

EXPLORING THE PROSPECTS OF CREATING AN AFRICAN *IUS COMMUNE* OF THE LAW OF OBLIGATIONS USING ROMAN LAW INTERSECTION*

Abstract

*The paper is motivated by the thinking that the age of autonomous systems of national law is drawing to a close, and that as a first stage exploration, the African continent should develop an African common law of the law of obligations. Its bold assertion is that the roadmap should come from the intersection Roman law provides the two dominant legal families of the common and civil law system; and that the creation of the *ius commune* should be structured more along the lines of the civilian tradition of the law of obligations. In suggesting a preference to develop the project along the civil law model, it argues that the common law translational process and mediation between norms and social reality through remedy for the realisation of rights, is less suitable than the civilian (Roman) counterpart for developing a science of law. Accordingly, the paper presses the argument that present efforts on harmonisation of European private law is pointer that an African project is feasible, and that knowledge of Roman law could be the very basis of mediation across the common law and civil law legal systems. In doing so, it argues that though the legal architecture of both families' shows a degree of dissimilarity; their essential building blocks are the same. From this premise it posits that there is little or no logical chasm between the common and civil law to constitute an obstacle to the project, and that if any does exist, it is more theoretical than real because Roman law provides the necessary intersection to understand and harmonize both, with little irritation. The paper therefore provides conceptual and practical justification for an African law of obligations developed along the lines a Roman civilian science of law, combining a codification system with the dialectics of reasoning. The prescription for an African '*ius commune*' is limited to only the law of obligations, in the first instance, because the paper is grounded in the normative assumption that it is an area of law propositional in character (regulations, rules and principles) and so is more susceptible to logical outlines or Roman codelike analysis. It therefore urges an African '*rapprochement*' project built on certain shared values derived from Roman law to create a transnational African law of obligations. This paper begins the African conversation.*

Keywords: Creating African *Ius Commune*, Law of Obligations, Roman Law, Prospects

1. Introduction

The metamorphosis of the African Continent from the Organization of Africa Unity (OAU) to the African Union (AU) and the emergence and coming into force of the African Continental Free Trade Area (AfCFTA) both creates heightening importance for a common legal lexicon for determination of obligations between persons to facilitate trade, commerce, investment and contract in Africa. The continent is blessed with an over one billion people and is home to the seven fastest growing economies in the world. These make imperative some form of harmonization or *rapprochement* of our law of obligations to harness these advantages in a way that interrogates and generate growth in commerce, trade and investment.¹ This paper is a wake-up call for lawyers, judges, policy and decision makers, including the African Union, to institutionalize and initiate a level of unification of the law of obligations in Africa to promote growth and felt-connection negotiated through knowledge and understanding of Roman law. It is considered a worthy project because the hypothesis is motivated by thinking that the age of autonomous systems of national law is drawing to a close. This is particularly so in the area of private law, in the specie of the law of obligation, where concepts and doctrines are readily susceptible to reduction into propositional knowledge in the form of a panoply of rules. The initiative to harmonize private law though ambitious, is certainly doable, because the initiative area is congenial to harmonization because it applies less to areas of law connected with historical and traditions values of any particular (African) society. In fact, the law of obligations is generally 'technical or neutral' to areas of law connected with the national character of a people, such as family law, customary law and inheritance, and their like. Most novice to comparative law, especially Roman law, will think that the idea of an African common law is preposterous to imagine, talk more of being doable.² This is to be expected. Africa is home to so many (often time conflicting) legal systems. It plays host to the common law, civil law, religious and customary systems of law, all of which make it less prevailing to harmonize. Not to be minimized is also the question of national pride. Many African States take pride in their legal tradition and are avid promoters of it. This will especially be the case for those who endorse and cherish the common law or religious systems, for this paper recommends

