to less educated Igbos, living in the same village as both their families, in rural areas in the South-East of Nigeria.

⁵⁰ L. Olurode and P. O. Olusanya, *Nigerian Heritage. The Yoruba Example* (Magodo Gate: Rebonic Publications, 2005) (1st ed. 1994), p. 61

⁵¹ *Ibid.*, pp. 70-71

⁵² In Asia the picture is more diverse. Sometimes polygamy was severely punished, such as the death penalty in Malaysia. B. Sandin, 'Some Iban (Sea-Dayak) Customary Law in Sarawak' in D. C. Buxbaum (ed.), *Family Law and Customary Law in Asia: A Contemporary Legal Perspective* (The Hague: Martinus Nijhoff, 1968), pp. 40-44, at p. 43. Sometimes it was allowed, e.g. in Thailand: A. Wichiencharoen and L. C. Netisastra, 'Some Main Features of Modernization of Ancient Family Law In Thailand' in Buxbaum (ed.), *Family Law and Customary Law in Asia*, pp. 89-106, at pp.91-101. In some countries, such as in China, higher ranked people were allowed to have a certain number of concubines, even if polygamy as such was prohibited. V.Y. Chiu, 'Some Notes on Chinese Customary Marriage' in Buxbaum (ed.), *Family Law and Customary Law in Asia*, pp. 45-49, at pp.47-49.

have limited polygamy to a maximum of four wives, but according to African customary law there are no limits of this kind.⁵³

Camille Kuyu lists a number of possible reasons which have been suggested as explaining the phenomenon of polygamy.⁵⁴ Politically, polygamy would strengthen the power of the elder members of the family in societies where access to women passes through submission to the elderly. Also, it may strengthen the unity and stability of the group by increasing the family relations within that group.

Economically, it allows men to have more children and hence more workers for the community. Sexually it offers alternatives for men whose wife or wives are almost constantly pregnant or have recently given birth to a child. In case of sterility it is also an alternative for having children without having to repudiate the sterile wife. Financially, it shows wealth when one is able to maintain several wives and, hence, it is a matter of prestige. Also, having many children may enhance one's prestige.

Kuyu concludes that all this may be true, but does not suffice to explain the phenomenon of polygamy fully. He notes that polygamy was never a free choice for the individual, but a system used to guarantee the continuity of the group or its equilibrium. After the death of a husband, the widow automatically became the wife of her husband's younger brother, who would then, in most cases, automatically be polygamous. As a result, the problem of orphaned children was solved and it avoided the risk of prostitution for a widow, who might find no other way to survive financially.⁵⁵ It seems that this necessity of taking care of widows and orphans has also been an origin of polygamy in Islam.⁵⁶

According to a recent survey in Nigeria, polygamy is still supported by a large majority (78%) of the population.⁵⁷ Ekpo noted in 1998, regarding Rivers State:

⁵³ In practice, however, figures show that the large majority of the polygamous marriages are limited to two wives.

⁵⁴ Kuyu Mwisaa, *Parenté et famille dans les cultures africaines*, pp. 29–30

⁵⁵ *Ibid.*, p. 30

⁵⁶ B. A. Ompidan, 'Limited Polygyny under Islamic Law: Compliance and Abuse' in: Z. I. Oseni (ed.), *A Digest on Islamic Law and Jurisprudence in Nigeria*, Auchi (Edo State: Darun-Nur 2003), pp. 97–105, at pp. 98–99. Other reasons are the limited possibilities of divorcing and the strict attitude towards any sexual relation outside marriage. *Ibid.*, pp. 101–102

⁵⁷ Onokah, *Family Law*, p. 107

'Polygamy is still common in the state'.⁵⁸ In Kwara State, in the same period, 31.7% of the male population and 33% of the female population lived in a polygamous union.⁵⁹ In Cross River State, only 12% of the respondents were polygamous in 1998.⁶⁰ In 1994 and in 2005, Olurode and Olusanya noted that '[p]olygamy remains strong among the Yoruba in spite of over a century of Christianity.'⁶¹

Although one of the reasons for polygamy is to have many children, one notes, both in the cases of polygamy and monogamy, a tendency to shift to smaller family sizes, especially because of economic conditions. Better educated couples and those living in towns or cities tend to have fewer children. On the other hand, farming is associated with low income and large family size.⁶²

