

Comparative Research in Contemporary African Legal Studies

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I. Introduction

In a leading work on comparative legal studies,¹ David Nelken starts by posing the question: “What is happening to comparative law?” He responds to this optimistically by suggesting that “amidst the current processes of borrowing, imitation and imposition of law and increasing global interdependence (both desired and undesired), comparative law is truly coming into its own.”² His confidence is shared by his co-author, Esin Öricü, who asserts that “in the 21st century comparative law will reach maturity,” and adds that this century can be heralded as “the age of comparative law.”³ They are not alone in feeling that comparative law has come of age.⁴ Indeed, interest and research in comparative law is booming in most places.

The situation in Africa, however, is worryingly different. A cursory look at the law curriculum in South African universities reveals the fairly disturbing trend in South Africa and, in fact, in most African universities, namely that comparative law as a subject of study has either been quietly relegated to the dustbin of history or left in the limbo of electives.⁵ This trend appears at a

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1. See David Nelken, *Comparative Law and Comparative Legal Studies*, in *COMPARATIVE LAW: A HANDBOOK* 3 (Esin Öricü & David Nelken eds., 2007).
2. *Id.*
3. See Esin Öricü, *Developing Comparative Law*, in *COMPARATIVE LAW: A HANDBOOK* 44, 62 (Esin Öricü & David Nelken eds., 2007).
4. For example, W.J. Kamba enthused, “There is no doubt that the days are over when comparative law represented an academic pastime good only to add a scholarly touch to footnotes in learned articles.” W.J. Kamba, *Comparative Law: A Theoretical Framework*, 23 *INT’L & COMP. L. Q.* 485, 485 (1974).
5. An examination of the law curriculum of the top twenty law faculties in South Africa shows that comparative law is studied as a module only in the University of Cape Town and

time when, globally, the debate is no longer about justifying the need for comparative law but rather trying to see how other emerging areas of legal scholarship can be incorporated within its big tent, areas touching on issues like globalisation, climate change, food security and migration. Does the trend suggest that comparative law is no longer of much relevance to contemporary legal scholarship in Africa?

The aim of this paper is to show that comparative law, more specifically comparative legal research, is of such critical importance to legal research in general that, in spite of the huge challenge of accommodating many important subjects in the law curriculum, it also deserves a place in all undergraduate curricula.

It can be argued that the doubts that there seemingly are about the relevance and future of comparative law in modern African legal scholarship have been encouraged to some extent by the rigid and dogmatic approach many traditional comparatists have taken to the subject. For example, whilst in many universities outside the continent the trend has been for comparative law to expand and penetrate other subjects in public and private law (giving rise, for example, to subjects like comparative constitutional law), there are still some who question whether it is a subject in its own right or nothing more than a method or technique of legal scholarship.⁶ The ambivalence of many renowned comparatists on the issue is quite profound.⁷ Where important questions arise, however, is in relation to undertaking general legal research. Do the methods and techniques of comparative law and comparative research have any relevance in ordinary legal research, or are they strictly reserved only for those doing typical traditional comparative law research? If it is the latter, then the threat that is posed to the quality of legal research by the removal of comparative law from the curriculum of African law schools needs to be taken seriously.

It is argued here that all legal research involves, directly or indirectly, some degree of comparison, which warrants applying certain of the principles and methodologies of comparative law. The next section paper therefore examines the rationale for adopting comparative legal research methods in undertaking every legal research. This is followed by a discussion of various methodological

University of South Africa. It is, however, an elective module in three other universities: Fort Hare, the Free State and North West University. By contrast, and based on the limited information obtained from the website of universities in the southern African region, it is only in the University of Botswana and University of Namibia where comparative law is studied.

6. See, e.g., Nelken, *supra* note 1, at 12, 14; Örücü, *supra* note 3, at 62. William Twining is one of those who argues that comparative law is not “an autonomous discipline or sub-discipline.” He advances three reasons for his position. The first is that such an idea is philosophically dubious; secondly, since all legal scholarship involves comparison, “it is misleading” to set comparative law apart; and, finally, comparative law has no defined subject matter. See WILLIAM TWINNING, *GLOBALISATION & LEGAL THEORY* 45 (2000); see also Kamba, *supra* note 4, at 486.
7. See, e.g., Nelken, *supra* note 1, at 14; Örücü, *supra* note 3, at 62; Kamba, *supra* note 4, at 486.

issues that are important in legal research. The section thereafter highlights a few of the pitfalls and limitations of comparative legal research. The concluding remarks contend that if comparative law has to be removed from law curricula in African law schools, it must be replaced by a course on research methodology introducing researchers to modern techniques of comparative legal research.⁸

II. The Rationale for a Comparative Approach to Legal Research

With so many new and exciting subjects competing for places on the curriculum of law schools, it is understandable that many of these institutions are inclined towards removing comparative law from their programmes or retaining it only as an elective. It is argued here that comparative legal research remains an important area of legal studies, particularly with regard to legal research. In arguing the point, this section considers two main issues. The first concerns the general relevance of comparative law to legal research; the second, the advantages to legal research of the comparative legal approach.

A. The relevance of the comparative approach

Questions about the relevance of the comparative legal research method in undertaking general legal research come to the fore because of the nature of comparative law. In its strict sense, comparative law, and inevitably any research linked to it, involves the comparison of two or more legal systems or legal families, including the comparison of selected aspects, branches or institutions of two or more legal systems or families.⁹ In this strict sense, comparative legal research means something more than just the study of the laws of more than one jurisdiction or the study of foreign law.

Going by the strict definition of comparative law, any legal research that does not meet this definition would not be regarded as comparative legal research. Nevertheless, it can be argued that all legal research is inherently comparative in nature. We can illustrate this by comparing two possible research topics: the first, “a comparative study of the judiciary in South Africa and that in Angola,” and the second, “a study of the role of the Public Protector in South Africa.” Whilst the first topic is explicitly comparative, one can argue that the second topic has implicitly comparative aspects to it. Why is this so?