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¹ The African Continental Free Trade Area (AfCFTA) is created by the African Continental Free Trade among 54 African Union nations, designed to remove tariffs from goods and services among members; to boost intra-African trade; create a single market; and deepen economic integration of the continent. See summary of key decisions and declarations of the 31st African Union Summit, July 6, 2018. Accordingly, it is expected that the purpose of the agreement will interrogate legal intersections in traditional areas of the laws of obligations (contract, delict, restitution, equitable obligations); consumer protection law; product liability law; company law; industrial and commercial rights law; competition law. Prior to AfCFTA some African states adopted a system for the harmonization of their corporate and business law and implementation institutions to facilitate trade amongst its members known as Harmonization of Business Law in Africa (OHADA) in 1993 (revised in 2008 in Quebec, Canada). OHADA was designed to create a better investment climate for the 17 African members. Since most members are former French colonies, it was reasoned that they could draw chiefly on French legal model to achieve the trade objective. Creating the supranational court (Common Court of Justice and Arbitration of OHADA) was further designed to ensure uniformity in legal interpretation. It is the thinking however, that with the coming into force of the AfCFTA African states who were previously members of OADA will leverage on the broader AfCFTA to give it the necessary implementation and objective effect.

² When the idea was first muted that a common law should be created for Europe, many thought that the idea was simply not possible. But today many scholars have done great transnational works on a European common law. See Gian A. Benacchio & Barbara Pasa, *A Common Law for Europe* (Budapest: Central European Univ. Press 2005 (trans. Lesley Orne). But cf. Pierre Legrand, 'European Legal Systems Are Not Converging' (1996) 45 *ICLQ* 52.

an overthrown of them and an eventual harmonization along the Roman inspired code structure of the civil tradition. But they may not be alone in their irritation. Even civilian legal admirers could find it unsettling, considering that though the grounding of this paper seeks an African common law along their legal system lines, it goes further, to suggest discarding components of particular national legal system and tradition for a new '*ius commune*,' with a different '*mentalité*'. In fact, for 'common lawyers' who read the abstract to this paper, the objection can be stronger as the paper reveals a preference for the (Roman) civilian tradition. Without wanting to engage in a normative justification for the civilian tradition, let us quickly state that the preference for it is because by our count, it is the system that closes more to a science of law.

Many more issues can be picked with the harmonization project. Some may object to the limitation choice of the two major world legal families—the common and civil law traditions; arguing (rightly) that it discounts the value of religious (ethical or customary) systems. More objectionable could be the idea of restricting the harmonisation project to the genre private law manifestations and no more. We beg for patience from the reader as we hope to proffer some tangential answers (even if limited) to these objections in the paper as space constraint only compels macro-generalised answers.

There can hardly be any question about the desirability of a level of economic integration for the continent. The over fifty States in the African continent presently operate multiple legal systems, some even applying multiply systems within a forum state. For example, Nigeria operates a plurality of systems within its federation. The common law legal system operates side by side with customary and Islamic (Sharia) religious systems, with rules of court providing for resolution of conflict between the plural regimes of law.³ This paper however narrows its focus to the two predominant families that characterise the largely propositional areas of law susceptible of harmonization in Africa—the common law and the civil law.

Two basic legal system models dominate Africa: the civil and common law models.⁴ Though both models exhibit different legal '*mentalities*,' their essential and basic conceptual building blocks are the same. In fact, recent studies increasingly reveal that knowledge of Roman law could be the very basis of mediation between both traditions, and that harmonization carries with it immense practical and economic advantages for trade and investment. This paper therefore seeks to evaporate the supposed '*epistemological chasm*' between the systems of law in Africa, and in its place create, if possible, an *ius commune* for commerce, trade and investment in Africa.