In Southern Africa, polygamy seems to have declined considerably in the course of the last century. In 1977, Sebastian Poulter concluded that there had been 'a steady decline in the incidence of polygamy in Lesotho during the course of the present century' (but he does not mention possible reasons for that).⁶³ In the same year, John Comaroff and Simon Roberts wrote, regarding Botswana: 'The dominant change in Kgatla marriage patterns since the first missionary presence has been the virtual elimination of polygamy'.⁶⁴

⁵⁸ A. H. Ekpo, *Socio-Cultural and Economic Disincentives and Incentives for Reduction in Family Size in Rivers State of Nigeria*, (Ibadan: Nigerian Institute of Social and Economic Research, 1998), p. 27

⁵⁹ I. I. Ihimodu, *Socio-Cultural and Economic Environment as Determinants of Family Size in Kwara State of Nigeria*, (Ibadan: Nigerian Institute of Social and Economic Research, 1998), p. 27

⁶⁰ A. H. Ekpo, U. B. Uwatt and O. J. Umoh, *Socio-Cultural and Economic Disincentives and Incentives for Reduction in Family Size in Cross River State of Nigeria*, (Ibadan: Nigerian Institute of Social and Economic Research, 1998), p. 18

⁶¹ Olurode and Olusanya, *Nigerian Heritage*, p. 34

⁶² Mott, *The Dynamics of Demographic Change in a Nigerian Village*, pp. 1, 6 (Ebendo village); Ekpo, *Socio-Cultural and Economic Disincentives and Incentives for Reduction in Family Size in Rivers State of Nigeria*, pp. 27–28 (Rivers State); Ihimodu, *Socio-Cultural and Economic Environment as Determinants of Family Size in Kwara State of Nigeria*, pp. 35–40 (Kwara State); Ekpo, Uwatt and Umoh, *Socio-Cultural and Economic Disincentives and Incentives for Reduction in Family Size in Cross River State of Nigeria*, pp. 19–23, 31 (Cross River State); Adewunmi and Aderinto, *Economic incentive/ disincentive for the reduction of family size in Ondo State*, Ibadan: Nigerian Institute of Social and Economic Research, no date – probably 1997 or 1998, pp. 30, 53 (Ondo state)

⁶³ Poulter, 'Marriage, Divorce and Legitimacy in Lesotho', *Journal of African Law*, 21 (1977), pp. 66–78, at 77

⁶⁴ J. L. Comaroff and Simon Roberts, 'Marriage and Extra-marital Sexuality. The Dialectics of Legal Change among the Kgatla', *Journal of African Law*, 21 (1977), pp. 97–123, at 97. Also Arthur Phillips mentions the influence of Christianity as the main reason for a changed attitude towards polygamy among the Tswana. Phillips and Morris, *Marriage Laws in Africa*, p. 89.

Polygamy is a solution for societies that hardly accept divorce, but considered in reverse, a more open attitude towards divorce, and/or extra-marital relationships once a divorce has occurred, may lead to a decline of polygamy, in favour of serial monogamy.⁶⁵

Obviously, Christianity has not succeeded in making African marriages monogamous. A survey among Creoles (freed slaves, who have mainly been strongly influenced by Western culture) in Sierra Leone shows how deeply rooted polygamy is in the African tradition: 'Although Creoles value Christian monogamous marriage, having children with women other than the wife is common'.⁶⁶

Divorce

In the pre-colonial period, marriage was regarded as a bond between not just the parties, but also the members of their communities. Divorce was not be accepted and would bear the risk of inter-village disputes and wars. Hence, the man who became dissatisfied with his wife would simply marry another one, without any previous divorce.⁶⁷ The wife, on the other hand, would simply accept a bad marriage or would have been forced to do so by her family, who would not want to have problems as a result of the wife leaving her husband.⁶⁸ Of course, if both families agreed on a divorce, such problems would not arise. In the case of a divorce, the bride price had to be refunded to the husband, except if did not have any justification for divorcing his wife. However, if he can justify the divorce, the

⁶⁵ See, in regards to such a development in Botswana: Comaroff and Roberts, 'Marriage and Extra-marital Sexuality. The Dialectics of Legal Change among the Kgatla', at p. 121

⁶⁶ B. E. Harrell-Bond, *Modern Marriage in Sierra Leone. A Study of the Professional Group* (The Hague: Mouton, 1975), p. 56 (see also pp. 139–144) where figures are given, based on interviews with both educated Creoles and less educated 'provincials'. In both cases, polygamy seems to be accepted by a (large) majority, including women.