One reason for this is that it is difficult to see how the law of a single country can form the basis of a serious independent scientific study. This is because

8. Whilst there is certainly no justification for retaining comparative law in its present Euro and Americo-centric focus, either it needs to be fundamentally Africanised, or aspects of it at least should be taught in other courses, such as introduction to law. See Charles Manga Fombad, *Africanisation of Legal Education Programmes: The Need for Comparative African Legal Studies*, 49 J. ASIAN AND AFR. STUD. 383, 383-98 (2014).
9. It is worthwhile pointing out that the entire concept of legal traditions, legal systems and legal families is highly contested in comparative law. See, e.g., Craig Lawson, *The Family Affinities of Common-Law and Civil-Law Legal Systems*, 6 HASTINGS INT'L & COMP. L. REV. 85, 85-131 (1982); Patrick Glenn, *Legal Traditions and Legal Traditions*, 2 J. COMP. L. 69-87 (2007).

one can only appreciate the role of the South African Public Protector and scientifically assess and comment on its effectiveness by referring to similar comparable institutions in other jurisdictions.¹⁰ These do not have to be similar institutions operating in other legal systems, although this latter aspect has to be factored into the analysis and the conclusions that will be drawn at the end of the study. No legal problem is inherently or exclusively national in nature or character.

Perhaps a more telling example is a study, for example, on “the limitation of rights under the South African Constitution of 1996.” Section 36(1) allows for limitations, provided they are “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” This clearly directs the court as well as the researcher to undertake a comparative inquiry about the practices in other free and democratic societies. Once again, it need not be a society operating under a different legal system but rather one that has a similar limitation clause. It is therefore clear that because no legal system is self-contained and self-reliant, legal research on any topic is either explicitly or implicitly comparative.

In fact, all scientific research involves comparison. As Esin Örüçü puts it, “[The] everyday process of thinking involves the making of a series of comparisons . . . the process of contrasting and comparing, juxtaposing the unknown and the known . . . [and] observing the differences and similarities.”¹¹ Swanson is blunter: “Thinking without comparison is unthinkable.”¹² However, it is Maurice Adams who puts the matter beyond debate. He states: “A legal arrangement can only be qualified as satisfactory or good because there is another arrangement by which it can be measured; such arrangement is never good in and of itself.”¹³

In spite of the way in which comparative law is defined, every legal topic or legal research is inherently comparative in nature. The difference between the legal comparatists carrying out a strict comparative law research and the ordinary legal researcher is simply one of degree, depending on the scope of the comparative research being undertaken. This also means that even in the

10. As James Gordley, *Comparative Legal Research: Its Function in the Development of Harmonized Law*, 43 AM. J. COMP. L. 555, 566 (1995), rightly points out: “Even when a national legislature has adopted a distinct solution, that solution can only be understood through analysis of the problem it was designed to solve. If the problem is transnational, one has to look outside one’s national boundaries to understand it. And sometimes, neither the problem nor its solution are national.”
11. Örüçü, *supra* note 3, at 45.
12. See Guy E. Swanson, *Frameworks for Comparative Research: Structural Anthropology and the Theory of Action*, in COMPARATIVE METHODS IN SOCIOLOGY ESSAYS ON TRENDS AND APPLICATIONS 141 (Ivan Vallier ed., 1971).
13. See Maurice Adams, *Doing What Doesn’t Come Naturally. On the Distinctiveness of Comparative Law*, in METHODOLOGIES OF LEGAL RESEARCH. WHICH KIND OF METHOD FOR WHAT KIND OF RESEARCH? 229 (Mark Van Hoecke ed., 2011).

absence of a separate module devoted to comparative law, comparative legal research is still a worthwhile pursuit for all legal researchers.

B. The imperatives for engaging in comparative legal research

A point made above bears repeating. All legal research, regardless of the topic and regardless of whether or not it is a comparative law topic, requires a degree of comparative research and analysis to ensure that its outcome is scientifically sound.¹⁴ Some writers have tried to make a distinction in comparative legal research between research conducted for “scholarly activities,” on the one hand, and research which involves “the activities of the legislatures, the practitioners of law and the judiciary.”¹⁵ Although the focus of this paper is on so-called scholarly research, especially at the postgraduate level, it can be argued nevertheless that all comparative legal research involves some degree of scholarly activity, the intensity of which will vary according to the objectives of the research. From this perspective, comparative legal research serves a number of important objectives.¹⁶

First, due to increasing globalisation and regionalisation, no legal problem is purely or exclusively national in nature or character. As a result, it is difficult to successfully research many aspects of national law in isolation of what is happening in the rest of the world. For example, the process of internationalisation or denationalisation of constitutional law has resulted in the adoption in national constitutional law of numerous shared norms of a universal nature whose origins can be traced to international and regional supra-national laws. As a result of these processes, certain constitutional law concepts, practices, institutions and doctrines have been reshaped, in some instances even replaced, by international or supra-national norms in several ways.¹⁷ Because of these external influences on constitutional law, it can be argued that almost all domestic constitutional law doctrines or constitutional texts raise issues which are inherently comparative in nature and therefore cannot be fully analysed and understood without comparative references either to common constitutional traditions (on account of similarity of constitutional traditions) or international law (on account of either international or regional human rights instruments).

14. There seem to be two logically distinct but similar-looking arguments: (1) it is all comparative in one way or another because that’s just how it is – the process is inherently like that; and (2) it is comparative because it has to be, normative, so as to live up to an external standard of scientific credibility (but it is then optional whether it is actually comparative – e.g. someone decides he does not care about the standard and then does not bother to be comparative in approach).
15. See Gordley, *supra* note 10, at 555-67; Öricü, *supra* note 3, at 53-56; Vicki Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 PENN. ST. INT’L L. REV. 319, 319-26 (2010).
16. See Öricü, *supra* note 3, at 53.
17. For a fuller discussion, see Charles Manga Fombad, *Internationalization of Constitutional Law and Constitutionalism in Africa*, 60 AM. J. COMP. L. 439, 439-73 (2012).

