AIDC | ACADÉMIE INTERNATIONALE DE DROIT COMPARÉ

INTERNATIONAL ACADEMY OF COMPARATIVE LAW | IACL

IUS COMPARATUM

Methodological Challenges and Opportunities When Comparing Family Laws in West Africa

Lukas HECKENDORN URSCHELER
Swiss Institute of Comparative Law

VOLUME 2 – 2022

LA MÉTHODOLOGIE
DU DROIT COMPARÉ
DE LA FAMILLE

COMPARATIVE
FAMILY LAW
METHODOLOGY

aidc-iacl.org

Ius Comparatum rassemble chaque année des publications académiques sur diverses questions juridiques ayant fait l'objet d'une analyse de droit comparé.

Toutes les publications sont disponibles sur le site Web de l'Académie et sont publiées avec l'ambition de faire avancer la recherche en droit comparé.

La qualité de la publication est garantie par une sélection en interne suite à un appel à contributions pour le thème choisi chaque année. Le contenu est la responsabilité des auteur(e)s. Les articles peuvent être téléchargés par des particuliers, pour leur propre usage, sous réserve des règles ordinaires du droit d'auteur.

Ius Comparatum gathers each year academic publications on diverse legal issues analyzed from a comparative law perspective.

All publications are available on the Academy's website and are released in the interest of advancing comparative law scholarship.

The quality of the publication is guaranteed by an internal review following a Call for Papers for each year's selected topic. The content is the responsibility of authors. Papers may be downloaded by individuals, for their own use, subject to the ordinary copyright rules.

Académie internationale de droit comparé

International Academy of Comparative Law

CITATION / CITE AS
Lukas HECKENDORN URSCHELER, 'Methodological Challenges and Opportunities When Comparing Family Laws in West Africa' Ius Comparatum 2(2022) 128-162 [International Academy of Comparative Law: aidc-iacl.org]

COMPARING FAMILY LAWS IN WEST AFRICA: AN OPPORTUNITY FOR COMPARATIVE LAW, A CHALLENGE FOR THE COMPARATIVE LAWYER

Lukas HECKENDORN URSCHELER[1]

Résumé

Faisant écho à l'appel visant à étendre le droit comparé au-delà de l'Europe et de l'Amérique du Nord, cette contribution met en avant le grand nombre d'opportunités que l'Afrique de l'Ouest offre au droit comparé de la famille. La première partie identifie différentes raisons et objets pour une comparaison culturelle en mettant en avant le rôle de la CEDEAO, la diversité normative (entre droit formel d'inspiration coloniale, droit coutumier et religions différentes) ainsi que l'intérêt dans la différence (entre les ordres juridiques ouest-africains et par rapport à l'Europe). Sur cette base, cette contribution développe un nombre de possibilités de comparaison en s'appuyant sur des considérations méthodologiques. La deuxième partie est une réflexion sur le défi que représente la comparaison juridique en Afrique de l'Ouest, en particulier pour des juristes occidentaux. S'inspirant de la réflexion qui a lieu dans d'autres disciplines, en particulier l'anthropologie, la contribution identifie un certain nombre de difficultés et pièges auxquels il convient de porter une attention particulière.

Mots clés : *méthode — droit coutumier — religion — anthropologie — Afrique — diversité — CEDEAO — culture*

Abstract

Echoing the call to expand comparative law beyond Europe and North America, this paper shows that West Africa offers a host of opportunities for comparative analysis of family law. The first part provides an overview on different reasons and possible objects for a cultural aware comparison in West Africa. It highlights the role and institutional setting of ECOWAS as well as the normative diversities between formal law deeply influenced by colonialization, customary norms and religious attitudes, but also the differences between the jurisdictions located in West Africa. It then develops a certain number of possibilities in the light of comparative literature on methodology.

[1] Deputy Director, Swiss Institute of Comparative Law, Lukas.Heckendorn@isdc-dfjp.unil.ch.

Especially for comparative lawyers from the West, comparing family law in West Africa will be particularly challenging. For this reason, the second part looks at anthropology in order to identify pitfalls and signposts in the process of comparison. This allows increasing awareness of a number of factors that are not entirely new to comparative law but might easily be forgotten.

Keywords: *method — customary law — African law — anthropology — religion — diversity — ECOWAS — culture*

TABLE OF CONTENTS

Introduction

Comparative family law has considerably grown in the last twenty years. A major focus of research are comparisons between European legal systems. Research has allowed identifying and understanding common tendencies and differences, and, in spite of initial doubts, research also tends towards harmonization, as the Commission on European Family Law's "Principles on European Family Law"[2] illustrate.[3] Therefore, current comparative family law in Europe is very much in line with "traditional" or mainstream comparative law.[4]

The focus on Europe itself is characteristic of traditional comparative law.[5] However, due to migration, understanding the developments in Europe requires engagement with family law beyond Europe. The clearest example is the way different Islamic traditions and their perceptions influence the development of family law in Europe, for example relation to the marriage of minors[6]. In the light of this development, interactions of Islamic and European family laws have become an important area of research for good reasons.[7] Looking beyond Europe is an imperative in order to understand the potential impact of migration on family law generally.

More importantly, for at least twenty years, many scholars have convincingly been pleading for giving up the western-centric approach in comparative law and for moving beyond Europe.[8] If one wants to understand law – and family law – globally, it is indeed necessary to take Non-European

---

[2] Available at www.ceflonline.net/principles/.

[3] Boele-Woelki, Katarina. 2018. What Family Law for Europe?. *RabelsZeitschrift für ausländisches und internationales Privatrecht* 28(1): 1-30.

[4] See Nicola, Fernanda. 2010. Family Law Exceptionalism in Comparative Law. *American Journal of Comparative Law* 85:777- 810, p. 782, who makes a point in showing that European harmonizing scholars define family law as « merely » private law.

[5] Twining, William. 2000. *Globalization and Legal Theory*, Cambridge, at 184 seq, speaks about « the Country and Western tradition » of comparative law.

[6] See on this issue the different contributions in Yassari, Nadjma and Michaels, Ralf (eds.). 2021. *Die Frühehe im Recht*, Mohr Siebeck.

[7] A few of many examples include Büchler, Andrea. 2012. Islamic family law in Europe? From dichotomies to discourse – or: beyond cultural and religious identity in family law, *International Journal of Law in Context* 8, 196 – 210 ; or several contributions in Shah, Prakash, Foblets, Marie-Claire, and Rohe, Mathias eds. 2014. *Family, Religion and Law*, Routledge.

[8] William Twining's postulate « to move away » from the country and western tradition of comparative law has been heard ; as there is a growing number of comparative law initiatives and research focusing on Asia (the Asian Law Institute or regional conferences of the Academy of Comparative Law).

legal systems seriously. African law seems to be particularly "understudied and underutilized"[9], and it has been argued that doing comparative law in Africa is an "international necessity."[10] This contribution will show that especially (though not exclusively) West Africa offers a wide range of opportunities to develop comparative family law.

Comparing family law in Africa is, however, a methodological challenge. The important increase of comparative research in family law is in itself an important shift from the majority of previous comparative literature that saw family law as different from other legal fields because of its cultural characteristics, and was therefore reluctant to engage in such research.[11] Two radically different explanations can justify this shift, and both have important methodological implications.

A first approach consists in minimizing the cultural differences as such or the importance of culture in family law. Many comparative projects adopt this perspective, without necessarily saying so explicitly: often, comparisons in family law are limited to legal systems that are (or seem) similar: European cultures (or jurisdictions in the West[12]) are not (or no longer) so fundamentally different that it would make comparisons impossible.[13] Another way is the adaptation of a supposedly neutral reference that allows for neutral and "scientific" comparisons.[14] European (or international) human rights law can serve as such a reference point, but also the identification of a "social function" as proposed by the functionalist tradition of comparative scholarship, makes it

---

[9] Okeke, Chris Nwachukwu. 2011. African Law in Comparative Law. Does Comparitivism Have Worth?, R*oger Williams University Law Review*, Vol 16: Iss. 1, Article 1, p. 1.

[10] Okeke, 2011, at 4.

[11] Boele-Woelki, 2018, at 1, mentioning the attitude in German academia in the early 2000 ; Bradley, David. 2012. Family Law. In *Elgar Encyclopedia of Comparative Law*, ed. Jan M. Smits, 2nd edition, 314 – 338, Cheltenham: Elgar at 315 – 316, with many references ; Nicola, 2010, who cites Harold Cooke Gutteridge's Introduction to the comparative method of legal study (1946), according to whom the links of family law "with race, religion and politics" make it unsuitable for comparative analysis (at 778), and, with a detailed historical account, at 787 seq.

[12] Glendon, Mary Ann. 2006. Introduction: Family Law in a Time of Turbulance. In: *International Encyclopedia of Comparative Law Volume IV: Persons and Family*. Aleck Chloros, Max Rheinstein and Mary Ann Glendon, ed. Brill, for example, discusses social/behavioural and legal changes in developed / industrialized or the West.

[13] See Boele-Woelki's observation that differences between family law in Europe are political rather than cultural ; see also the general argument of convergence in family law, referred to, amongst others, by Bradley 2012, at 314, and by Nicola.

[14] Nicola, 808. Both justifications are linked to the more general idea of convergence,

a priori possible to compare[15] (in spite of the fact that the proponents of functionalism were hesitant to apply it in family law and beyond the West[16]).