⁶⁷, p. 15

⁶⁸ They may have been forced to refund what was given at the occasion of the wedding and, if they were unable to do so, to allow the husband to take another member of the bride's maiden family. *Ibid.*, p.16

husband could still claim the children of his (former) wife, whoever their father might be.⁶⁹

When studying the laws of the Yoruba people in Nigeria in the 1920s, A. Ajisafe noted that 'divorce is not permissible in native law'.⁷⁰ However, it would appear that customary law in other parts of Africa would have been more open to divorce, for example, from the Natal Code of Native Law.⁷¹

In figures from surveys taken around 1998 in different states of Nigeria, it appears that the large majority of men and women were married and only a very small number were divorced.⁷² However, in 2003 Margaret Onokah noted that 'divorce of customary law marriages is so common in modern Nigerian society that most of the people accept it as a socio-legal fact'.⁷³ According to her, 'the introduction of alien marriage laws with divorce as the necessary incident has had a tremendous influence on the indigenous attitude towards the formation of marriage and divorce'.⁷⁴ The loosening of the ties between marriages and the spouses' families, especially in an urban environment, may be another explanation for this commonality of divorce.

Just as in Europe (and in some cases even before this happened in Europe), Nigerian law has replaced the previous grounds for divorce among spouses married under the Acts (not under customary law) with the no-fault concept of 'irretrievable breakdown of the marriage'.⁷⁵ However, fault-related elements are introduced at the level of the evidence of this 'irretrievable breakdown' to be submitted by the

⁶⁹ For Sesotho law, see Poulter, 'Marriage, Divorce and Legitimacy in Lesotho', p.73. So, refunding the bride price was a way for the woman to 'buy' her own children.

⁷⁰ A. K. Ajisafe, *The Laws and Customs of the Yoruba People* (1924), p. 54 (quoted by Onokah, *Family Law*, p.16)

⁷¹ Sections 76 and 77 of this Code mention as grounds for divorce: adultery, continued refusal of conjugal rights, wilful desertion, continued gross misconduct, imprisonment for at least five years, conditions such as to render the continuous living together of the partners insupportable or dangerous, accusations of witchcraft, and some others.

⁷² Cross River State: 91.3% married, 3.4% widowed, 3.7% separated and 1.6% divorced. Ekpo, Uwatt and Umoh, *Socio-Cultural and Economic Disincentives and Incentives for Reduction in Family Size in Cross River State of Nigeria*, p. 17; Ondo State: 82.7% married; 6.3% widowed; 6.2% separated; 4.8% divorced. Adewunmi and Aderinto, *Economic Incentive/ Disincentive for the Reduction of Family Size in Ondo State*, p. 20.

⁷³ Onokah, *Family Law*, p.16

⁷⁴ *Ibid.*, p.16

⁷⁵ Nigerian Matrimonial Causes Act 1970, s.15 (2)

petitioner. They include: refusal of sexual relations, adultery, bad behaviour, desertion of the partner for at least one year. Actual separation is sufficient after a period of two years, if the other party agrees with a divorce, and three years if not.

Equality

Equality of men and women was not a characteristic of customary law in Africa in the nineteenth century. British judges in the Nigerian Supreme Court in the early 20th century used their power to 'interpret' customary law with a more egalitarian perspective. For example, under Yoruba customary law, only male children were entitled to an inheritance from their father. The Supreme Court, however, recognised the equal right to a father's property of his surviving sons and daughters.⁷⁶

Just as in Europe until recently, adultery has always been a sufficient ground for divorce against a woman. For a marriage according to state law in Africa, adultery on behalf of the husband also suffices as grounds for divorce, but this is not the case for a marriage according to customary law if the husband can make it plausible that he will marry the girl with whom he had sexual relations.⁷⁷

According to customary law in Rivers State in Nigeria, a wife may only ask for divorce with the consent of her husband, whereas the husband may take steps for a divorce without any consent from his wife. Here, the courts have simply discarded customary law and allowed a wife to ask for a divorce without the consent of her husband.⁷⁸

Under customary law, a husband can divorce his wife on the reason of her lack of respect for him and members of his family, but it does not work the other way

⁷⁶ See the cases *J.S.Andre v. Adeniyi, Aghebi & Johnson*, *Nigerian Law Review*, 10 (1913), p. 79; *T. Ricardo v. J. Abal*, *Nigeria Law Reports* 7, (1926), pp. 58–59

⁷⁷ For Nigeria: Onokoh, *Family Law*, pp.171–172

⁷⁸ Case *Solomon v. Gbobo*, *E.C.S.N.L.R.*, 1975, p. 457, cited in Onokoh, *Family Law*, pp. 165–166

around (i.e. lack of respect by the husband).⁷⁹ This is due to the dominant position of African men in the domestic sphere.