This paper is divided into thirteen parts. Part II, is a discussion of what constitute the tripod of the law of obligations and how equitable obligations sit within the divide generating rights '*in rem*' and '*in personam*'. Part III is a classification structure of African legal families using the classic comparative lawyers' attempts to divide legal families based on non-homogenous factors, into the four basic macro-families largely following the lines of Rene David classification. It tangentially examines the possible challenges it may throw up for analysis and a possible project of harmonisation. Part IV, explains the Roman influence in the early development of the common law, and how this continues to shape the structure and content of common law remedies, thus providing the intersectional bases to explain both the common law and civilian legal families. Part V, plots the similarities in content between both systems, examining the basis architecture of contract, *delict*, restitution, equity and other seemingly analogous troublesome civilian concepts, to find equivalence. It argues that it is a jurisprudential error to think that there is any '*real*' chasm between the common law and its civilian counterpart in contributing to a harmonized African law of obligations. Part VI and VII, searches for harmonization cryptotypes, arguing for the use of scientific '*mentalité*' to generate general principles of law that will serve as foundation for explaining the law of obligations. Part VIII, argues that the common law is further from a science of law than the civilian system that closely resembles the Roman-inspired understanding of obligations, and so should be the preferred route to creating an African law of obligations. Part IX, is directed to dispel fears that a harmonization project is not doable. Recounting experiences from mixed systems of law, it posits that the project is viable. It however goes further in Part X, to examine why a '*combo*' will require a change in '*mentalité*' for common and civilian lawyers and judges in way that requires rapprochement in interpretation and application of law that could affect how legal institutions conceive remedies. The fear that a science of the law of obligations will result in fossilization, with no flexibility is addressed in Part XI, illustrating through empirical examples, how a science of law can be combined with the dialectics of reasoning to generate justice. Part XII, examines the methodology for the harmonization project. It is followed by our modest conclusion, urging African States to begin a '*rapprochement*' project built on certain shared values derived from Roman law to create a transnational African law of obligations.

The methodology adopted in this paper seeks a systematic and comparative law method of searching for '*cryptotypes*' (hidden types) legal principles and rules in the various (chosen) legal families, revealing how they (apparently) distort the description of similarities and differences between traditions; and it highlights and evaluates some of them in a rapprochement structure for Africa. Much as we attempt to identify the major issues posed by harmonization, uniformization, and unification of the legal rules and guiding principles of an African private law, the paper does not overlook the policy choices of the individual African State, the instrumental nature of judicial harmonization, and its role in sustaining the values and objectives of an Africa common law.

³ See for example, s. 17(1) of the Supreme Court Ordinance (Cap. 211 of the Laws of Nigeria 1948), a statutory provision now found in all High Court Law in the various States in Nigeria. See also, *Adesobokan v. Yinusa* [1971] All NLR 227 (discussing how the conflict between statute and custom will be resolved); Oluwole I. Agbede, *Legal Pluralism* [referred to as '*Themes*']; Oluwole I. Agbede, 'Law in Time and Space: The Doctrinal Bases and Judicial Practice' (an inaugural lecture delivered at the University of Lagos on June 5, 1991).

⁴ The third legal family (religious/customary systems of law) has little bearing on trade and investment in the African continent. See, Agbede, Id. [Themes]; William Tetley, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' (2000) 60 *La. L. Rev.* 677.

2. What is the Law of Obligations?

Since the African '*ius commune*' sought to be created largely covers (at least in its initial stage) the law of obligations, it is considered apposite to clarify its boundaries, more so, as it gives insight on how Roman law creates the enabling foundation to understanding the modern law. This is especially important for clarifying the categories of private law this paper seeks to bring within the bracket of an African '*ius commune* project'.⁵ It is fairly settled that private law (as captured by the Romans civilian system) divide remedies as triggered by both property and obligations, expressed as rights *in rem* and *in personam* respectively. The common law is also fairly rooted in this Romanist thinking, and it develops along similar lines. Property law captures rights *in rem*. It is concerned with *owning* (ownership). It arises out of the relationship between person and thing (*possessio*). On the other hand, the law of obligations deals with rights *in personam*, and so is concerned with *owing* (debt or obligation). It is raised out of the relationship binding one person to another (*obligatio*).⁶ So at the foundational level a distinction exists between *possessio* and *obligatio*. The former belonged to property and the later to obligations. This is the historical encapsulation of private law boundaries drawn by Gaius and Justinian (in the sixth century A.D) from an early history of a synthesis of the Roman law.⁷ Both compilations posit that all laws concern either persons or things, or actions.⁸ Things encapsulate property, succession and obligations. For example, in the Gaius *Institutes*, Books 1 (persons) and 2 (things), obligation is said to have two main sources: contacts and delicts (analogous to torts in the common law legal system).⁹ Contracts were a range of transactions with agreement (*conventio*) between two persons as its common denominator.¹⁰ It included transactions such as sale, hire and loan and the like. The category delict was founded on wrongs outside the confines of *conventio*.¹¹ Gaius initially thought that all obligations arose either from contract or tort.¹² Latter however, the jurist stumbled on another legal class of events that did not squarely sit within his contract and tort dichotomy (i.e. obligations not founded on contracts and wrongs), such as the obligation to reverse mistaken payments.¹³ With a view to accommodating this class of causative event and to cure