The other way to overcome the reluctance in mainstream comparative law to engage in family law is to put the cultural diversity in family law at the forefront. Rather than considering it impossible to compare different cultures, it focuses the methodological considerations on the society.[17] The underlying idea is to consciously include cultural aspects of law -tradition, religion, politics and even economy - within the method as such, and not only treat them as an explanation or a factor hindering comparison. This is admittedly challenging for lawyers trained to look, in the first place, at texts (in statutes or formulated by courts).[18] Therefore, comparative lawyers taking such an approach very often engage with other social science disciplines.[19] While this fits the current focus of comparative law methodology on interdisciplinarity,[20] interdisciplinarity as such does not automatically put cultural elements in the foreground: the debate around legal origins and comparative law and economics has led to results quite to the contrary.[21] An interdisciplinary approach that takes the cultural specificities seriously should focus on society-oriented rather than on

[15] For an interdisciplinary approach to function, focused on family law, see Scheiwe, Kirsten, 2000, Was ist ein funktionales Äquivalent in der Rechtsvergleichung? Eine Diskussion an Hand von Beispielen aus dem Familien- und Sozialrecht, *Kritische Vierteljahrsschrift für Gesetzgebung und Rechtswissenschaft* 83, 30-51; for the debate in comparative law, see Michaels, Ralf.

[16] Zweigert, Konrad & Kötz, Hein. 1996. *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 3rd edition, at 38 ; see Nicola, 2010, who sees the functionalist approach as closely linked to a market orientation of comparative research, striving for efficiency and convergence / harmonisation ;.

[17] Nicola, 2010, talks about "positive-sociology functionalism" and refers to Rheinstein, Llewellyn, Khan-Freund, and Sacco.

[18] In the area of constitutional law, Peter Häberle develops an interesting approach that keeps the focus on texts: Häberle, Peter. 2019. *Ein afrikanisches Verfassungs- und Lesebuch – mit vergleichender Kommentierung*. Berlin: Duncker&Humblot.

[19] See for example Nadjma Yassari's project on islamic law that explicitly addesses the context and the impact of political structures on family law, https://www.mpipriv.de/grundlagenforschung-recht-islamischer-laender.

[20] "Interdisciplinary research is at the heart of comparative law today": Adams, Maurice and Husa, Jaakko and Oderkerk, Marieke. 2017. Method and Methodology of Comparative Law: Introductory Remarks, in Adams and Husa and Oderkerk, eds. C*omparative Law Methodology*; Cheltenham: Elgar, at xxiii; see the interdisciplinarity in funding instruments; see also the event, organized by the American society of comparative law, on interdisciplinarity and comparative law

[21] See among many Husa, Jakko. 2014. Interdisciplinary Comparative Law – Between Scylla and Charybdis ?, *Journal of Comparative Law* 9: 12-26, at 14.

market-oriented disciplines without denying the importance of economic factors.[22]

For a comparative lawyer venturing beyond the West, the choice between the two options is quite clear. As a European scholar, I could not legitimately rely on cultural similarities. I also felt that referring to an individual standard or a given social function would be culturally biased – contrary to the current tendency to decolonialize comparative law[23] – and, in addition, bear the risk of overlooking important aspects. I therefore decided to take up the challenge and started thinking about how to proceed – what method(s) to apply or develop – in order to consciously focus on social and cultural elements. Being well aware of my limits, and not pretending to be (or become) an expert in those other fields, I nevertheless started to explore literature in other social sciences. The risks of misunderstanding and distortion[24] seemed worth taking when looking for inspiration.

The aim of this contribution is not to identify "the method" to do comparative family law in Africa, as I share the conviction with many other comparative scholars,[25] that there are many different methods for doing comparative law; ultimately, the "right" method depends on the purpose and the conditions of the comparative enterprise. Therefore, the contribution explores opportunities and identifies methodological challenges that comparative work needs to address when comparing family laws in Africa. When doing so, it explores ways to integrate approaches and insights from other social sciences in the process of comparison. It does so by dealing with

---

[22] Nicola, 2010, mentions K.N. Llewellyn, Max Rheinstein, and others as examples; for a culturally aware comparison that takes into account economic considerations, see Diala, Anthony Chima. 2021. Legal Pluralism and the Future of Personal Family Laws in Africa, *International Journal of Law, Policy and the Family 35,* 1 - 17.

[23] For the term colonial comparative law and its method, see e.g. Zollmann, Jakob, 2014, German Colonial Law and Comparative Law 1884 – 1919, in Thomas Duve ed., *Entanglements in Legal History: Conceptual Approaches*, Global Perspective on Legal History 1, Max Planck Institute for European Legal History, 253-294, especially at 280 seq; today, comparative law theory and method aims at decolonializing its method (postcolonial comparative law, see e.g. Husa, 2015, at 138; Michaels).

[24] See e.g. Anders, Gerhard. 2015. Law at its limits: interdisciplinarity between law and anthropology. *The Journal of Legal Pluralism and Unofficial Law* 47, 411 – 422, at 414.

[25] Leckey, Robert. 2017. Review of Comparative Law, *Social & Legal Studies* 26(1): 3-24; Basedow, Jürgen. 2014. Comparative Law and its Clients, *American Journal of Comparative Law* 62, 821 - 857; Husa, Jaakko. 2015. *A New Introduction to Comparative Law*, Hart, at 99.

the questions at the heart of any comparison[26]: Why and what to compare (I.) and How to compare (II.).

I. WHY AND WHAT TO COMPARE: CHALLENGES AND OPPORTUNITIES IN WEST AFRICAN FAMILY LAW

Dealing with African family law is a daunting enterprise, especially when carried out with a European background. The size and the diversity of the African continent require limiting the area of analysis. However, looking at one national jurisdiction alone is too narrow an approach: it would exclude intra-African comparative law and perpetuate the impact of colonial state-formation on the comparison. In addition, there is a temptation to generalize on the basis of only one example. The approach "one country represents the whole continent" might be legitimate for some purposes and in some context such as when choosing samples for a global study (including one African jurisdiction is better than not to include any) or for increasing audience and interest for a publication, or for promoting African identity. However, it goes against the postulate to take Africa and its diversity serious. Especially a methodological analysis needs to consider the diversity and complexity of the continent. Therefore, it is necessary to look at multiple jurisdictions.

Legal literature often makes two subdivisions when dealing with Africa: the one between sub-Saharan Africa and North-Africa (the latter being often integrated in the MENA-area),[27] and the one between anglophone and francophone or English and French – influenced jurisdictions.[28] The latter leaves out the jurisdictions where none of these two languages are dominant, such as Guinea Bissau, Angola or Mozambique and is therefore less attractive for a comparative law enterprise that wants to reflect the diversity. For the same reason, the former is only partly useful: the North African jurisdictions are relatively homogenous in terms of religion and the weak influence of the English

[26] See Samuel, Geoffrey. 2014. *An Introduction to Comparative Law Theory and Method*. Hart, at 173, according to whom comparative law can be reduced to two questions : what is comparison, and what is law (the object of comparison).

[27] In French, the term « l'Afrique noire » is very often used as an equivalent to Sub-Saharan Africa, see for example M'Baye, Kéba. ed. Le droit de la famille en Afrique noire et à Madagascar, Paris 1968.

[28] See for example Stibich, Robert, 1969, Family Law in Some English-Speaking African States, *Journal of Legal Pluralism*, 47.

common law tradition. In addition, the area is sometimes not considered as Africa at all[29]. However, focusing on sub-Saharan Africa means looking at over 40 States – too big a number to analyse.

In order to narrow down the object of analysis for purposes of methodology, I propose to refer to the United National Geoscheme. The scheme divides Sub-Saharan Africa into four subregions: Eastern, Southern, Middle (or Central) and Western. The division has mere statistical purposes,[30] but the following argument will show that it provides an interesting starting point for comparative law.

While there is a big number of publications on Southern Africa, especially (but not exclusively[31]) on South African family law,[32] there is less scholarship on the other three subregions. Without considering (and therefore judging on) Eastern and Middle Africa, and consciously disregarding other possibilities of sampling African jurisdictions, the following considerations will show that West Africa would be particularly interesting for comparative family law and provide plenty of opportunities (A.). Taking up these opportunities, I will then explore what exactly can be compared when comparing West African family law (B.).

A. West African Family Law as an Opportunity for Comparative Law

Three main reasons make West Africa particularly attractive for comparison, as they indicate different opportunities. First, the regional organisation has a particular dynamic and can be seen as a model in Africa in some regards (1.). Second, West Africa is particularly rich in normative diversity (2.). Third, there are both, theoretical and practical considerations that justify dealing with the difference West African family law offers (3.).

---

[29] Sacco, Rodolfo. 2012. The sub-Saharan legal tradition, in The Cambridge Companion to Comparative Law, Mauro Bussani and Ugo Mattei, eds., 313 – 343, at 313 (referring to African law); Yassari, Nadjma & Michaels, Ralf, 2021, Einleitung, in N. Yassari and R. Michaels. eds. *Die Frühehe im Recht*, Mohr Siebeck, 1-15, at 13; see also: Mezahi, Maher. 2021. Algeria and a question of identity: Who counts as African?, *BBC News*, 20.12.2021, available at https://www.bbc.com/news/world-africa-59689710.

[30] See unstats.un.org/unsd/methodology/m49.

[31] For a comparative approach in Southern Africa, see Rautenbach, Christa. 2016. A Family Home, Five Sisters and the Rule of Ultimogeniture : Comparing Notes on Judicial Approaches to Cusotmary Law in South Africa and Botswana, *African Human Rights Law Journal* 2016 145-174.

[32] An online search in the International Journal of Law, Policy and the Family confirms this impression.

1. The "Model Function" of ECOWAS

West Africa according to the classification established by the UN is a generally accepted reference. It largely coincides with the 15 member states of the Economic Community of West African States (ECOWAS). As Mauritania has withdrawn from ECOWAS, there is a difference between the two, but for the purpose of the following arguments, there are only minor implications.