Also in Africa, views on the equality between men and women are changing. From a survey in Kwara State, Nigeria in 1998, it appears that roughly half of the population (49.6%) agrees with the statement, 'Women are expected to stay at home and remain obedient to their husbands', whereas 42% is of the opinion that 'women are equal partners to their husbands'.⁸⁰

Interpreting legal transfers: What are the lessons for the methodology of comparative law?

Once more, it appears that legal systems may have more in common than one would expect, but at different stages in their history.

Indeed, law is closely linked to its socio-economic environment. Agricultural societies facilitate large families that have close ties with the land that they cultivate and on which they live. That is why family law in Europe, in times when the majority of the population was working as farmers, had a lot in common with African customary family law.

However, socio-economic conditions are not the only element that explains law. Underlying world views strongly linked to a culture and longstanding tradition determine the content of the law and the way it is handled, interpreted and applied in practice. Here, a more communitarian and less rational approach distinguish African customary law clearly from the more individualistic and rational European approach. Those characteristics may explain differences in otherwise rather similar socio-economic circumstances.

Today, globalisation is affecting the law and the attitude to law worldwide and, hence, diminishing divergences due to socio-economic, historical and cultural

⁷⁹ Onokoh, *Family Law*, p. 173

⁸⁰ Ihimodu, *Socio-Cultural and Economic Environment as Determinants of Family Size in Kwara State of Nigeria*, p. 29

differences. This conclusion also applies to the development of African family law, as we notice an increasingly equal treatment of men and women, a facilitation of divorce, a decrease in the influence of the family over marriages, and a decrease in the size of families.

It is obvious that the cultural influence of the West, and especially of the US, through movies and television programmes is affecting cultures, world views and attitudes worldwide. Law doesn't escape it. However, the African traditions are stronger than many have expected, and not just in law.⁸¹

So, legal transfers of rules and institution will always have diverging interpretations within local, historical, socio-economic, ideological and social frameworks. Or there will be an obvious difference between 'law in the books' and 'law in action'. The judge, applying imported rules of family law, may still interpret them on the basis of recent decisions of the courts of the previous colonial power and keep up the appearances of official monogamy. While he may well have several wives himself and, hence, he is not following those rules either, just like the majority within his country. Anyway, very little efforts seem to have been made after decolonisation to adapt the imported law and to find a new balance between African customary law and European statutory law. Whatever attitude is taken by officials, the tension between tradition and modernity cannot be escaped, nor the necessity to find a new equilibrium.

What are the lessons for the methodology of comparative law? Obviously, black letter law cannot be isolated from its social context. The more those contexts diverge, the broader the approach will have to be. It doesn't make much sense to conclude that monogamy today would be generally accepted outside the Islamic

⁸¹ As to health policy, the sociologists Olurode and Olusanya, concluded: 'The thrust of our social policy on health discriminates against the preference of the majority of our people. Our health policy is largely western and highly bureaucratic. Our people prefer the traditional approach to health because of their belief from time immemorial that ill health has both a material and non-material causes. Our Public Health personnel are trained in the western tradition and are mostly illiterate in the indigenous aspect. Major public functionaries have often not hidden their hatred for the non-western health care providers in spite of its wider coverage, and its enduring nature in the midst of profound flux. The resilience of our cultural heritage has however ensured that views about alternative therapy get radio and TV publicity'. (Olurode and Olusanya, *Nigerian Heritage: The Yoruba Example*, p. 5. The parallel with the legal developments is remarkable.