For example, a student writing on the limitation clauses in section 36 of the South African Constitution of 1996 cannot do justice to the topic by foregoing some degree of comparative inquiry. This is not only because of the fact that, in drafting this provision, the South African legislator was influenced by developments in other jurisdictions, but also because the courts in the country have frequently referred to foreign cases to help them interpret the provisions properly. In other words, the experience gained by one country in interpreting comparable legislation provides a valuable source of learning to another country.¹⁸

The denationalisation process entailed by the adoption of uniform international standards is taking place not only in public law but private law. The most significant of these initiatives is, without doubt, that by the Organisation for the Harmonisation of Business Law in Africa (OHADA).¹⁹ No study of any commercial law topic – for example, the liquidation of companies or insolvency – in any one of the member countries is complete without reference to developments in the OHADA member states. As this makes clear, it is difficult to conceive of a topic in which the law of a single country can form the sole basis of legal research and where the researcher will not in one way or another have to look beyond the national territory.

A second reason is that comparative legal research exposes the researcher to a wide range of legal principles, institutions, values, models, and approaches to dealing with problems. It is impossible to fully appreciate the strengths and weaknesses of one's national law or its approach to dealing with a specific problem in isolation of how similar problems are dealt with in other countries. Comparative legal research provides the researcher with an opportunity to discover and understand how other legal systems or institutions deal with a problem; why a particular approach has been adopted; how it compares with his or her legal system; and what lessons can be drawn from this to enable the design of a better system. By scrutinising and understanding the different conditions and historical circumstances that may have influenced a particular approach to problem-solving, the researcher will then be better placed to appreciate which doctrines, policies, institutions and other practices can be copied and which cannot.

A third advantage of comparative legal research is that it enhances the researcher's power of discernment. It enables him or her to differentiate those features of a legal system that are accidental, specific or peculiar, and which therefore cannot be transferred across national borders, from those that are general and universal and which can hence be transplanted and adapted to meet national needs. Apart from this, comparison is more generally a

18. See, e.g., Christa Rautenbach, *The South African Constitutional Court's Use of Foreign Precedent in Matters of Religion: Without Fear or Favour?* 18 PER/ELJ 1545, 1545-71 (2015), <http://www.scielo.org.za/pdf/pelj/v18n5/11.pdf>.

19. See Charles Manga Fombad, *Some Reflections on the Prospects for the Harmonisation of International Business Laws in Africa: OHADA and Beyond*, 59 AFR. TODAY 50, 51-80 (2013) [hereinafter Fombad, *Some Reflections*].

fundamental tool of scholarly analysis because it “sharpens our power of description and plays a central role in concept formation by bringing into focus potential similarities and differences”²⁰

Fourthly, comparative legal research enables research students as well as others, such as legal practitioners, judges, legislators and policy-makers, to become aware of other legal options which could be used to enrich national law. Comparative legal research promotes an open, critical but objective outlook that is mindful of the fact that the cross-fertilisation of ideas and cross-systemic dialogue should not be biased, for example, by being limited only to a study of developed countries.²¹ Judge Guido Calabresi, referring to the fact that several post-1945 constitutions were explicitly modelled on the United States Constitution, argues that the experience of judicial review in those systems should not be lightly ignored in the U.S. As he put it, “Wise parents learn from their children.”²² From this perspective, one can say that comparative legal research helps to liberate the mind from the confines of judicial nationalism, legal isolationism and parochialism, and reflects the ever-accelerating cross-systemic judicial dialogue which is taking place through inter-court borrowings.

Comparative legal research plays three main roles in facilitating the enactment of legislation and, more generally, law reform.²³ One role is that a study of the experience of other systems of law is valuable in indicating to what extent foreign institutions or solutions could act as a guide in developing new rules or solutions, or modifying or abolishing existing ones. A second advantage is that it acts as a guide with respect to the technique of drafting or formulating new legislation. Finally, the experience from the study of foreign legal systems may also provide useful guidance as to the practicability and enforceability of any proposed new law.

Fifthly, comparative legal research provides a useful means for filling the gaps and addressing the ambiguities which arise from the fact that no national legal system is complete. In common law systems, lacunae may occur where an issue is not covered clearly by legislation or binding judicial precedent. In civil law systems, the gap could come about because an issue is not covered by the provisions of existing codes. In common law jurisdictions, it is an inherent

20. See Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 129 (2005).

21. As Zweigert and Kötz point out, if comparative analysis suggests that a particular solution to a problem developed in one legal system should be adopted by another, one should not reject it simply because the solution is foreign. See KONRAD ZWIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 17 (1998). The authors quote Rudolph Jhering, who states: “The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from far when he has one as good or better at home, but only a fool would refuse quinine just because it didn’t grow in his back garden.” *Id.*

22. See *United States v. Then*, 56 F.3d 464 (2d Cir. 1995).

23. See Kamba, *supra* note 4, at 496-97.

function of courts to fill any gaps, and in doing so the judges often undertake extensive comparative legal research. Nevertheless, such research plays not only a positive role – that is, providing an occasion for judges to review the law and practice of foreign courts and see what can be borrowed to fill gaps – but also a negative role of indicating possible but undesirable solutions.

Sixthly, comparative legal research is key to any research aimed at drafting harmonised laws or drawing up international conventions and agreements. In harmonising or unifying laws, such as the OHADA system, extensive comparative legal research on the national laws is undertaken to assess the extent to which the diverse elements of the different legal systems need to be combined or adapted to each other so as to form a coherent whole whilst retaining their individuality or eliminating this entirely, if the desire is to unify the laws. However, a thorough study of the different legal systems is of vital importance in determining whether harmonisation or unification is feasible, desirable or useful. Comparative legal research identifying general principles recognised by most or all states is usually conducted when drafting international and regional conventions and agreements. In all cases of interpretation and application of international conventions and harmonised laws, comparative legal research is indispensable to ensuring orderly, uniform and consistent practice.

In spite of numerous imperatives for adopting a comparative approach in legal research, one major issue, to which we will now turn, is that of the method to be used.