Founded in 1975, ECOWAS is the oldest regional economic organization in Africa that has been operating without interruption. Due to the level of coordination and integration, ECOWAS is seen as a role model in the African continent in various aspects.[33]

ECOWAS' main purpose is the promotion of co-operation and integration with a focus on economic integration and development (articles 2 and 3 of the revised Treaty[34]). The Treaty identifies a variety of areas for co-operation, essentially different economic sectors, but cooperation includes political, judicial and legal affairs (Chapter X) as well as social and cultural affairs (Chapter XI). In addition, Member States "undertake to consult with one another (…) for the purpose of harmonizing and coordinating their respective policies in all other fields (….)" (article 67).

Unlike OHADA (the Organization for the Harmonisation of Busines Law in Africa that includes many, but not all West African jurisdictions), ECOWAS does not state the harmonization of law as such as one of its aims, with the exception of the creation of a common investment code (article 3 (2) (i)). However, economic integration and general cooperation often imply legal harmonization.[35] It is therefore not surprising that there are efforts to

[33] See for example Growing together : The ECOWAS countries are looking to deepen the level of integration, in Oxford Business Group: *The Report: Ghana 2012: Country Profile*, p. 31; for migration, see Dick, Eva / Schraven, Benjamin. 2019. *Regional Cooperation on Migration and Mobility : Insights from two African Regions*, Proceedings of the African Futures Conference, Volume 2 : Africa in the World : Shifting Boundaries and Knowledge Production, available at https://anthrosource.onlinelibrary.wiley.com/doi/10.1002/j.2573-508X.2018.tb000011.x, 102 seq., p. 114, with references.

[34] Revised Treaty of the Economic Community of West African States (ECOWAS), 24 July 1993.

[35] See for the desirability of harmonisation already : Ovrawah, O. Anukpe. 1994. Harmonisation of Laws within the Economic Community of West African States (ECOWAS), *African Journal of International and Comparative Law* 6(1), 76-92.

harmonize laws in different areas such as labour law[36] or mining[37]. While it is difficult to assess the success of such initiatives, ECOWAS seems one of the more active regional economic communities in Africa in this regard.[38]

More importantly, it is in the judicial protection of human rights and free movement of persons that ECOWAS played a model role.[39] Since 2005, the ECOWAS Community Court of Justice accepts the submission of individual complaints for human rights violations.[40] In spite of difficulties in enforcing such awards[41], the ECOWAS court seems to become "a formidable judicial force in the field of human rights."[42] Regional Human Rights Courts have played an important impact on family law, and the European Court of Human Rights Illustrates that such judicial competency might be particularly powerful in this regard.

In West Africa, local academics have considered the harmonization of family law already relatively early on. However, there are little political efforts promoting harmonization in this area, with two important exceptions: the

[36] According to a ECOWAS press release of 23/05/2019, a Directive on the Harmonisation of Labour Laws in the ECOWAS Region was discussed, ECOWAS to harmonise Labour laws in the region | Economic Community of West African States(ECOWAS), available at https://www.ecowas.int/33826/

[37] A Model Mining and Minerals Act was adopted in 2019 and is available (in French) at https://www.minesgeologie.gouv.sn/sites/default/files/2021-01/EMMMDA%20&%20Impl%20Strategy%20Abuja%20%20v01072019.Fre .pdf ; see also the ECOWAS press release, 16/08/2018, National experts examine ECOWAS model mining and minerals development act, available at https://www.ecowas.int/national-experts-examine-ecowas-model-mining-and-minerals-development-act/ ; currently, a regional petroleum code is being elaborated, see ECOWAS press release of 15/12/2021, Towards an ECOWAS Regional Petroleum Code, available at https://www.ecowas.int/towards-an-ecowas-regional-petroleum-code/.

[38] For the term regional economic community, see Article 3 (l) of the Constitutive Act of the African Union ; see also https://au.int/en/organs/recs.

[39] Ebobrah, Solomon T. 2012. Human rights developments in African sub-regional economic communities during 2011, *African Human Rights Law Journal* 12:223, at footnote 1 and p. 243 ; Viljoen, Frank. 2007. *International Human Rights Law in Africa*, OUP, at 496-497, 503 and 507.

[40] Supplementary Protocol amending the preamble and articles 1, 2, a9 and 30 of Protocol A/P.1/7/91 relating to the Community court of Justice, new Article 9 (4) and new article 10 (d) ; see Viljoen 2007, p. 507, for the development.

[41] See for example Frimpong Oppong, Richard. 2017. The High Court of Ghana Declines to Enforce an ECOWAS Court Judgment, *African Journal of International and Comparative Law* 25, 127-132.

[42] Ebobrah, 2012, 243.

effort to prevent child marriage,[43] and (to a lesser extent) the strive towards gender equality.[44] Both issues would require comparative analysis.

ECOWAS's potential for cooperation and integration coupled with a judicial institution that can hear individual's human rights complaints make it an interesting area to explore. Especially in the latter area, ECOWAS has a model function in Africa that renders it particularly appealing for comparative investigations.

2. Normative Diversities

West Africa is fascinating for comparative lawyers interested in normative pluralism, but also in post-colonial approaches. Its geographical proximity to Europe meant that different European colonial powers took possession (sometimes successively) of areas inhabited by the same ethnic groups. Unlike in other places such as South Asia or North America, even with time, none of the colonial powers prevailed in a way to have the major influence in the entire region. In the 15 West African states, there are today three official languages (English, French and Portuguese) – and there are over thousand local languages, several of them cross-border such as Ewe (Ghana, Togo, Benin), Ga (Ga-Dangme: Ghana, Togo, Benin), Fulflulde (Fula/Peul: in most West African countries), Hausa (Nigeria, Niger), Mandingo (Guinea, Guinea-Bissau, The Gambia, Senegal), Wolof (The Gambia, Senegal, Mauritania), Yoruba (Nigeria, Benin, Côte d'Ivoire), and others.[45] The colonial experiences and administrations have defined the boundaries (and also, to a large extent, the

[43] ECOWAS Press Release, 28/01/2019, ECOWAS moves to protect child rights and to prevent child marriage, available at https://www.ecowas.int/ECOWAS-moves-to-protect-child-rights-and-prevent-child-marriage-in-the-region/; see also the Niamey Declaration of the ECOWAS first ladies, Press release of 07/07/2019, available at https://www.ecowas.int/the-niamey-declaration-of-ecowas-first-ladies/ , on the (poor) implementation, see Onyeji, Ebuka, 2021, Child Marriage: Experts rue poor implementation of ECOWAS policy by member-states, Premium Times (Nigeria), available at https://www.premiumtimesng.com/news/headlines/464090-child-marriage-experts-rue-poor-implementation-of-ecowas-policy-by-member-states.html

[44] Since 2003, ECOWAS has a Gender Development Center within the Executive Secretariat, see https://www.ecowas.int/specialized-agencies/ecowas-gender-development-centre-egdc/.

[45] The enumeration is copied from the Website of ECOWAS: www.ecowas.int/about-ecowas/history, with slight adaptation to more common denominations ; it does not represent a valuation of the author or a scientific sample ; a correct linguistic representation exceeds the capacity of the author, see for the debates : Vossen, Rainer and Dimmendaal, Gerrit. eds. 2020. *The Oxford Handbook of African Language*, Oxford Universtiy Press.

state legal systems). The underlying cultural layers[46] often go beyond these borders.

The most striking example in this regard is the situation of Senegal and The Gambia. The former British Colony and Protectorate is entirely surrounded by Senegal, with the exception of the Western coast, and it essentially follows the course of the Gambia river. The border does not follow any ethnic division, and the local languages often correspond. Interestingly, though due to the colonial experience, such languages (such as Wolof) are often complemented with English or French words respectively.[47] Also in other areas of West Africa, the ethnic groups and their languages cover several states, colonialized by the French and the English. The Ewé people (and their language), for example, spread across Ghana, Togo and Benin.[48]

Such a setting is an ideal exploration for legal scholars interested in exploring the interactions between the different legal formants, or/and between formal statutes, strongly influenced by the colonial heritage and sometimes even still colonial in origin, and different customary[49] laws and traditions. In Senegal, for example, family law was codified in 1972, 12 years after independence, after controversial debates. The family Code unified the over 60 different customary rules previously recognized by law[50], with differences according to the religions even within the same ethnic group.[51]

---

[46] Sacco, Rodolfo. 2012. The sub-Saharan legal tradition, in The Cambridge Companion to Comparative Law, Mauro Bussani and Ugo Mattei, eds., 313 – 343, uses the term traditional law, religious layer, colonial layer, and law of independence.

[47] See for the importance of Wolof in the region and the mix with French: Mc Laughlin, Fiona. 2017. How a lingua franca spreads, in E. Albaugh & K. M. de Luna, eds. *Tracing Language Movements in Africa*, Oxford University Press, 213-233.

[48] See for a historical account and the political debate in the 1950ies : Amenumey, D.E.K., 1969, The Pre-1947 Background to the Ewe Unification Question : A preliminary sketch, *Transactions of the Historical Society of Ghana*, Vol. X, 65-85.

[49] On the different meanings of customary law, see Diala 2021.

[50] Arrêté 2591 du 23 février 1961.