world on the basis of the legislation and case law in the different states in the world, including the African ones, when it is obvious that in practice polygamy is still quite present.⁸² Also, the fact that rules that conflict with deeply embedded traditions can easily be discarded says something about the attitude to law. It seems as if imported Western law is not looked at as 'binding' to the same extent as some more traditional rules. On the other hand, it cannot be denied that Western ideas of 'democracy', 'equality' and 'human rights' have influenced all societies worldwide, be it not without opposition. As one Nigerian student commented, after a lecture on European Family Law at the University of Lagos in January 2009: 'Our problems are partly caused by the import of perverted Western ideas, such as the acceptance of homosexuality, the equality of men and women, and the idea of monogamy'. Imported ideas, indeed, may be favourable for some groups in society and jeopardise the power position of others. Even when translated into legal provisions, it is not obvious at all that they will be interpreted and applied in the same way as similar rules in the countries of origin. To understand this correctly, one needs to have a sufficient insight into the local tensions and struggles, traditions and world views, and into the historical changes that make this society either fit for such new ideas or not. The tension between tradition and modernity, between conservatism and changes, is present in every society during most of its history.⁸³ The history of European family law shows strong jumps towards modernity, influenced by Enlightenment during the French and Russian Revolutions, followed by drawbacks which restored, sometimes largely, the old traditions.⁸⁴ From the 1960s most of what French and Russian revolutionaries introduced in the 1790s and after 1917 was reintroduced in the legislation of most European countries, now being backed by a large majority of the population.

⁸² Also in some Asian societies; in 1968, Wichiencharoen and Netisastra noted 'However, the Thai experience since the promulgation of the new family law in 1935 indicates that the law has not succeeded in eradicating polygamy, which it has attempted to do. Statistics are not available, but the general impression is that, in spite of the law, the practice of polygamy seems to continue undiminished'. Wichiencharoen and Netisastra, 'Some Main Features of Modernization of Ancient Family Law In Thailand', Thailand' in: D.C.Buxbaum (ed.) *Family law and customary law in Asia: A contemporary legal perspective*, The Hague: Martinus Nijhoff 1968, 89-106, at p.105)

⁸³ See, e.g., for Hindu family law: Menski, *Comparative Law in a Global Context*, pp. 249-58

⁸⁴ For Russia (and the Soviet Union), see: O. A. Khazova, 'Family Law in the Former Soviet Union: More Differences or More In Common?' in M. Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe*, (Antwerp: Intersentia, 2007), pp. 97-119, at pp.97-99, regarding the 1944 changes and the following pages as to the post-Soviet changes in each of the former Soviet republics.

Legal transfers have to be studied in that context, too. When they translate foreign ideas that lack local support, such as monogamy in an African context, they will not survive. However, when local ideas change, be it under internal or external influence, they may become acceptable in the society where the legal transfer took place. For this, socio-economic developments may be important, such as the change from a mainly agricultural society to an industrial or service society, and/or from a mainly rural to a mainly urban society. The strong or weak position of power groups, such as churches, trade unions, lobbies, ideological pressure groups, etc, may block or promote such societal changes. Also, the willingness of judges to interpret and apply the existing law in a more liberal, or rather in a more conservative way, will not only change the 'law in the books', but also influence public opinion in that sense. An example is the quite liberal interpretation of rather strict divorce rules in several European countries, to make divorce by mutual consent possible, against the original will of the legislators concerned.⁸⁵

On the other hand, the fact that lawyers seem to have fully accepted legal transfers should keep us cautious. Often they have been educated at a university in the country from which such transfers came and, thus, have been acculturated to such an extent that they have completely internalised a legal institution which otherwise doesn't really fit in the 'receiving' society. Hence, there may be a gap between some legal elite in this country and a much larger group, which will be inclined to follow the local traditions rather than the imported law. This can be compared to the gap between educated lawyers in medieval Europe, who might have studied Roman law during many years at far away universities but didn't know anything about local customary law when they entered into legal practice after their return, and local judges in lower courts who never got a university education, but knew and applied (only) local customary law. An example is the decision of the Constitutional Court of the Republic of Benin of 23 December 2002 which declared void the provision in the newly enacted Family Code (6 July 2002) allowing polygamy, but not polyandry, as

⁸⁵ See M. Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective*, Antwerp: Intersentia 2006, 255-256 under the quite appropriate title 'Law in the Books versus Law in Action: Divorce by Collusion', giving the examples of creative judicial activism in France, England and Germany. See also pp. 236-237 where a similar attitude in the Nordic countries is described and p. 220, where the Dutch 'great lie' is explained.

this provision was not in accordance with the principle of equality between men and women. This was obviously a clash between the culture among lawyers and general culture in Benin, but also between tradition and modernity. It is interesting to see that parliament has changed the provision in the Code by prohibiting polygamy (Article 143), be it only for the future (Article 1018 – as from 1 December 2004).⁸⁶ The question is to what extent the new law will remain symbolic or become a sociological reality.