⁵ Classification has always been a tool for making intelligent disparate manifestations of social life. Common law lawyers generally classify normative groups for convenience and justice purposes. See Peter Birks (ed.) *The Classification of Obligations* (Oxford: Oxford Univ. Press, 1997) (stating that legal writers have done only limited work in bridging classification with legal reasoning); Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge: Cambridge Univ. Press 2003) (examining the relationship between legal classification and legal reasoning); Stephen Waddams, 'Classification of Private Law in Relation to Historical Evidence: Description, Prescription, and Conceptual Analysis' in Andrew Lewis & Michael Lobban, (eds.) *Law and History: Current Legal Issues* (Oxford Univ. Press 2004) vol. 6, 265 (discussing questions of common law classification from the historical perspective); Geoffrey Samuel, 'Classification of Obligations and the Impact of Constructivist Epistemologies' (1997) 17 *Leg. Stud.* 448 (arguing that the Gaius *Institutes* provides a foundational map of the law in the form of an institutional model that insinuates itself within social reality in such a way that it becomes amenable to legal rules in the three focal points of persona, res, and action – all being institutions in the sense that they exist as elements both in the world of law and in the world of social fact). See also Ernest J. Weinrib, 'The Juridical Classification of Obligations' in Peter Birks (ed.) *The Classification of Obligations* (Oxford: Oxford Univ. Press 1997) 37 (discussing juridical classification). Classifications usually proceeds based on causative events that trigger legal remedy, not on content. This accounts for why lawyers think of legal entitlements based on events rather than content. For example, though a claim for payment of money, for an ineffective transaction and a claim for debt for goods sold or in fact the rights to compensation for injuries caused a plaintiff, may structurally all have to do with obligation, because the contents are basically the same, lawyers would prefer to separate them into quasi-contract or restitution, contract and tort respectively by emphasizing the events that trigger the legal remedy. Writing on the linkage between and the unity of the law of obligations Birks alludes to this question of legal taxonomy thus: 'For example, you could, albeit inconveniently, distinguish between obligations to pay money, give goods, do work and so on. The inconvenience of such a division by content turns out to be that in any exposition you have to keep explaining how the obligations come into being and those explanations in terms of causative events do not vary much whatever the content of the obligation.' See Peter Birks, *An Introduction to the Law of Restitution* (revised ed., 1989) 28; Peter Birks, *Unjust Enrichment* (2003); Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *Western Australia L. Rev.* 1 (referred to as 'Taxonomy').

⁶ Whether these are complete categories in themselves is questioned by writers and by legal development of the law that interrogates the normative categories of civil law extensively. There no longer exist the crude classification dichotomy of *possessio* and *obligatio*. In fact, the concept of bailment transcends the dichotomy, as shown in *Houghland v. R.R. Law (Luxury Coaches) Ltd* [1962] 1 QB 694. See also, P. H. Winfield, *The Province of the Law of Tort*, Cambridge Univ. Press, 1931, 92; R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Cape Town, 1990, 205; Tony Weir 'Contracts in Rome and England' (1992) 66 *Tulane L. Rev.* 1615, 1636 - 1637; Geoffrey Samuel, 'Property Notions in the Law of Obligations' (1994) *Camb. L.J.* 524. In fact, the recent House of Lords decision in *Lipkin Gorman v. Karpnale Ltd* [1991] 2 AC 548 explicitly recognizing restitution is amply illustration that the dichotomy between *possessio* and *obligatio* is no longer relevant in law, except serving to illuminate contemporary development in the light of legal history.