[51] E.g. for the Diola (catholic and Islamic), for the Bainouck (animiste, catholic and islamic) or the Mancagne; see arrêté 2591 du 23 (or 28) February 1961, quoted by Ndoye, Doudou, 2011, La famille sénégalaise et le droit moderne, in *Droit africain de la famille*, Editions juridiques africaines, at 5 - 6; Guinchard, Serge. 1978. Le marriage coutumier en droit sénégalais, *Revue internationale de droit compare* 30, 811-832, also refers to that statute (at 811); for a general overview on the part of customary law in African (mainly francophone) family law codifications, see Kangulumba Mbambi, Vincent. 2005. Les droits originellement africains dans les récents mouvements de codification: le cas des pays d'Afrique francophone subsaharienne, *Les cahiers de droi*t 46:1, 315-338, at 327 -332; for a similar comparison, see Thioye, Moussa. 2005. Part respective de la tradition et de

Subsequent discussions about family law reforms did not lead to major changes.[52] In The Gambia, there seems[53] to be a distinction between three different regimes: a statutory, a customary and a religious[54]: indeed, the 1997 constitution provides for the application of customary law (section 7, e), and sharia law (section 7, f), the latter "as regards matters of marriage, divorce and inheritance", but both limited to the members of the communities to which it applies.[55] The application of customary law in family matters seems limited to a small ethnic group (the Manjagoes) who are Roman catholic[56]; the big amount of family law issues is dealt with by the Cadi courts in application of Sharia.[57] The largely uncodified family law in The Gambia contrasts with the Senegalese codification, and it would be interesting to explore whether and how this difference translates with the institutions and the people dealing with family law issues and conflicts.

The normative complexities of West Africa go beyond the interaction of traditional norms and formal law. At times of a growing realization, in Europe, of the (remaining) importance of religion in the area of family law, given the challenges European legal systems and societies perceive especially in interactions with Islamic law, a look at West Africa might be revealing. Here, both, Islam and Christianity have had profound influences, on state law and on other norms.[58] Islam has a long history and has had a profound influence mainly in the North and Christianity has generally had more influence in the South of

---

la modernité dans les droits de la famille des pays d'Afrique noire francophone. *Revue internationale de droit comparé* 57 (2): 345-397.

[52] See Brossier, Marie, 2004, Les débats sur le droit de la famille au Sénégal. Une mise en question des fondements de l'autorité légitime ? *Politique africaine* 96 :4, 78-98.

[53] Reliable sources on The Gambia are difficult to obtain in Europe, another example that shows the importance of collaborative research in West-Africa.

[54] Jallow-Sei, Aisatou. 1997. Women & Law in The Gambia, in Akua Kuenyehia. Ed. *Women & Law in West Africa. Situational Analysis of Some Key Issues Affecting Women*, Legon: University of Ghana, at p. 2 ; see also Komaye Agin, Emmanuel. 2009 *The Gambia Legal System*, Artwords Production, at 13 seq.

[55] The 1997 Constitution even explicitly allows for discrimination "with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law" (section 33, subsection 5).

[56] Jallow-Sei, 1997, at 8-9: the cases on customary law mainly concern issues of land tenure, see FaFA Edrissa M'Bai. 2016. *Select Superior Court Judgments on Customary Law and Procedure* 1964-2014.

[57] See Judiciary of the Gambia. 2012. *Rules of Islamic Personal Law applicable in the Gambia*; The Gambia Judiciary. 2011. *The Gambia Sharia Law Reports Containing Some Judgements and Rulings of the Cadi Appeals Panel*.

[58] Sacco, 2012, at 319, speaks about the religious layer.

West Africa, the two religions coexist to varying degrees in basically all the countries of West Africa, often mixing with other traditional beliefs. Only in Niger (99% Muslim) the Gambia (96% Muslim) and Mali (95%), the majority of one exceeds 95%, and in Cape Verde, only 2% of the population identifies as Muslim.[59] The interaction of religious norms with traditional belief systems and ethnic norms[60] as well as with state norms is very dynamic, and the different norms have important and often competing influence on the family.[61] This makes the area a particularly interesting terrain for the exploration of religious pluralism. The codification and reform process in Senegal, but also in other jurisdictions such as Mali shows the strong influence of religion in those fields.[62]

3. Practical and Theoretical Interests in Difference

An important practical reason to look at West Africa is migration. The links between West African states and their former colonial power have led to African migration to Europe long after the slave trade, and the number of West African migrants to Europe seems to be on the increase.[63] The migrants bring their family law conceptions, so knowing them (and the related issues and interests) is a prerequisite for dealing with family law issues in the context of migration. This is especially important with regards to conceptions that are radically different from the ones in Europe. In this sense, practical considerations can relate to a more theoretical consideration in research design, the choice of a "most different" jurisdiction.[64]

---

[59] Statistics according to the US Department of State, 2020 Report on International Religious Freedom, available at https://www.state.gov/reports/2020-report-on-international-religious-freedom/. The report refers to the official estimates.

[60] I do consciously not attempt a classification and systematization of the different normative systems.

[61] See Sacco, 2012; see also Menski, Werner. 2006. *Comparative Law in a Global Context. The Legal Systems of Asia and Africa*, 2nd ed., Cambridge : Cambridge University Press.

[62] See Lekebe Omoualli, Dapthone. 2016. Les réformes de droit de la famille dans les Etats d'Afrique noire Francophone: tendances maliennes, in: *Les réformes de droit privé en Afrique. Actes du colloque organise par le laboratoire d'études et de recherche sur le droit et les affaires en Afrique*. Djuidje Chatué, Brigitte. ed. Presses Universitaires d'Afrique, 229 – 255, especially at 231-233; for Senegal, see N'Diaye, Marième, 2016, La réforme du droit de la famille, Une comparaison Sénégal-Maroc, Presses de l'Université de Montréal.

[63] Flahaux, M.-L., & De Haas, H. 2016. African migration: Trends, patterns, drivers. *Comparative Migration Studies, 4*(1), 1- 25.

[64] See for example (though for the area of constitutional law) Hirschl, Ran. 2005. The Question of Case Selection in Comparative Constitutional Law, *American Journal of Comparative Law*, 125-156, at 139, who speaks about «the 'most different cases' logic».

In fact, many West African legal systems recognize some form of polygamy, and homosexuality is often very critical regarded and even criminalized – Ghana is currently discussing the "Proper Sexual Rights and Ghanaian Family Values Bill 2021" that would do so[65]. The interest of this area will be shown more in detail below (B.2.). West Africa would therefore be a useful terrain for comparatists interested in exploring and understanding these very different approaches and attitudes in family law.

B. The Object of Comparison – A Challenge for the Comparative Lawyer

Taking one of the many opportunities West Africa offers for comparative analysis doesn't mean that carrying out such a comparative law enterprise will be easy. Already identifying the object of comparison can be a challenge.

Conceptually, comparative law is about comparing "law". However (also) comparative lawyers have realized that defining the concept of law is very difficult (if not impossible) and the understanding of law varies in different cultures.[66] After having focused on state law and state institutions for a long time, many comparative lawyers have today come to broaden the focus and see non-state normative orders as equally worthy of attention.[67] The normative diversities in West Africa (see above, A.2.) illustrate that such a broad focus is of particular interest and importance in this area.

Methodologically, comparatists nevertheless frame the starting point in terms of law. Even the functional method, designed to take social function rather than "the law" as a *tertium comparationis*[68] is closely linked to legal

[65] For a critical discussion, see for example the analysis by experts appointed by the Human Rights Council, available at https://ghana.un.org/index.php/en/139914-draft-bill-proper-sexual-rights-and-ghanaian-family-values-bill-2021-analysis-un-independent.

[66] Menski, Werner. 2006. *Comparative Law in a Global Context. The Legal Systems of Asia and Africa*, 2nd ed., Cambridge : Cambridge University Press, at 26 seq; Samuel, Geoffrey. 2004. Epistemology and Comparative Law : Contributions from the Sciences and the Social Sciences, in Mark Van Hoecke ed., *Epistemology and Methodology of Comparative Law*, Hart, 35 – 77, at 39 seq.; Twining, William. 2009. General Jurisprudence. Understanding Law from a Global Perspective. Cambridge: Cambridge University Press, at 65 seq

[67] Michaels, Ralf. 2016. Religiöse Rechte und postsäkulare Rechtsvergleichung. in: *Zukunftsperspektiven der Rechtsvergleichung*, ed. Reinhard Zimmermann, Tübingen: Mohr Siebeck, 60-122; Leckey 2017, at 16.

[68] Samuel, Geoffrey. 2014. An Introduction to Comparative Law Theory and Method. Hart, at 76.

concepts:[69] Lawyers typically identify the social function in relation to a legal concept, for example the protection of a weaker party of a contract. More generally, by their legal background, comparative lawyers will be unlikely to reach the stage of anthropologist who do not necessarily attach a lot of importance to the classification of the normative systems they analyse.[70] Being aware of this limit, defining the objects of comparison is nevertheless a possibility to integrate the social element within the research method. Before exploring ways to do so when comparing West African family law (2.), some methodological choices need to be made (1.).

1. Methodological Choices

The different aspects that might attract interest in doing comparative law on West African family law are of primary importance for the method of the enterprise. Several authors correctly emphasize that the purpose of a comparative enquiry is one of the main factors when determining the research design.[71] The aim of the analysis – and of the comparison - is an important element when formulating the research question,[72] and the research question necessarily relates to the object of the analysis.

Jaakko Husa distinguishes between two types of choices that have to be mind when defining the strategy (or design) of the comparison: technical ones that are closely linked to the collected data and more theoretical choices relating to the theoretical frame of reference (functionalism and its different

[69] Samuel, 2014, at 68 (Figure 4.1.), explains that the function is identified on the basis of the legal rule; at 80, he points out that it is epistemologically difficult to distinguish law object (the legal rule) and function.

[70] This according to Anders, 2015; von Benda Beckmann, 1981, at 311 seq, gives a slightly different account, either representing a different (earlier) view or because of the different purposes of the contributions.

[71] Basedow 2014, at 856; Jaluzot, Béatrice. 2005. Méthodologie du droit comparé : Bilan et perspectives, *Revue internationale de droit comparé* 57: 29-48, at 45; Moréteau, Olivier. 2005. Conclusions générales, in Jean du Bois de Gaudusson ed. *Le devenir du droit comparé en France*. Presses Universitaire Aix-Marseilles ; see also Kischel, Uwe. 2015. *Rechtsvergleichung*, Beck, at 93; critical: Frankenberg, Gunter. 2016. *Comparative Law as Critique*, Elgar, at 73: "In general, the 'how compare' is shaped by a 'why compare' : purpose infiltrates perspective."