The idea that Western law is more 'developed' and more 'efficient' has sometimes led to the conclusion that it will, as a kind of natural development, push aside less rational and less efficient rules in non Western societies.⁸⁷ As far as concepts and other 'technical' aspects of law are concerned, this may overall be true. An example is the hegemony of French and German law at the level of drafting European law, at the disadvantage of the much less developed English Common law. Also, in areas where applying the same rules is more important than the exact content of the rules, such as international contract law, business law or transport law, which are not strongly linked to traditions, this technical 'survival of the fittest' may work as well. However, when it comes to values, world view and the legal conceptions, rules and principles linked to them, we are no longer at the level of efficiency or 'stage of development'. Legal transfers will not work if they cannot fit with the local culture. Of course, as already mentioned, this culture may develop in its turn, in a communicative interaction with foreign cultures, but as long as the required change doesn't take place, legal transfers will prove inadequate. Capital punishment, for example, is considered in Europe to be inhuman, contrary to basic human rights and not appropriate for a civilised society. Although it has been proven that it is not efficient for limiting criminality, countries such as the US and China will not change their policy for reasons of efficiency, but they may do so in the future if they start to share the same ethical views as Europe (however, a reverse development cannot be excluded either). The history of family law in Africa shows how 'religious transplants'

⁸⁶ U. Spellenberg, 'Materialien – Documents', *Recht in Afrika – Law in Africa – Droit en Afrique* 2005, pp. 131–38

⁸⁷ See for comments and references: J. Gillespie, 'Towards a Discursive Analysis of Legal Transfers into Developing East Asia', *International Law and Politics* (2008), p. 657, at pp. 666–69

facilitate the legal ones, but are not sufficient for changing long standing, deeply rooted traditions and attitudes. Socio-economic changes may be more influential, but it is likely that only changed world views, partly as a result of those developments, will guarantee the full acceptance of legal transfers. Globalisation and increasing intercultural communication in turn are facilitating such developments.

However, one should be aware of possible of (fundamental) differences in the paradigmatic framework within which law is conceived, handled, approached and used in diverging cultures. If other social or religious norms supersede law, 'harmonised' law may still become quite different in practice.⁸⁸

In many countries, especially the smaller and the less developed ones, it has proven difficult to establish new legal doctrine. Here, there are less academics than in larger, wealthier countries. When they are poorly paid they need other professional activities for obtaining a reasonable income, leaving too little time for research. In most African countries there is full access to the Internet, but not to electronic journals. Libraries too are often poorly equipped, so that even for those who would like to carry out research, the necessary sources are largely lacking. This too explains why legal doctrine in African countries is still so oriented towards the law and legal writings of the former colonial power, lacking to a large extent creative adaptation of that imported law to the local needs.

The strong link between African lawyers and the legal system of their former colonial power leads to a continuing daily interaction between both parties involved in legal transfers and to a continuing acculturation by the colonising legal system. Moreover, as this happens on a voluntary basis, it is no longer perceived as a colonising process. Legal transfers may easily be seen as neutral 'technical' ways of organising society, hiding in this way the underlying tension with traditional culture. In society at large this view of lawyers will inevitably influence the traditional views, even more when

⁸⁸ Examples are given by John Gillespie in his article cited above, at p. 675 ff. See also: M. Van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', *International and Comparative Law Quarterly*, (1998), pp. 495–536, at pp. 505–513

they are supported by socio-economic changes for which those rules seem to better fit the current needs than traditional law. This happens in a permanent communicative interaction through information on law to the population at large, discussions in the media, the way cases are reported in the media, and the way politicians present new law (proposals). What used to be a tension between the coloniser's culture and local African culture has increasingly become a tension between tradition and modernity within one and the same African country.

Transcultural comparative legal research, therefore, is inevitably a study of law in context, for which on average more elements and developments will have to be taken into account than when legal systems that largely share similar socio-economic, historical and ideological frameworks are compared. Moreover, such comparative research should always be carried out in a historical perspective. What is not the law today may have been so in the past, or may be likely to be so in the future, depending on socio-economic and ideological conditions. The constitutional prohibition of divorce in Ireland during most of 20th century couldn't prevent its introduction in 1996.⁸⁹ The constitutional prohibition of same-sex marriages in Latvia from 2005 will do little to prevent its introduction in the future.

⁸⁹ In force as of 27 February 1997