⁷ Gaius (115-180 CE) *Institutionum iuris commentarii quatuor*, often referred as *Gaius Institutes* (around 160 AD) an elementary textbook on Roman private law contained four books, each dealing with the various manifestation of private law The *Institutes* of Gaius is reputed to be one of the first great textbooks on Roman law.

⁸ Gaius, *Institutiones* 1.8; Justinian, *Institutiones* 2.12; See also H. F. Jolowicz, *Obligatio and Actio* (1952) 68 *LQR* 469.

⁹ For example, Gaius, *Institutes* (G.) 3.88 states that 'the principal division of which is into two classes, for every obligation either arises from a contract, or from an offence.'

¹⁰ *Digest* 2.14 1.3.

¹¹ *Digest* 44.7.4.

¹² *G.* 3.88

¹³ For example, the *Institutes of Gaius* 3.91 and *Digest of Justinian/Dalloz* 44.7.5.3, both recognize that mistaken payment would be a basis for reversal of an enrichment even though the obligational duty to repay is neither rooted in contract or delict. The obligation to repay does not arise from contract because the payer discharges a duty rather than form a contract. *G* 3.91 reads: 'He also who received something that was not due from a person who paid him through mistake, is liable under a contract of this description, for a personal action can be brought against him under the formula, 'If it appears that he was required to give'; just as if he had received the property as a loan for consumption. Hence certain authorities hold that a ward or a woman to whom payment was made of something which was not due, through mistake, and without the authority of his or her guardian, is not liable to a personal action; any more than they are for a loan for consumption. This species of obligation does not, however, appear to arise from a contract, for a party who gives with the intention of paying a debt, rather desires to discharge an obligation than to incur one.'

his earlier error in classification, he designed a third category, which he styled: other miscellaneous events.¹⁴ To address this gap, Roman lawyers invented two further categories- 'quasi-contract' and 'quasi-delict' to capture those anomalous claims.¹⁵ Quasi-delict however did not prove useful and was discarded by later civilian lawyers. Quasi-contract on the other hand grew to become an independent head of obligation, associated with the common denominator of unjust enrichment. It became generally associated with the law of obligations as arising either from agreement (contract), wrongs (torts) and unjust enrichment (now properly called restitution law).¹⁶

However, legal development and the ingenuity of enforcing informal agreements through the use of 'trespass on the case,' largely illustrated in *Skyrme v. Butolf*,¹⁷ (equating tortious action to a breach of an undertaking under an informal agreement), led to the decline of the fourth category, *quasi ex maleficio (quasi-tort)*.¹⁸ The legal system, finding no usefulness with the *quasi-tort* category, since claims under it can conveniently be subsumed under quasi-contract wasted no time in discarding the *quasi-tort* category. So, a threefold division of contract, of tort and of quasi-contract were maintained and it constitutes the gamut of the law of obligations today.¹⁹ This paper will for convenience treat the law of obligations as those manifestation captured by contract, tort and restitution, interspersing equitable obligation between property and obligations depending on its place in generating property and obligations remedies.²⁰

3. Classification of African Legal Families

It is generally suggested by comparative lawyers that from the disparate differences among systems of law and legal systems, certain distinctive features are sufficiently common among some that warrants them been classified as belonging to a family. The question for comparative lawyers has therefore narrowed to what common features these systems exhibit either as group or the common features that divide them. Using the hypothesis, comparative scholars have sought to use the 'similarity and dissimilarity' to allocate distinct family groupings.²¹ These related questions have triggered interest in taxonomy, suggested to be the grammar of legal discourse.²² It has to a large degree aided comparative lawyers to decide if there are certain deep-rooted characteristics shared by a number of legal orders that transcends the differences between systems sufficient to classify them as belonging to a family. Far back in the 1900s, Esmein, a comparatists, without stating what principles were used as basis for distinction and classification, divided the world's legal families into five, the Roman, Germanic, Anglo-Saxon, Slav and Islamic families.²³ Arminjon, Nolde and Wolff in the 1950s, however picked holes in Esmein's division on the ground that his division is not explicit.²⁴ Using a historical source as scientific basis for classification of the peculiar structure and characteristics of