[72] See for the research question: Samuel 2014, at 26, who stresses the need to formulate a question that has built into it "the reason why a comparative approach is fundamental if a satisfactory response to the research question is to be provided".

alternatives such as structural comparisons).[73] Rather than analyzing the different theories of comparison, this contribution will take a more practical approach and look at the technical choices, highlighting the potential advantages and difficulties of the different options.

A first and fundamental question is to decide whether one wants to stay with frontal comparison – exploring a given foreign legal system with one's own background[74] – or whether the additional step of horizontal comparison can be taken. As anthropological literature highlights, the distinction between frontal and horizontal comparisons helps creating awareness of the influence of the person carrying out the comparison[75], even though comparative law literature most often considers only horizontal comparisons as truly comparative exercise.[76] Nevertheless, already a frontal comparison, i.e. the description of one West African jurisdiction by a Western-educated lawyer is a challenging enterprise that requires taking into account numerous methodological issues. A majority of publications on West African family law are of this nature. However, comparative family law as a discipline would probably benefit more from horizontal comparison (see for opportunities A.).

When engaging into horizontal comparison, the number of jurisdictions taken into account will have an impact on the possible depth of enquiry: the more jurisdictions are taken into account, the less it is possible to go beyond the surface.[77] An example for a broad but shallow overview is for example the African Union Compendium of marriage laws,[78] a tool to inform various stakeholders, but not the result of a deep comparative analysis. Given the

---

[73] Husa, Jaakko. 2015. *A New Introduction to Comparative Law*, Hart, at 99 – 117; different authors name the alternatives to functionalism differently, Husa, mentions systemic and critical (including postcolonial) approaches besides functionalism and structural comparison (at 117); Samuel, 2014, at 81 seq (who speaks about « schemes of intelligibility) structuralism and hermeneutical method; see also Kischel, 2015, at 108 seq.; for a critical description of functionalism and alternatives, see Frankenberg, 2016, at 37 – 70.

[74] The description of one's own legal system for a foreign readership / audience is rarely considered as comparative law, though similar considerations / reflections would apply.

[75] See below, II.B.2., for more details.

[76] In German, frontal comparison is generally qualified as "Fremdrechtskunde" or "Auslandrechtskunde": see on the links between the two: Kischel, 2015, at 2 seq; it is not clear whether Husa, 2015, at 108, would consider frontal comparison as bilateral comparison or not.

[77] Husa, 2015, at 108-109

[78] African Union, Marriage Laws in Africa, 2019, A Compendium from 55 African Union Member States, available at https://africa.unwomen.org/en/digital-library/publications/2019/03/marriage-laws-in-africa.

number of jurisdictions in West Africa, such an enterprise is challenging, especially if one aims for a culturally informed comparison. It approaches the impossible if it is done by one researcher alone. Therefore, they will probably be limited to collaborative projects, an approach that has numerous other advantages. Even then, however, the depth of the analysis will probably decrease with the number of jurisdictions under consideration.

Comparative lawyers interested in understanding the normative diversities indicated above (2.) would therefore be well advised to limit the number of jurisdictions. It is nevertheless worthwhile to venture into more than one jurisdiction. For such an enterprise, the question of sampling will become essential. In this process, general overviews such as the African Union Compendium above might serve as a helpful starting point. The sampling will then depend on the objective of comparison.

As indicated above, an analysis into the impact of different colonial experiences and heritages could be particularly interesting. One might speak of cross-cultural comparisons because of the impact of the colony on the (formal) legal culture and the legal language[79]. Such an analysis will necessarily look at jurisdictions with different colonial backgrounds: either neighbouring jurisdictions (with an overlap in ethnicities) such as Senegal, the Gambia and Guinea-Buissau, or Ghana and Togo, or/and jurisdictions with different colonial backgrounds on the basis of other general criteria that might have an impact on family life such as religion, the UN Human Development Index, the Gender Development Index, or other indicators.[80] Nigeria and the Ivory Coast would, for example, have similar values. Scholars have argued with good reason that comparative lawyers should take such indicators more seriously, considering them in the process of sampling might be a first step, though one shouldn't do so without a critical analysis and awareness.[81]

---

[79] See Husa, 2015, at 114 seq.

[80] UNDP, Human Development Report 2020, The New Frontier, Human Development and the Anthropocene, available at http://hdr.undp.org/sites/default/files/hdr2020.pdf.

[81] See e.g. David Nelken & Mathias Siems. Eds. 2017 Global Social Indicators: Constructing Transnational Legitimacy. International Journal of Law in Context. 2017:4; for legal indicators and comparative law, see e.g. Infantino, Marta. 2019. Quantitative Legal Comparisons: Narratives, Self-Representations and Sunset Boulevards, *Journal of International and Comparative Law*: 287 – 306 (for legal indicators);.

The colonial heritage does not need to be the only or the main criteria for sampling. Especially (but not exclusively[82]) for a longitudinal – historical comparison rather than a contemporary one,[83] it could equally be interesting to look at the developments of different jurisdictions with the same colonial heritage.[84] For reasons of language and formal legal culture / education, such comparisons are currently more common than cross-colonial ones.

A subtype of multilateral comparison, and a more radical way of acknowledging the importance of non-state normative orders would be to compare customary norms within a single state jurisdiction, or to take a non-state normative order as starting beyond of a cross-jurisdictional comparison. Such an approach was taken for example when formulating Senegalese family law[85]. This research will then approach anthropological research and would therefore gain from being construed as interdisciplinary in nature.

There are other methodological choices that show the variety of possible comparative analysis in West Africa. A very common distinction in comparative literature is the one between micro- and macro-comparison.[86] Family law comparisons could be seen by definition as a type of micro-comparison, as they will necessarily look at specific aspects of the legal system under review. However, a macro-comparison focusing on the big lines of the different family law regimes in West Africa might nevertheless be possible, and a preliminary macro-analysis is important for purposes of sampling (see above, a.). In addition, in any thick comparison, macro-considerations will be taken into account, as much as the macro-comparatist will need to engage in a certain number of micro-comparisons. Therefore, the distinction between the two levels of comparison might be of lesser importance than general theory.

---

[82] See for example N'Diaye, Marième, 2016, La réforme du droit de la famille, Une comparaison Sénégal-Maroc, Presses de l'Université de Montréal, the book is based on a PhD thesis in political science.

[83] Husa, 2015, at 104 – 105 sees the choice between longitudinal and « traverse » or horizontal comparison as one of the fundamental choices. However, a thick comparison will need to take the legal history of the jurisdictions under review into consideration.

[84] See for example Morris, H.F. 1979. The Development of Statutory Marriage Law in Twentieth Century British Colonial Africa, *Journal of African Law* 23: 37-64; more recently, see Esubonteng, John, G.. 2018. Conflictual insertion of marriage ordinances in British Colonial Africa: The Ghanaian Experience, in Christian Green, Jeremy Gunn and Mark Hill, eds., *Religion, Law and Security in Africa*, Stellenbosch: African Sun Media, 317-334.

[85] Arrighi, Gabriel, Le droit de la famille au Sénégal. 1968. In *Le droit de la famille en Afrique noire et à Madagascar*, ed. Kéba M'Baye, 83-115. Paris: Maisonneuve; see Brossier, Marie, 2004.

[86] For many: Husa, 2015, at 100 seq.

A final choice[87] is the one between vertical and horizontal comparison. While the horizontal approach (comparison of different jurisdictions / issues at the same level) is probably at the foreground, horizontal comparison could develop into an interesting area thanks to ECOWAS. A comparison between ECOWAS policies and the national approaches in these areas (e.g. concerning child marriage) would be a starting point; another one might be the case law of the ECOWAS Court, as soon as it develops in the area of family law.

The choices mentioned above are a few possibilities and considerations when choosing jurisdictions for research into West African comparative family law that could bring insights to the comparative law community as a whole. Of course, the interest, success and failure of a comparison will also depend on the identification of interesting objects of comparison.

2. West African Family Law as an Object of Comparison

This reflection on the object of comparison does not aspire to identify or classify and map all possible objects of comparison. Its main purpose is to explore ways in which the cultural aspects of family law can be brought to the centre of comparison (see above, Introduction).

A first possibility to do so would be to define the objects of comparison on the basis of anthropological research and debate, or/and on the basis of publications in African studies. There is, of course, a considerable amount of anthropological research on topics such as kinship and family. In the 1960 – 1970ies, several anthropological research project on family and marriage were carried out, and a Survey of African marriage and Family Life was published with a chapter on West Africa.[88] As anthropological theory has given up the ambition of generalized large-scale description in the wake of several shifts in anthropological theory, more recent anthropological research is more limited.[89]

---

[87] Given the perspective of this paper, the monocultural approach (see Husa,2015, at 114) is not further elaborated.

[88] Mair, Lucy. 1969. African Marriage and Social Change. Frank Cass & Co Ltd.

[89] See for an example of a recent research project of Alber, Erdmute, Häberlein, Tabea and Martin, Jeannett. , Generationenbeziehungen und innterfamiliäre Ressourcenflüsse in Westafrika: Ein Vergleich Benin – Togo, information available at https://www.ethnologie.uni-

Access to such scholarship requires a certain familiarity with the field and, at best, interdisciplinary cooperation. Consultation of classics in anthropology on kinship might be an inspiration, but generally be insufficient to assess how anthropological insights or cooperation can be useful for a specific project. In other terms, it would be naïve to assume that a mere consultation of a couple of books on anthropology would allow identifying objects of comparison that will then allow successful intercultural research. One would need to rely either on sufficient existing ethnographic fieldwork or engage oneself in such fieldwork, after having acquired the necessary tools to do so. While there are several lawyers who have engaged in anthropology and basically changed their disciplinary orientation, it would go beyond the capacity of many comparative lawyers to do so.