III. Some Methodological Issues in Comparative Legal Research

How do you go about conducting comparative legal research? How do you compare? What methods do you use to compare? How do you decide the topics for a comparative study? These and other methodological questions have been posed since the early beginnings of legal scholarship in comparative law. Yet, despite the voluminous scholarship on this and related issues, there is no generally accepted framework for carrying out comparative legal research. As the writers Zweigert and Kötz correctly point out, “[I]t is extremely doubtful whether one could draw up a logical and self-contained methodology of comparative law which had any claim to work perfectly [for all topics or that will be generally accepted].”²⁴ The reality is that “comparative law still lacks a clearly formulated and widely accepted theoretical framework within which specific comparative legal studies and research [can be undertaken in any meaningful and effective manner].”²⁵

There are two reasons for this. First, the choice of methodology in any comparative law analysis is dictated by several factors, such as the nature of the research topic, the research questions and the purpose of the research. A second factor is that the choice of methodology will depend on whether the

24. See ZWIEGERT & KÖTZ, *supra* note 21, at 33.

25. See Kamba, *supra* note 4, at 495.

topic of research is a traditional comparative law topic in the strict sense of the word, or a domestic law topic with some comparative aspects; it also hinges on the scope, depth and level of the comparison involved. The latter form of comparative research can take a number of forms. It may be of an explanatory nature, for example, in that it requires the researcher to explain a law, principle, rule or legal institution by drawing on its historical background and evolution in a comparative manner. It may also be of a descriptive nature, requiring that the researcher merely identify and describe the applicable norms in two or more areas as a prelude to a subsequent analysis.

The methodological questions that scholars have asked over the years, without coming to any definitive answer, are diverse and complex but boil down to three main ones: what do you compare, what method do you use and how do you undertake the comparison itself?

A. What is to be compared?

One important prerequisite that has to be met before comparison can begin is determining the topic as well as legal system to be studied. This is critical because it will ultimately influence the methodological technique adopted in carrying out the research. Even more fundamental is the fact that the “success” or “effectiveness” of the research depends on the selection of the appropriate topic or area of law for the research.

It is often said that the topics to be compared must be comparable. Zweigert and Kötz have even gone further to state that “incomparables cannot usefully be compared” and “in law the only things which are comparable are those which fulfil the same function.”²⁶ It is the unity of the issues under investigation that warrant the possibility of any useful comparison. This point is made even more compellingly by Gerhard Dannemann, who observes that “there is no point in comparing what is identical, and little point in comparing what has nothing in common,” adding that “it is therefore inevitable that comparing legal systems involves, at least to some degree, exploring both similarities and differences.”²⁷ For example, a research topic that involves comparing the judiciary in Botswana with the legislature in South Africa would yield very little dividend. Without a common basis for comparison, it becomes difficult to establish any links between rules and their effects or to identify differences and similarities. For the same reasons, not much will be gained from a comparative study of the High Court in two different parts of the same country.

However, caution is required, as the anathema on incompatibility in research topics, especially those covering a single jurisdiction, should not be pushed too far. The guiding principle is often dictated by the objectives of the comparative research. For example, if the researcher’s objective is to gauge the

26. See ZWIEGERT & KÖTZ, *supra* note 21, at 34.

27. See Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, in OXFORD HANDBOOK OF COMPARATIVE LAW 384 (Mathias Reimann & Reinhard Zimmermann, eds., 2008).

impact today of the colonial legal heritage on African legal systems, there is little profit in comparing the judiciary in Senegal with that of Gabon, because they are too similar for useful conclusions to be drawn from them. Conversely, a comparison of the judiciary in Senegal with that in Ghana or Nigeria is likely to bring to light rather more interesting findings about the impact the various colonial experiences have had on modern-day Africa's judiciary.

Another important issue that the comparatist must decide upon, especially in a typical traditional comparative law topic, is which legal systems to compare. Bearing in mind that the crux of legal comparison is assessing similarities and differences, the chosen systems should be neither so similar nor dissimilar as to make analysis difficult or fruitless. Again, the issue of how much difference or similarity is necessary is closely linked to the objectives of the research. It is not realistically possible to examine all the legal systems or legal traditions in the world. Therefore, in deciding on the system, it is desirable and advisable to concentrate on, or start with, the so-called mature or parent legal systems, which have seen extensive adoption or imitation by others.²⁸

That being said, comparative studies cannot be restricted to mature legal systems - usually taken to mean Western legal systems,²⁹ with non-Western systems confined to being studied by ethnologists and cultural anthropologists. One could examine an affiliate of a mature legal system if it is significantly different from the parent legal system, be it generally or in some particular respect which is under examination. Thus, although English law is unquestionably the parent source of the common law legal system, and the law of other countries such as Australia, Canada, Kenya, Nigeria and the United States are undoubtedly its offspring, some of the latter nevertheless have developed distinctive styles, principles, institutions and rules which it would be unwise to ignore. Ultimately, this may depend on the topic of research. For example, in a comparative study of anti-trust or no-fault liability in the common law and the civil law, the best example to use as a case study is certainly not English law but U.S. anti-trust and New Zealand no-fault liability law, both of which are far more developed in these respects.

The objective of the study also may be equally important in deciding whether or not to undertake a cross-systemic comparative study. For example, a Swazi undertaking research to improve the judicial system in Swaziland will gain more from a comparative study involving the South African than the Angolan judiciary, simply because Angola belongs to a different legal system.³⁰ Nor would it be especially helpful to draw a comparison with the

28. See generally ZWEIGERT & Kötz, *supra* note 21, at 40-42.

29. For a good example of such Western bias, see Roscoe Pound, *The Study of Common Law*, 4 NEBRASKA LEGAL NEWS 1 (July 25, 1896).

30. Alternatively, having as a topic a comparison of judicial independence in South Africa and Swaziland may look superficially attractive. However, when one notes that Swaziland's constitution effectively gives the king absolute powers and that the judiciary is, as a result, subject to his whims, then the major premise of the comparison, namely "judicial independence," falls away, leaving little room for any meaningful comparison. See Charles

English judiciary purely because it is the parent system that influenced the judiciary in a particular country. A student examining customary law marriage with the aim of suggesting ways in which it can be improved will gain more from comparing it with Western-based marriage laws in spite of – or because of – their considerable differences. Although most comparative studies deal with Western legal systems which are at the same level of development, in this era of decoloniality and a drive towards the Africanisation of law and legal studies, one would expect there to be a greater number of comparative studies between Western and non-Western systems as a result of promotion of research aimed at adapting indigenous legal principles and values to modern needs and requirements.