¹⁴ *Digest*, 44. 7. 1 pr.(Gaius, 2 Aurea). See also, Birks, 'Taxonomy' (n. 5) 30.

¹⁵ *Digest of Justinian/Daloz* 44.7.5. The Justinian Institutes, also identifies the two main groups of obligations as based on contract or tort, but had difficulty like his predecessor in making a classification of the residuary class of cases which seem to defy the contract and tort classification. He referred to 'those obligations which do not originate, properly speaking, in contract, nor arise from a delict, as quasi-contractual. See Justinian, *Institutes* 111 Tit. xxvii, pr. (3.13. 1. 2.J) where he stated that the three divisions are *ex contractu*, or *ex maleficio* or *quasi ex maleficio*.

¹⁶ In dividing obligations by reference to causative events, rather than content, The Justinian Institutes, also identifies the two main groups of obligations as based on contract or tort, but had difficulty like his predecessor in making a classification of the residuary class of cases which seem to defy the contract and tort classification. He referred to 'those obligations which do not originate, properly speaking, in contract, nor arise from a delict, as quasi-contractual.' It therefore adopted the four divisions of Gaius obligation – contract, quasi-contract, tort and quasi-tort. See, *Digest* 44. 7. 5 (Gaius, 3 Aurea). See also, Festus Emiri, *The Law of Restitution in Nigeria*, Lagos: Malthouse Press, 2012; Andrew S. Burrows, Contract, Tort and Restitution—A Satisfactory Division or Not (1983) *LQR* 217; Birks, 'Taxonomy' (n. 5) 30.

¹⁷ (1367) 7B. 11 Ric 11 (Ames Series). For detail discussion of how contract merged into tort, see Festus Emiri & Ayuba Giwa, The Cautelary Nature of Obligations Law in the Common Law System, in Tonwe & Oho (eds.) *Developments in Law: Essays in Honour of Bozimo*, CJ (Lagos: Malthouse Press 2010) 68.

¹⁸ See John H. Baker, *An Introduction to English Legal History* (3rd ed. London: Butterworths) 33.

¹⁹ Quasi-contract came to represent those obligations which though positively prohibited could not be squared into contract or tort. Such acts were treated as giving rise to consequences analogous to the Roman list of contract. Under the group of quasi-contract were grouped a number of cases, which logically may have some common thread, but had little or no affinity with contract. That notwithstanding they were clothed with some figure in the Roman list of contracts. Within the class of quasi-contract could be located, action to recover money paid by the plaintiff to the defendant under a mistake of fact or in pursuance of an ineffective contract, money had and received by a third party to the plaintiff's use, claims against wrongdoers, claims on a quantum meruit, etc. See *Moses v. Macferlan* (1760) 2 Burr 1005. Lord Mansfield was the first who attempted to determine the scope of quasi-contract, the forerunners of restitution. He said: 'the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.' But cf. Peter Birks, 'Taxonomy' (n. 5) (questioning the three strand thesis of the law of obligations)

²⁰ Festus Emiri, The Place of Equity in the Modern Law of Restitution: An Exercise in Taxonomy, in Emeka Chianu, (ed.) *Legal Principles and Policies: Essays in Honour of Justice C. Idigbe, JSC* (Benin City: Univ. Benin Press 2006) 18 (positing that the two obligations related categories of equity and restitution law should be harmonized in a manner that overthrows the taxonomy of equity rooted in division by reference to unity of content, with that of the common law taxonomy organised by unity of cause. The article presses the argument that it is a jurisprudential error to claim that the dualism of common law and equity is an obstacle to a unifying structure of the modern law of restitution, because the 'contents' of both equity and restitution are analytically the same).