Another possibility for cultural inclusion would be to focus on debates and discussions rather than on legal rules.[90] Here, reasoning in terms of different institutions and for a – religious institutions, customary institutions, state institutions, might bring insights that go beyond the strictly legal. According to the same idea, it might be interesting to look at the debates surrounding recent legal reforms in family law.[91] Family law is indeed an area that is actively developing, and legal reforms in the field have been the object of controversial discussions, politically and culturally.[92] Focusing on state law reforms obviously bears the risk of overlooking the cultural. However, when looking at the debates rather than the black letter law alone, cultural elements and context will transpire, even if some voices risk not to be heard.

There are more advantages in focusing on debates. In terms of method, it might be easier to do than sound ethnographic fieldwork and therefore seems more at the reach of lawyers. It might also be a first step for a comparison that

---

bayreuth.de/de/forschung/forschungsprojekte/alber_innerfamiliaere-ressoucenfluesse/index.html; for the development of anthropology, see Rosen 2012 and Candeas 2019.

[90] See for an example: Leckey, Robert, 2021. Differences in a Minor Archive : Feminist Activists and Scholars on Cohabitation, American Journal of Comparative Law [forthcoming]-

[91] For an example, see Lekebe Omouali, Daphtone. 2016. Les réformes du droit de la famille dans les États d'Afrique noire francophone : tendances maliennes. In Brigitte Djuidje Chatué. Ed., *Les réformes de droit privé en Afrique*, Presses Universitaires d'Afrique, 229 – 255; for a comparison (grounded in political science) see N'diaye, Marième. 2016. *La réforme du droit de la famille : une comparaison Sénégal-Maroc*, Montreal : Les Presses de l'Université de Montréal.

[92] See for example the debates surrounding the adoption of new statutes in Côtes d'Ivoire (2012) and in Mali (2012).

looks at reasoning in different cultural areas.[93] Finally, it acknowledges that family norms are very much shaped by the debate that surrounds it. This debate is often political, social, and religious, reflecting different attitudes towards the family and gender. Political actors are playing an important role, and the diversity between the different jurisdictions – and the different actors - is considerable: for example, some political figures are seen (at least in the media) to promote gender equality[94], others have a more conservative agenda.[95]

A final consideration on the object of comparison takes a look at recent comparative family law more generally. When consciously leaving aside issues related to reproductive medicine that seem to be of little importance in West Africa for socio-economic reasons, two topics have been at the centre of attention: the role of women in the family and in family law, and same-sex relationships.

There is considerable research in West Africa on the former that has interesting cultural aspects,[96] and exploring it is promising.

The latter topic, however, seems to be beyond academic studies, even though it is a focus of international human rights law. It is important to realize that many see same sex relationships as contrary to their culture: the President of Senegal, for example, has repeatedly justified the prohibition of homosexuality on grounds of culture. This perceived public attitude makes academic research on this topic difficult for researchers located in these areas. Therefore, gender equality and regulation of same -sex couples are promising areas of research that will unavoidably deal with cultural context. It appears, therefore, that the look at other disciplines might be useful, but is not a

---

[93] Rosen, Lawrence. 2012. Comparative Law and Anthroplogy. in *The Cambridge Companion to Comparative Law*, ed. Mauro Bussani and Ugo Mattei, 73 – 87. Cambridge: Cambridge University Press at

[94] See for example : BBC News, Coronavirus lockdown : Sierra Leone 'role model' minister carries baby and holds Zoom meeting, available at https://www.bbc.com/news/world-africa-52487213; Glocal Citizen : The Gambia is Rewriting Sexist Laws to End Gender Discrimination, https://www.globalcitizen.org/en/content/the-gambia-rewriting-sexist-laws/; for social norms, see also OECD, Gener equality in West AFrica ? The role of social norms, available at https://oecd-development-matters.org/2018/03/08/gender-equality-in-west-africa-the-key-role-of-social-norms/

[95] See for example the pressure in Mali against the draft family code between 2008 and 2011 that led to considerable modifications of the original project.

[96] See for example: Akua Kuenyehia. Eds. 2003. Women and law in West Africa: gender relations in the family – a West African perspective, Ghana; Kañji, Saliou Samba Malaado and Camara, Fatou Kiné. 2000. *L'union matrimoniale dans la tradition des peuples noirs*, Paris: L'Harmattan.

necessity when defining objects of comparison, as long as the research methods will work with a sufficiently broad cultural awareness.

II. HOW TO COMPARE – INTERDISCIPLINARY SIGNPOST AND PITFALLS

Most literature on family law in West Africa generally describes one or several African family laws or traditions.[97] Possibly because of this descriptive approach, many of the authors who deal with more than one legal system do not address methodological questions of comparison, though they might well address other methodological issues.[98] Especially publications that describe "the African laws" sometimes give the impression to generalize without sufficient analysis, or, at least, they do not address important questions (such as the reason for choosing certain jurisdiction but not others).[99] Generalizations sometimes do have an important purpose that might well move considerations on comparison to the background[100]. Generally, however, it is important that statements on "the Africans" be grounded on sound methodological grounds, especially when made from outside of Africa.

For this reason, the second part of this analysis focuses on the methodology of comparison. In an attempt to consciously integrate social and cultural aspects, it will do so by looking at social sciences relevant for

[97] Thioye, Moussa. 2005. Part respective de la tradition et de la modernité dans les droits de la famille des pays d'Afrique noire francophone. *Revue internationale de droit comparé* 57 (2): 345-397; Ndoko, Nicole-Claire. 1991. Les manquements au droit de la famille en Afrique noire. *Revue internationale de droit comparé* 43(1): 87 – 104.

[98] Because of the focus on methodology, this is striking in Van Hoecke, Mark. 2012. Family law transfers from Europe to Africa : lessons for the methodology of comparative legal research, in: ed. John Gillespie and Pip Nicholson, *Law and Development and the Global Discourses of Legal Transfers*, 279-302, Cambridge: Cambridge University Press.

[99] See the examples quoted above, footnote 22.

[100] Kañji, Saliou Samba Malaado and Camara, Fatou Kiné. 2000. *L'Union matrimoniale dans la tradition des peuples noirs*, Paris : Harmattan, for example, have the purpose to show how important matriarchy has been in the tradition of « the black africain people » ; they address methodological issues in their introduction, but not relating to comparative elements ; Antoine, Philippe. 1997. Le mariage: droit canonique et coutumes africaines. Paris : Beauchesne : the author (a canon lawyer) discusses only one custom, while the title implies a more general analysis ; however, his aim is to show how canon law could deal more efficiently with African custom.

understanding law. The risk of misunderstanding and distortion[101] is worth taking when looking for inspiration.

There are many social sciences that are relevant for understanding law. The "social-scientific study of law" has become a large and somehow heterogenous area, as different approaches (law and society & critical legal studies in the US, socio-legal studies in the UK, and sociology of law and legal anthropology with slightly different focuses and separations in the anglophone West and continental Europe) have developed in different countries, and even though they are interacting and overlapping[102], they have not merged into a unified discipline.[103] The field brings together lawyers interested in social sciences and social scientists interested in law. Given the amount of literature and its diversity, it is a challenge to give an accurate picture, even when focusing on questions of method. Choices need to be made.

From a continental European perspective, anthropology seems the most relevant discipline to explore in order to gain relevant insights for legal research in Africa. While this seems an obvious choice, it requires critical explanation, engagement with comparative law and the anthropology of law (A.). This reflection will then allow looking for inspiration from anthropological literature on comparison (B.).

A. Comparative Law and Anthropology of Law

Anthropology used to be the discipline that analyses foreign cultures or « people ».[104] For a European scholar who intends to do research on West African law, anthropology therefore seems to be an ideal source for insights

---

[101] See e.g. Anders, Gerhard. 2015. Law at its limits: interdisciplinarity between law and anthropology. *The Journal of Legal Pluralism and Unofficial Law* 47, 411 – 422, at 414.

[102] See for example the collection *Comparative Law and Society*. 2012. Cheltenham : Elgar, edited by David Clark, with contributions on comparative sociology of law, comparative anthropology of law, and many more.

[103] Anders, Gerhard. 2015. Law at its limits : interdisciplinarity between law and anthropology, *The Journal of Legal Pluralism and Unaofficial Law*, 47(3) : 411-422 ; see also von Benda-Beckmann, Franz. 2008. Riding or killing the centaur ? Reflections on the identities of legal anthropology, *International Journal of Law in Context* 4,2 : 85-110 ; more recently : Herklotz, Tanja. 2020. Law and Society Studies in Context: Suggestions for a Cross-Country Comparison of Socio-Legal Research and Teaching, *German Law Journal* 21, 1332-1344.

[104] As the German term "Ethnologie" shows (Ethnos, Greek = people); see for this understanding: Von Benda-Beckmann, Franz. 1981. Ethnologie und Rechtsvergleichung. *Archiv für Rechts- und Sozialphilosophie* 67(3): 310 – 329.

relating to the methodological inclusion of social aspects. In addition, anthropological sources and insights take an important place in many publications on African family law.[105] However, in a time when many social sciences are grappling with their colonial past and increasingly questioning how western centric they are, when attempts are being made to "decolonialize" comparative law, such a reference to anthropology might also be antiquated, fostering a paternalizing view of "Europeans" on "Non-Europeans".