Comparison can be done at different levels. The most common levels of comparison are those that distinguish between macro-comparison and micro-comparison. The former, whilst concerned with two or more entire legal systems, tries to compare their spirit and style, along with their methods of legal thought, analysis and procedure. At the level of macro-comparison, one could focus, for example, on general issues such as the different techniques of legislation, the styles of codification, the methods of statutory interpretation, the authority of precedents and the role of academic writing in the development of the law. By contrast, micro-comparison is limited to examining specific legal institutions or rules that are designed to solve a particular problem, such as children born out of wedlock. The range of topics for micro-comparison is potentially limitless. However, in spite of the distinction made between macro-comparison and micro-comparison, the dividing line between them is not clear-cut and very often they merge with or complement each other.

Another level at which comparisons can be made is between national law, on the one hand, and international, regional or sub-regional law. Such cross-level comparisons are different from normal comparisons between legal systems due to the approach they take. For example, a comparison of the prospects for promoting constitutionalism within the African Union (AU) and a particular African country has to take into account the different power structures and different levels of institutional constraint. However, as regional co-operation and integration efforts in Africa intensify, one can anticipate greater deal of cross-systemic research aimed at establishing common standards.

One of the key issues, to which we now turn, is deciding how to carry out the comparison itself.

B. What method do you use in doing the comparison?

One of the most challenging issues in comparative law in general and comparative legal research in particular has been that of deciding on the precise method to use. The method is important because it will determine whether the comparative inquiry serves the purpose for which it was undertaken, is accurate and will result in valid and valuable conclusions being drawn. In fact,

Manga Fombad, *The Swaziland Constitution of 2005: Can Absolutism be Reconciled with Modern Constitutionalism?*, 23 S. AFR. J. HUM. RTS. 93, 93-115 (2007).

the result of any legal research is only as reliable as the method used to carry it out.

As pointed out earlier, there is no standard or generally agreed method that will work well for all topics. In fact, no issue has divided comparatists more than the question of what methods are the most appropriate to use in conducting comparative legal research. Writers such as Mark Van Hoecke suggest there are at least six different methods for comparative legal research, that is, the functional method, structural method, analytical method, the law-in-context method, the historical method and the common-core method.³¹ However, he stresses that the methods are not mutually exclusive but can be combined in one and the same piece of research.³² Esin Örüçü points out that “‘functional equivalence’ and the ‘problem-oriented’ approach, ‘model-building’ and ‘common core’ studies, the ‘factual’ approach and ‘method in action’” are just some of the approaches that have been put forward over the centuries.³³ Other authors have formulated these in the form of principles.³⁴ Nevertheless, the general starting-point appears to be what Zweigert and Kötz stated as follows:

The basic methodological principle of all comparative law is that of *functionality*. From this basic principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on.³⁵

Over the years, many have criticised this functional approach. Among its strongest critics is Ralf Michaels, who – after contending that the “functional method is a chimera, in both theory and practice of comparative law”³⁶ – argues that

‘the functional method’ is a triple misnomer. First, there is not one (‘the’) functional method, but many. Second, not all allegedly functional methods

31. See MARK VAN HOECKE, *METHODOLOGY OF COMPARATIVE LEGAL RESEARCH* 8, <http://www.lawandmethod.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001> (last visited May 2017).

32. *Id.* at 9.

33. See Örüçü, *supra* note 3, at 48; see also Pierre Legrand, *How to Compare*, 16 *LEGAL STUDIES* 232, 232-42 (1996). Ralf Michaels, refers to “three main current approaches other than functionalism,” consisting of comparative legal history, the study of legal transplants, and the comparative study of legal cultures. See Ralf Michaels, *The Functional Method of Comparative Law*, in *OXFORD HANDBOOK OF COMPARATIVE LAW* 341 (Mathias Reimann & Reinhard Zimmermann, eds., 2008).

34. For example, John C. Reitz, *How to Do Comparative Law*, 46 *AM. J. COMP. L.* 617, 617-36 (1998), formulates this in relation to what he terms the nine basic principles of the comparative method.

35. See ZWEIFERT & KÖTZ, *supra* note 21, at 34.

36. See Michaels, *supra* note 33, at 340.

are 'functional' at all. Third, some projects claiming adherence to it do not even follow any recognizable 'method'.³⁷

In spite of all the criticisms levelled against it, the functional method is still an important starting-point for all legal comparisons. The functional method operates on the fundamental assumption that the only things that can be compared are those which share the same function. That being the case, since every society faces essentially the same or very similar problems, and notwithstanding that these problems are solved in fairly different ways, they end up with similar solutions or results. In other words, most legal systems will use different rules, principles, procedures or institutions to solve similar legal problems in a similar or identical manner. The heart of the functional method is the search for any functional similarities and differences and the provision of an explanation for this. The comparative analysis and research questions should be posed in a functional manner. For example, in a comparative study on marriage, the proper question to pose is not what the requirements for marriage are, but rather how the two systems ensure that the two parties consent fully to the marriage. The researcher must approach the subject matter of the investigation with an open mind and look at the law broadly. For example, the researcher may find that a function performed in one legal system by a rule of law is performed in another system by an extra-legal principle, such as unwritten and uncodified conventions, customs and usages.

The functional approach indeed has its limitations.³⁸ It is concerned only with functional equivalents at the level of the solutions, not the way in which legal rules and procedures have been used to arrive at this "similar or same" solution. A researcher focusing only on the solution arrived at to a similar problem in both legal systems may conclude that the law is the "same." However, ignoring the way the legal rules and doctrinal principles have been used to solve the legal problem can create a distorted view, given that "different cultures may use different ways to structure similar realities."³⁹

In addition, comparative research cannot be complete where it limits itself only to a comparison of black-letter legal rules, concepts or systems. There is often a risk that by relying strictly on the functionalist approach, the purposes and the effects of legal rules can be confused.⁴⁰ Furthermore, the functional method operates on the implicit assumption that legal problems are the same everywhere - the assumption of universality of facts. This is not always the

37. *Id.* at 342. In his paper, Ralf Michaels suggests three approaches other than functionalism, namely, comparative legal history, the study of legal transplants, and the comparative study of legal cultures.

38. Besides the authors referred to earlier, *see also* Dannemann, *supra* note 27, at 384-419.

39. *See* Van Hoecke, *supra* note 31, at 11.