Indeed, with its focus on the foreign, if not to say the exotic[106], anthropology was the science to analyse societies that, according to the West, « lacked » law, and where Western-style law needed to be imported.[107] The consequence was a disciplinary division between the Western "laws"– comparative law – and legal anthropology.[108] In both disciplines, Western scholars have shaped the debate - and, to a large extent, they still do so today.

However, there have been important developments in both disciplines. As already mentioned in the introduction, awareness for different forms of law outside the West has been increasing in comparative law. Lawyers from the West who spent time in colonies or former colonies in Africa to teach "the law" realized the limits of the Western understanding of law, developed an interest in legal anthropology,[109] but remained sufficiently anchored in law to shape the debate. Today, writing about African "law" is no longer exclusively Western. African scholars do publish in Western comparative law journals on African family law,[110] and besides the (local) African publications (that are often difficult

[105] See for example: Arrighi, Gabriel. 1968. Le droit de la famille au Sénégal. In *Le droit de la famille en Afrique noire et à Madagascar*, ed. Kéba M'Baye, 83-115. Paris: Maisonneuve; other contributions in the same volume take a much more legalistic approach.

[106] Von Benda-Beckmann, 1981, at 310, mentions the term exotic.

[107] See for the powerful political reasoning behind this argument: Nader, Laura. 2005. Law and the Theory of Lack, *Hastings International and Comparative Law Review*. 28(2): 191 – 204.

[108] Von Benda-Beckmann, 1980.

[109] William Twining, Jacques Vanderlinden (who was born in Congo); more recently, Brian Tamanaha (see Twining, William. 2009. General Jurisprudence. Understanding Law from a Global Perspective. Cambridge University Press at 90).

[110] To cite just a recent example: Diala, Anthony Chima. 2021. Legal Pluralism and the Future of Personal Family Laws in Africa, *International Journal of Law, Policy and The Family*, 1-17; the Journal regularly publishes African contributions; for a French forum Tjouen, Alex-François. 2012. La condition de la femme en droit camerounais de la famille. *Revue internationale de droit comparé* 64: 137-167 ; Ndoko, Nicole-Claire, Les manquements au droit de la famille en Afrique noire. *Revue internationale de droit comparé* 43(1): 87 – 104.

to access), there are now comparative law fora in Africa.[111] Thus, the comparative law debate starts being more inclusive, though there are still important challenges – one of them being the mere lack of interest for Non-western legal systems that still seems very important in Western legal circles.[112]

Anthropology has changed as well. The discipline is no longer dedicated exclusively to exotic or "extraordinary" [113] places. As much as the comparative lawyer has realized that looking at foreign law will bring new insights to understanding his own law, anthropologists realized that their methods are useful to analyse institutions in the west: ethnography is applied to legal institutions such as the French Conseil d'Etat.[114] The geographical focus is no longer a distinguishing feature between comparative law and legal anthropology.

Having realized the use and the legitimacy of anthropological approaches when dealing with all institutions and societies, it appears unnecessarily restrictive not to look at the discipline when doing comparative law in West Africa. It is, however, important, to be aware of the context described above when doing so.

There is another feature in anthropology that makes it attractive for the purpose of the present enquiry. This feature is not specific to anthropology of law (that, apparently, fails to have a big impact on the discipline)[115], but a feature of anthropology generally: the fact that it deals essentially with comparisons.[116] It is this particular feature that I will explore more in detail.

---

[111] For example the Journal of Comparative Law in Africa, published by the Center for Comparative Law in Africa at the University of Cape Town.

[112] See Rosen 2012, at 83.

[113] See Örücü, Esin. 2003. Comparatists and Extraordinary Places: In: *Comparative Legal Studies: Traditions and Transitions*. Pierre Legrand & Roderick Munday, eds. Cambridge University Press, 467-489, at 468 seq. (who argues that comparative lawyers should do research in extraordinary places, with a slightly different focus than anthropologists had).

[114] Latour, Bruno. 2010. The Making of Law: an ethnography of the Conseil d'Etat ; see also Baudouin Dupret and Julie Colemans and Max Travers, eds. 2020. *Legal Rules in Practice. In the Midst of Law's Life*, London: Routledge, that combines Western and Non-Western approaches.

[115] Rosen, Lawrence. 2012. Comparative Law and Anthroplogy. In *The Cambridge Companion to Comparative Law*, ed. Mauro Bussani and Ugo Mattei, 73 – 87. Cambridge: Cambridge University Press.

[116] Rosen 2012, at 74 seq ; see also Barthélémy, Tiphaine. 2021. Pour une comparaison "au ras du sol", ethnographiques.org 41, available at https://www.ethnographiques.org/2021/Barthelemy.

B. Comparing in Anthropology: Inspiration

When exploring comparison in anthropology for inspiration in comparative law, I will first look at the field closely related to comparative law - legal anthropology (1.) - before considering anthropological literature on comparison more generally (2.).

1. Legal Anthropology

In her chapter on comparative law and anthropology, Lawrence Rosen[117] identifies four ways in which legal anthropologists have engaged in comparison. First, some legal anthropologists regard legal systems either as a specific instance of universal features found in all legal structures (thus addressing common problems) or at least treat them as equal in jurisprudential quality. A second and related approach was to measure the legal system against standards of another (typically Western) system of law – an approach that led to a debate on the appropriateness of applying legal concepts of one legal system to describe another one. A third approach consists in treating law as unique rather than as a part of culture, trying to identify "the legal": concepts, specialists, institutions. The last approach that Lawrence Rosen describes focuses on exotic elements (such as witchcraft) rather than on other methods relevant for conflict resolution/fact-finding or other functions that law might have.

Rosen identifies one common trait in the different approaches: their failure to go beyond the legal and explore mechanisms such as styles of thought or categorisation within and without the strictly legal.[118] According to her, this "circling back to the 'legal'" was a reason for the failure of legal anthropology to have a bigger impact on anthropology as a whole.

For a comparative lawyer, the methodological concerns expressed in Rosen's typology are all too familiar. Talking about the universal has been very present in comparative literature. In its most radical (and probably oldes) form, it is comparison for the sake of finding natural law. To some extent, the search for "the better law" – a purpose of many comparative enterprises – is a way to

[117] Rosen 2012, at 76.
[118] Rosen 2012, at 77.

measure different laws. Measuring also is in the core of the controversial discussions on legal origins and the efficiency of legal systems. Addressing common social problems is the methodological key idea of the functional approach to comparative law. And there probably is no comparative lawyer who has not grappled with finding ways to describe foreign concepts. The temptation to focus on the "exotic" is probably less present in mainstream comparative law, though comparative lawyers have expressed both, a fascination for the exotic and a risk to idealize or romanticize it.[119]

Comparison in legal anthropology, at least as described above, shows that legal anthropology and comparative law share common problems. Several methodological debates in comparative law seem to mirror some of the debates that have taken place in legal anthropology.

Most importantly, it is quite eye opening that legal anthropologists, too, seem to have difficulties to go beyond the legal – though undoubtedly at a different level than comparative lawyers do. Incorporating "the social", the culture when comparing law is therefore in and by itself a challenge. According to Rosen, this incorporation is more often done in other fields of anthropology; therefore, the next part will look at discussions of comparison in anthropology more generally.

2. Anthroplogy in General

In a recently published monograph[120], Matei Candea analyses the different debates in anthropology relating to comparison and proposes an archetype of comparison. Candea describes the history of anthropology as a history of comparisons, a history of debates and decisions on what and how comparisons "could" and "should" be done. He also shows the complexities of cultural comparisons – the subtitle of the book ("The Impossible Method") is telling.

The book offers other insights for a comparative lawyer. His description of the history of debates on comparisons in anthropology as a succession of debates between two ways in which comparison should be done reminds of the debates in comparative law methodology: the opposition between

[119] Frankenberg 2016, at 106 seq.

[120] Candea, Matei. 2019. *Comparison in Anthropology. The Impossible Method*. Cambridge : Cambridge University Press.

functionalism and contextualism, for example, can be pictured as a binary debate that involves so-called caesurism: postulating a break with what has been before and dismissing it.[121] This parallelism between the debates might be a consequence of Western (rhetorical) culture: the binary is a typical western style of reasoning[122] and caesurism a way to increase the importance of a proposal or idea by referring to its novelty. Therefore, the criticism against caesurism in anthropology and the proposed alternative – a vision of multiple comparison[123] is equally convincing when applied to comparative law and speaks for a multiplicity of methods in comparative law.[124]

More importantly for the present purpose, Candea identifies (and names) three sets of problems in anthropological comparisons[125]: problems of "mapping" relating to the identification of objects, properties and relations invoked in comparison, problems of "communication", addressing the relationship between the anthropologist and her or his object, and, finally, problems of purpose (such as the purpose of producing scientific generalization vs. understanding human experience, or the different political purposes).

All three sets of problems are not unfamiliar to comparative law. The focus of "everyday" comparative law lies on problems of mapping – anyone who decides to "do" comparative law has to decide what to compare. There is also extensive writing on the purposes of comparative law – partly quite different from the one's in anthropology, due to the need of comparative law to find a justification for the discipline in the field of law, and partly similar (such as the quest for generalizations or the political dimension). The so-called problems of communication are less prominently discussed in comparative law, except for some theoretical literature on incommensurability[126] and the subjective elements of comparison (they relate to similar issues than the ones in

[121] See the different authors mentioned above in footnote 73; for caesurism, see Candea, 2019, at 149 seq.
[122] Glenn, Patrick. 2014. *Legal Traditions of the World. Sustainable Diversity in Law*. 5th ed., Oxford : OUP, at 368 seq, with further references.
[123] See Candea 2019, 150 seq, refering to Pina Cabral and Gingrich and Fox.
[124] See also Samuel, Geoffrey. 2004. Epistemology and Comparative Law : Contributions from the Sciences and the Social Sciences, in Mark Van Hoecke ed., *Epistemology and Methodology of Comparative Law*, Hart, 35 – 77, at 39.
[125] Candea 2019, Chapter 1, 34 seq.
[126] See Petretta, Ida. 2020. The Question of Comparison. *The American Journal of Comparative Law* 68 :4, 893-928, at 917, with references to Joseph Raz.

anthropology[127]). Therefore, insights on the issue of communication, the relationship between the object and the person doing the comparison are of particular interest.