40. For as David Nelken, points out, "problems' do not just produce 'solutions'; these have to be fought for by competing interests and groups." Nelken, *supra* note 1, at 22.

case, because problems that may ostensibly look similar may become different due to their socio-economic or historical context.

For example, similar sanctions may be imposed for witchcraft in modern South African law and most Western laws, but the cultural context of the crime is very different. Even if the problems were the same, there is no reason to assume that different societies will respond to them by using law or, even where they do, use it in the same manner. More generally, the functional approach is not suitable for legal comparisons involving legal systems that are socio-culturally and legal-culturally different from each other, for example in comparing a capitalist and a socialist society. There will also be problems when the institution being compared performs several functions. Legal realism, based on the fact that legal, social, cultural, economic, religious and political contexts can no longer be ignored in any serious legal research – combined with the increasing influence of the ideas of decoloniality and Africanisation of the law – has made it imperative to consider other methods of comparative legal research.

However, most of these other methods assume the application of the functional method, complementing rather than displacing or excluding it, given that often they are not self-contained. Four of these other methods are worth mentioning: the law-in-context method, the problem-solving approach, the historical method, and the common-core method.⁴¹

The *law-in-context approach* requires that the actual societal context and social reality in which the law operates should be taken into account when undertaking any legal comparison. This means that existing rules, principles and institutions should be analysed with due regard to their diverse historical, political, social and cultural contexts. Borrowing from developments in the sociology of law and U.S. critical legal scholarship, David Nelken makes a distinction between “putting law in context,” which entails using context to explain the form and effects of law, and “finding context in law,” which seeks to show how law helps to construct and communicate the social context.⁴² In this way, law-in-context is complementary to and dependent on the other methods for understanding how the law operates. In many instances, the contextual reality may necessitate some empirical legal research aimed at checking the implicit assumptions of the law or the effect and efficiency of legislation in the different legal systems.⁴³

41. As noted earlier, many writers refer to several other possible methods drawn from legal theory, but the exact nature and scope of these methods, along with their application to comparative legal research, is often obscure. For a fuller discussion of these methods, see Van Hoecke, *supra* note 31.

42. See *Criminal Law and Criminal Justice: Some Notes on their Irrelation*, in CRIMINAL LAW AND JUSTICE ESSAYS FROM THE W.G. HART WORKSHOP 3-10 (Ian H. Dennis, ed. 1986).

43. Such empirical investigations in comparative legal research may require the use of one or more sophisticated research methods such as the qualitative and quantitative methods used in social science research. See, e.g., Anne Meuwese & Mila Versteeg, *Quantitative Methods for Comparative Constitutional Law*, in PRACTICE AND THEORY IN COMPARATIVE LAW 230-57 (Maurice

In using the *problem-solving approach*, the researcher takes a specific problem or set of problems and tries to investigate how it is solved in different legal systems and why it is solved in the particular way that it is. For example, the researcher looks at how and why states A and B deal in the same or different ways with the maintenance of a child born out of wedlock.

The *historical method* is more or less part of the law-in-context method. With many research topics, a proper understanding of how the present law, or certain principles, rules or institutions, operate is not possible without a historical overview of how they came about and evolved over time. As Mark Van Hoecke rightly notes, historical comparisons not only explain the origins of and reasons for the object of analysis in question, but may also reveal that similar approaches in one legal system have been present in another legal system in the past.⁴⁴ In turn, this may reveal that, whatever the differences are that appear in the different legal systems today, they could be merely reflections of differences in stages of development of the legal system or the outcome of tensions between competing views. The historical analysis of the legal systems can thus provide deeper insight into their similarities and/or differences and enable the comparatists to be more informed about the options that are available.

Finally, there is the *common-core method*, which is closely linked to the functional and law-in-context methods. This method is particularly relevant where the objective of the research is to harmonise laws from different legal systems. It looks at the similarities and differences between the laws or specific areas of the law in the different legal systems and tries to see to what extent they can be harmonised, at best, or, at the least, interpreted and applied in a manner that fits well with the different national traditions. This common-core approach is at the heart of all attempts within the European Union to develop harmonised laws, or what is sometimes termed “the common core of law in Europe,” in different areas of the law. It can be argued that, within the framework of the AU, this is what Africa needs to do through its African Union Commission on International Law and its Regional Economic Communities.⁴⁵

Settling on the method to use still leaves open the question of how to carry out the comparative exercise itself – an issue to which we now turn.

C. How do you do the comparison itself?

Once the topic and method of carrying out the research have been decided upon, the next important issue is that of determining how to undertake the comparison itself. For obvious reasons, there is no general approach that will work in all cases. This has led to diverse approaches being suggested by comparatists.

Adams & Jacco Bomhoff, eds., 2012).

44. See Van Hoecke, *supra* note 31, at 18-19.

45. See Fombad, *Some Reflections*, *supra* note 19, at 51-80.

One approach is that suggested by Peter de Cruz. It consists of following a number of steps: an outline plan of action identifying the problem; identifying the foreign jurisdiction, the parent legal family and the primary sources of law that will be relevant; gathering and assembling the relevant material; organising the material in accordance with headings; tentatively mapping out the possible answers to the problem (bearing cultural differences in mind); critically analysing the legal principles according to their intrinsic meaning; and, finally, setting out the conclusion within a comparative framework, with caveats if necessary.⁴⁶

For his part, W.J. Kamba posits that the process of legal comparison involves three main “operations or stages.” These consist of the descriptive stage, which involves a description of the norms, concepts and institutions of the system under study, or an examination of the socio-economic problems and the legal solutions provided by the system in question; the identification phase, which concerns the identification or discernment of differences and similarities between the systems under comparative consideration; and finally the explanatory phase, during which the divergencies and resemblances are accounted for.⁴⁷

Another approach is that suggested by Gerhard Dannemann. Whilst admitting that there can be no uniform structure which fits all types of inquiries, he suggests that comparative inquiries involve three major stages: first, selection of what will be compared; secondly, a description of the law and its context in the legal systems under consideration; and, finally, the analysis of any similarities and differences that emerged at the descriptive stage.⁴⁸

In spite of the apparent differences between the approaches outlined above, the reality is that their differences are more in detail and style than anything else.⁴⁹ The main issues that must be dealt with when carrying out the comparison itself can be summarised under the points discussed below.

The first point to note is that comparing legal systems or aspects of legal systems does not mean merely juxtaposing the systems being compared, although this is the first step in the exercise. Juxtaposing the systems provides an opportunity for separate reports to be prepared, each introducing the legal system and the context in which it operates. Such reports must be objective and contain all significant qualifications and explanations that bring out the distinctive features of these systems. For example, a study comparing the South Africa and Angolan judiciary should be preceded by a brief autobiographical sketch of their legal systems to provide the context for the comparison. A common mistake, though, is to end with a third section that compares the

46. See PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 235-39 (2d. ed. 1999).

47. See Kamba, *supra* note 4, at 511-12.

48. See Dannemann, *supra* note 27, at 406-18.

49. See Marieke Oderkerk, *The Importance of Context: Selecting Legal Systems in Comparative Legal Research*, 48 *NETH. INT'L L. REV.* 293, 293-318 (2001), who suggests five guidelines for use in conducting comparative legal research.

systems on the basis of the reports in the two preceding sections. Instead of taking this simplistic, ineffective and inefficient three-part approach, one should aim to make every section after the report comparative. The best way to approach this is to break the topic under investigation into its natural sub-units or common sub-themes, which will form the framework and basis from which the actual comparison itself can begin.

A second step in the process is developing a framework to structure the comparison. As noted, this requires coming up with a system, or common classification of the main sub-units or sub-themes, that will guide the comparison. Although a key aspect of the process is the identification of similarities and differences, simply listing them is not helpful. It is at the stage of building up a comparative framework for the analysis that the functional principle applies with full force. As Zweigert and Kötz point out, the process of comparison begins when each of the solutions offered by the different legal systems are “cut loose from their conceptual context and stripped of their doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need.”⁵⁰

In this regard, the question that must be addressed is whether the different legal systems meet the same legal need in the same or different ways, and if so, how. In explaining this, it might be necessary to consider the historical, economic, sociological and political context in which the legal system is operating. Such factors lend a particular colour to the legal problem or principle under examination.

As mentioned, only legal concepts, principles or institutions which fulfil the same or similar functions can be usefully compared. In posing questions in purely functional terms, one should not allow one’s prejudices or unconscious biases to cloud the assessment. The focus should be to determine objectively how a particular function or purpose has been fulfilled or ensured in another legal system. The comparatist should not blithely assume there is no functional equivalent of a rule in a foreign legal system. If one’s preliminary investigations appear to suggest that there is no functional equivalent to a particular principle or institution in one’s national system, then the better approach is to “rethink the original question and purge it of all the dogmatic accretions of one’s own system.”⁵¹

As already pointed out, more patient and extensive research could reveal that a problem addressed in one legal system by a legal rule is performed in another by an extra-legal rule, such as unwritten usages and conventions. There might also be other principles, doctrines and institutions which achieve the same or similar purposes. For example, a comparative study of the mixed Roman Dutch and common law-based law of contract of South Africa with that of the common law-based law of contract in Nigeria will show that the doctrine of consideration is present in the latter but not in the former. It would

50. See ZWIEGERT & KÖTZ, *supra* note 21, at 44.

51. *Id.* at 35.

be simplistic, however, to conclude that the doctrine is entirely absent in the South African law of contract, because scrutiny will reveal other principles addressing the legal problems which the doctrine of consideration seeks to resolve.

The comparatists should therefore also explore the *degree* to which there are, or are not, such functional equivalents in the other legal systems. In doing so, he or she should note that one legal system may achieve more or less the same result as another legal system, but in doing so use another terminology, procedure or rule or be affected by differences in the interrelationships between the various areas of law in the different legal systems, especially between substantive and procedural law.⁵²

Although the focus of comparative research is the identification of differences and similarities, there is, however, always a danger of rushing to premature conclusions. What may look different or similar may turn out not to be so. Very often, good scholarship will require the researcher to go further and investigate the extent of, as well as the reasons for, the similarities or differences. For example, in a study of the sources of law in a civilian and common law jurisdiction, the researcher may note, as one of the important differences, the fact that the principle of *stare decisis* does not apply in the civil law jurisdictions. On closer examination, the researcher will realise that, although this is generally true in all civil law jurisdictions, in the sense that an inferior court is not bound to follow the rule of law laid down on an issue by a superior court, the inferior court may sometimes feel compelled to follow it, not because it is bound to do so, but because it is probable that an appeal against its decision which ignores the previous superior court decision is likely to be reversed by the superior court.

Sometimes, apparent similarities or differences need to be viewed with healthy intellectual scepticism. Thus, what may look like similar terms in two or more legal systems may have totally different meanings, just as seemingly different terms may have the same meaning. A good example of the former is the French notary, the British public notary and the American notary, which all look similar and appear to refer to the same concept but which in reality are three distinct concepts. Even if, after a careful analysis, the conclusion is that the two systems approach the same legal issue in two different ways, there might still be room to see some commonalities. For example, an analysis of the legal systems being compared may show them to be as different as apples to oranges. However, on closer scrutiny, the comparatist may come to the conclusion that although both are different, they would be categorised as fruits for purposes of comparative law. The advantage of this is that it encourages researchers to broaden the scope of their enquiry and take account of other realities that lead to broader categories of similar functional needs.

Comparative studies need to be undertaken not only with an open mind but also in the spirit of mutual respect for the legal system under investigation.

52. See Reitz, *supra* note 34, at 621.

The fact that the approach adopted in addressing a legal problem is different should not make this bizarre or wrong. Before criticising, the comparatist must make every effort to understand the reasoning behind the different approach as well as its context in all its historical, political and social ramifications.

What ultimately comes out of the comparative study depends on the original objectives of the study. For instance, the comparatist may conclude that the solution provided by the other systems to the common problem investigated is equally sound or superior in one way or another. Based on these findings, the comparatist may suggest ways of improving his or her legal system or confirm that his or her system provides the best possible solution to the relevant legal problem. But before drawing conclusions and as part of the comparative research, there are a number of important pitfalls that must be avoided.

IV. Some Pitfalls in Undertaking Comparative Legal Research

Comparative legal research entails a number of risks, dangers, limitations and other problems that the researcher must be aware of and try to guard against them. Many of these pitfalls depend on the objectives of the study, and often all the best researchers can do is familiarise themselves with the risks and take reasonable steps to mitigate their negative impact on the scientific quality of the research. A number of these common problems are worth noting.