Anthropologists see the problem as specific to the discipline and discuss it extensively.[128] I will choose two examples to illustrate this discussion and the consequences. One example is the observation that "comparisons between 'us' and 'them' are always driven by an implicit or explicit agenda of relative valuation", leading to the claim that "there are five valences (…): establishing the superiority of the self, the superiority of the other, the similarity of the self and the other, the incomprehensibility of the other, or the potential to learn from the other."[129] At first sight, there seems to be a confusion between the purpose of comparison and communication. However, the observation can be taken as a reminder that the purpose, the underlying attitude, will have an impact on how the object is understood.

Another example are the culturalist, feminist and postcolonial critiques that lead to the realization that the units of comparison are often an "unacknowledged extension of western assumptions and interests"[130]. The anthropological debate following this realization led to a worry that was not exclusively epistemic, but also political. However, it seems that anthropologists have not found a solution: many authors have come to realize that neither extending western concepts nor giving up on them is a satisfactory way out.[131] Anthropologists, therefore, have to live with this dilemma.

Both examples draw attention to difficulties that are not completely foreign to comparative law. The first example is a reminder for a comparative lawyer to be aware of how the purpose of the enterprise influences her perspective. The second one appears like a development of a concern – the influence of the comparative lawyers' own legal system when looking at foreign law - that has been present in comparative law and that the functional approach

---

[127] See, for example, Legrand, Pierre. 2019. What Is That, To Read Foreign Law, *Journal of Comparative Law* 14:2, 290-310.

[128] Candea, 2019, at 40 seq and 128 : « Questions of communication – of the relationship between observer and observed – have taken centre stage. ».

[129] Candea, 2019, at 43, with references to Lloyd, G.E.R. 2015. *Analogical investigations*. Cambridge University Press.

[130] Candea, 2019, at 44.

[131] Candea, 2019, at 44, with further references.

to comparative law has tried to overcome. The problems voiced in the anthropology go further and make it clear that using a function alone will not solve the problem. The cultural understanding will shape the identification of a social function even if it does not explicitly attach to law as the identification of a legal concept would do.

It might seem unfortunate for the comparative lawyer looking for inspiration that Candea's description does not provide solutions to the numerous problems to comparison identified. It is therefore not possible for comparative law method to transplant a solution that anthropologists have found. The main insight to be gained, in my opinion, is to realize that comparative lawyers are not neutral when approaching any foreign legal system. Both, their purpose and their background will have a profound impact on their understanding of foreign law and their method when dealing with it.

There are several consequences of this realization. First, comparative lawyers should take an additional step, an extra effort, when looking at the foreign and when defining units of comparison, in order to detect, prevent and explain their own biases and assumptions. Another, maybe more controversial consequence is the need for transparency on the different cultural biases, and the need for humility. When doing comparative family law in West Africa, this is important and complex, given the important cultural aspects of the subject matter and the geographical area.

Family law is an area particularly prone to individual, to cultural and to gender biases, as it relates to a very personal topic: everyone has her personal history and experience with family – both, as a child and as an adult. These experiences will shape the attitudes, the interests and the sensibilities, and it therefore seems reasonable to assume that they will also shape the understanding of family law. However, to my knowledge, there is relatively little systematic research or debate in comparative law on these biases. The questions to be asked are very difficult and seem provocative, but, in my opinion, they are important ones: Do women and men do comparative family law in the same manner? How do factors such as being a parent, having gone through divorce, or sexual orientation influence one's look at family law? And given that all these experiences are closely related to culture,[132] how do they

[132] Cownie, Fiona. 2004. *Legal Academics : Culture and Identities*. London : Hart, at 167.

influence the look at foreign family law? Asking these questions bears risks that cannot be underestimated and need to be addressed right away: the personal experience cannot be taken as a factor that disqualifies from doing research in the area of family law. It would also be inadmissible to require disclosure of family status, experience and sexual orientation, as this would be a violation of privacy. Disclosure also bears the risks of any argument or research finding being dismissed or explained on the basis of the background of the researcher. This would obviously be contrary to a sound and rich debate. Therefore, awareness of one's experiences and potential biases - consciously addressing one's identity - when dealing with family law is essentially a personal enterprise.

When engaging with West African law from a European perspective, when attempting to understand non-western law, the cultural differences will bring an additional layer of potential bias. Here, the risk of misunderstanding or misinterpretation is considerable. One might well argue that it will be impossible for a European to fully grasp the cultural complexities of such a different context.[133] However, in my opinion, comparative law "lives" from the exchange between insights from "within" and observations "from the outside". Maybe as a pre-condition, comparative lawyers who engage in culturally different foreign legal systems should be equally prepared to debate their own legal system. Engagement with foreign law will often help for doing so. There is, however, an important additional element when talking about comparative law. In the West African legal systems, the colonial heritage is still very important. Legal writing is very much influenced by the legal culture of the former colonializing power.[134] At the surface, considering the worldwide diffusion of Western conceptions of law, the epistemic difficulties might therefore seem less important. However, Rodolfo Sacco has rightly pointed to the importance of other legal formants, underlying cultural layers that play an important role in the way formal state law operates, even if the discourses are influenced by the western conceptions of law.[135] In addition to these epistemic difficulties, the political questions will remain. On both areas, it will again be an

[133] As Pierre Legrand probably would.

[134] For example the references to French authors in writings on Senegalese law.

[135] Sacco, Rodolfo. 2012; for a more theoretical explanation of the formants: Sacco, Rodolfo. 1991. *La comparaison juridique au service de la connaissance du droit*, Paris: Economica, 33-49.

issue of intellectual honesty for the comparative lawyer to reflect on these influences and disclose them.

Of course, there are good reasons to argue that self-awareness and self-reflection of the comparative family lawyer is not enough. There is an important theoretical literature on feminist legal theory and queer-theoretical approaches to law that addresses issues of gender and identity biases within the legal system and its categories.[136] And if comparative law is really interested to move away from its Euro-centric perspective, it is almost a necessity to adopt postcolonial theory in comparative legal scholarship.[137] However, in order to promote the diversity within comparative law, it would be overly restrictive to limit the comparative enterprise to developing these specific approaches.

It is on this last observation that an additional meaning of the term "communication" as proposed by Candea brings an important insight. The term does not only address the relationship between the object and the observer, but also the communication between the different observers.[138] In comparative law, the debate on method seems limited to certain fields or uses and purposes and is often ignored by others who "just do it".[139] In addition, it is important to realize the diversity (or rather homogeneity?) of the people that shape the discipline. For comparative law as a discipline to grow, the discipline needs to consciously and actively encourage diversity and engage in debate with "the other". In other terms, when doing comparative law on West Africa, an approach that includes cooperation and debate between local scholars and outsiders would be particularly promising.

The look at a discussion of comparison in anthropology has shown – unsurprisingly, perhaps - similarities and difference in the way comparisons are done and dealt with in the two disciplines. The difference leads to the

---

[136] See for example Genovese, Ann. 2014. Goode and Godde: The Practice of Feminist Judgment in Family Law, in Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter, eds., *Australian Feminist Judgments. Righting and Rewriting Law*, 375-388, Hart ; for Queer theory, see for example Robert Leckey and Kim Brooks, eds., 2010, *Queer Theory : Law, Culture, Empire*, Abingdon : Routledge, 2010, or Cossman, Brenda. 2019. Queering Queer Legal Studies : An Unreconstructed Ode to Eve Sedgwick (and Others), *Critical Analysis of Law* 6(1): 23-38.

[137] See e.g. Dann, Philipp and Hansehmann, Felix. 2012. Post-colonial Theories and Law, *Law and Politics in Africa, Asia and Latin America*, 45(2) 123-127; Roy, Alpana, *Postcolonial Theory and Law. A Critical Introduction*.

[138] Candea 2019, at 44 seq.

[139] Leckey, 2017.

conclusion that a transplantation of the debate is not possible. The similarities, however, draw the attention to several factors which the comparatist should be aware of, especially in order to deal with cultural biases and difference.

Conclusion

This article has argued that comparative family law in and on West Africa needs to put culture at the forefront, especially when it's done from a Western perspective. It then explored possibilities to do so. When looking at what to compare in West African family law, it becomes clear that the region hosts a big number of opportunities. Several issues under debate in Europe on the practical and theoretical level have been present for a long time. In fact, the cultural dimension is so present in debates on different issues on family law that even state-centric approaches to comparison are likely to include cultural elements. In that sense, while interdisciplinary cooperation is probably the most promising avenue to fully explore the potential of comparative family law in West Africa to understand law, a focus of comparison on debates in different arenas rather than on black letter law will also allow putting the cultural element at the centre. In this sense, culturally aware comparative law does not need to be an area for the social-scientific study of law alone.

When analysing the process of comparison, the discussion of comparison in anthropology of law is particularly interesting. On one hand, it confirms the possibility, or rather the need, to be open to a variety of methods to do comparisons. It also confirms the need – and challenge - to relate the legal to other fields. Both observations are an invitation, an opportunity to develop innovative approaches to comparative research that are aware of the different dimensions of comparison. The anthropological debate also shows the many problems related to comparison, the several risks of bias being the most relevant for comparative law. This risk can, however, be taken up as an opportunity in that it calls for an open and inclusive debate within the discipline of comparative law.