One of the main challenges that a comparative researcher will encounter is the fact that there is often a gap between the law in the books and on the statute books, on the one hand, and the law in action, on the other. There is often an assumption of a straightforward causality between the law and/or legal principles, rules and institutions and the good/or just results in society. Things are not necessarily so. This could be because of the gap in the law applied by courts and the law contained in the statute book, which may arise, because in many countries, people may, due to poverty, ignorance, attachment to traditional way of life, prejudice, corruption or fear of persecution, not be able or willing to invoke the formal legal rules to vindicate their rights.⁵³ Therefore, in order to accurately gauge the functional equivalence of a legal solution devised to deal with a similar problem in two legal systems, the comparatist must take into account those practices that may attenuate or magnify the impact of the formal legal rules contained in the statute book. Nevertheless, even if the issue of establishing a direct causal connection between the law and certain outcomes cannot be conclusively established because of the complexities of society, the value of such comparative research is that it may still give some indication of legal solutions that are not working and which, therefore, for purposes of law reform, need to be avoided.

A further problem is that there can be gaps in the knowledge available about foreign law. This could arise in a number of ways. First, there are inadequate resources for acquiring a library collection of foreign legal materials which is as comprehensive as the best libraries in the foreign country itself. Secondly, save

53. For more on this topic, *see id.* at 629-33.

for a few kinds of cases, most countries of the civil law tradition do not publish the decisions of their superior courts.⁵⁴ Although it has been part of the common law tradition for the decisions of many of the superior courts in Anglophone African superior courts to be published, due to financial constraints this is no longer done with the thoroughness and regularity necessary to ensure that this source of law is readily available to researchers.⁵⁵ Good comparative research requires the researcher to have full access to the most recent sources of the current law, including case law and the writings and commentaries of scholars. This is not easy in most African universities, which are operating under tight budgets at a time of decreasing government subsidies to tertiary institutions. If there is little likelihood of accessing fairly recent good-quality information about a foreign legal system, then such a country should not be included in the comparative study.

Ideally, the comparatist should also possess the linguistic skills, and perhaps even the skills of anthropological field study, needed to collect information about the foreign legal system first-hand. However, where this is not possible, the researcher must be able to have access to good-quality translated legal information on the legal system under investigation. Knowledge of the foreign language not only gives the researcher access to in-depth knowledge of the history of the country, its people, and the philosophical and religious traditions that have influenced the legal system, but also provides a cultural and geographical context for understanding the way the legal system functions. However, whilst it is legitimate to base the comparison of the legal system on work translated by foreign legal experts, there is a need for some caution and extra effort in checking the accuracy of the material. This is because the translation may not be very accurate or may be influenced by the personal biases and idiosyncrasies of the translator. The researcher must also note that certain concepts and principles are very difficult to translate with any reasonable degree of accuracy. In general, there is danger in basing a comparative study entirely on translated secondary sources.

Finally, the fact that certain approaches to dealing with a legal problem may owe their existence to a historical accident could limit its usefulness to the comparatists who take the legal rule or principle out of its social, cultural and political context. Awareness of these limitations is helpful in ensuring that the researcher devises appropriate mitigating precautions.

54. The exception to this are some of the decisions of constitutional courts in Francophone Africa, which are published in *Les grandes décisions de la justice constitutionnelle en Afrique*, LA CONSTITUTION EN AFRIQUE (Oct. 9, 2009), <http://www.la-constitution-en-afrique.org/article-les-grandes-decisions-de-la-justice-constitutionnelle-africaine-3722994.html>.

55. An important exception to this are the countries belonging to the Southern African Legal Information Institute (SAFLII), that is, Angola, Botswana, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe. SAFLII publishes and allows free public access to the case law of all superior courts in the listed countries. See generally <http://www.saflii.org/> (last visited May 2017).

V. Conclusion

The central argument of this paper is twofold. First, in spite of the declining interest that most African law schools have in teaching comparative law, its disappearance from the law curriculum is likely to have a negative impact on the quality of legal research and, consequently, legal education. Granted, there is strong competition from many new subjects seeking inclusion in the law curriculum, but even if comparative law cannot be taught as a separate subject, the tenets of comparative legal research remain indispensable to other legal courses and research practices. At a minimum, they should be incorporated in other subjects, such as any introductory course to law and legal systems or jurisprudence, though ideally they should form part of a research methodology course.

Secondly, if it is accepted that comparing is an inevitable and inescapable aspect of legal research, and that a study based entirely on the law of a single country or its institutions and principles, without looking beyond its borders, can hardly be scientifically sound or yield much dividend, then a more pragmatic approach must be taken to conceptualising comparative law today in the face of changing, and competing, curricular priorities. Intellectual interest in the comparative study of law is bound to grow, not only because of the increasing trend of cross-judicial borrowing but also thanks to the increasing cross-systemic sharing of ideas and experiences. This is to be welcomed at a time of progressive denationalisation through regional and sub-regional integration, which has led to intensified efforts at legal harmonisation and to ongoing processes of legal modernisation at the national level. All of these developments make cross-systemic and cross-national comparison in legal research imperative as a means of ensuring functional compatibility and adaptability that reflects contextual realities.

As with other branches of science, the comparative approach to legal research has, amidst its advantages, its share of challenges in that there are no settled principles, standards, guidelines or rules. It nevertheless provides the researcher, guided by the goals and objectives of the research, with an opportunity for serious self-reflection freed from the constraints of national prejudices. In the final analysis, the legal researcher undertaking a comparative inquiry is given an opportunity to be imaginative and creative, guided by the desire to come out with the best regardless of whether it owes its provenance to English, French or German law. As Rudolph Jhering once observed, “[O]nly a fool would refuse quinine just because it didn’t grow in his back garden.”⁵⁶ It doesn’t take rocket science to discover that there is more than one way of addressing the great challenges we face. What it does take, though, is the genuine desire to pursue a full investigation – which is precisely what the comparative approach caters for and enables one to do.

56. See ZWEIFERT & Kötz, *supra* note 21, at 17.