²¹ The difficulty of an established criterion for division can be likened to a similar challenge posed in attempts to classify languages in comparative linguistics. While the comparatists generally agree that there is need for a theory of classification, they rarely make clear which common qualities is material for classing common and different families. See R.B. Schlesinger, H. Baade, M. Damaska & P. Herzog, *Comparative Law: Cases, Text Materials* (5th ed. 1988 & Supp. 1994) 311.

²² Ugo Mattei, Three Patterns of Law: Taxonomy and Change in the World's Legal Systems (1997) 45 *Amer. J. Comp. L.* 5.

²³ A. Esmein, Le Droit et l'enseignement du Droit, in: *Congres international de droit compare*, (Proces-verbaux des séances et documents 1, 1905) 445, cited in Konrad Zweigert & Hein Kotz, *An Introduction to Comparative Law* (Tony Weir trans, 3rd ed. 1977) 63.

²⁴ See Pierre Arminjon, Baron Nolde & Martin Wolff, *Traite de droit compare I* (1950). The learned writers Zweigert & Kotz, have however suggested that the basis of Arminjon, Nolde & Wolff criticism of Esmein is unfair, because it fails to consider how taxonomy over time

legal traditions, the learned commentators conceive private law manifestations evidence in seven legal family divisions: the French, Germanic, Scandinavian, English, Russian, Islamic and Hindu families.²⁵

Rene David however rejected the explanatory power of the 'substance' criterion employed by Arminjon. He thus divided the world into an initial five legal families. He criticised prior divisions by other for failing to show clearly the scientific basis for their taxonomy. He therefore proceeded with a structure using 'ideology' (political, religion, philosophy, economic or social structure) as major premise and 'legal technique' as minor premise to group legal traditions. Since his major premise was rooted in a distinction grounded on conception of justice, the learned writer conceived of the following five families: Western systems, socialist systems, Islamic law, Hindu law, and Chinese law.²⁶ Rene David however reversed his classification sometime in the 1990s, and he divided the world in four families: the common law, civil law, socialist law and other conceptions of law (residual classification).²⁷

Generally, the four-family division by Rene David, namely: (i) common law, (ii) civil law, (iii) socialist law, and (iv) other conceptions of law (residual category) is reputed to be the most viable, successful division.²⁸ The virility of his division is exhibited by the fact that most text on comparative law continue to understand the world's legal families in his four classification. Lawyers consider the categories as sufficiently representational of the global legal traditions, while capturing the religious systems under the broad residual category. Even those who disagree with his structure often time simply complicate his four-fold class in such circularity that ends up confirming that which they seek to refute.²⁹ The generalisation is however not without its drawbacks. Some have criticised it for treating taxonomy as an 'end,' with a claim to universality, rather than a 'means' for understanding. The argument proceeds like this: to classify the world into the simple four-family structure is to assume many things as 'given' when they are not. First, it uses only of private law manifestations to explain the whole bunch of the legal system, when private law is constitutive of a whole. That comparative scholar assumes private law as representational of the legal system is to be expected. The majority of comparatists are private law scholars. In fact, Arminjon, Nolde and Wolff, clearly stated that their 'substance' criterion based on originality, derivation and common elements were all grounded in private law observations.³⁰ It is therefore without question that to the extent that present taxonomy does not account for public law manifestations, comparative classification can only serve as mean and not end. For instance, while it is plausible to think that the divide between the United States and Germany is that between the common law and civil law respectively in private law classification, the differences in constitutional law (public law) particularly in the area of constitutional review does not show marked differences. Thus, to label them in the common vs. civil law divide can be nothing than sheer thumb rule generalization—private law translation. It is this drawback that implicates the universality division claim and probably clogs enrichment of our understanding of legal systems using the general private law bases.

Furthermore, some others have raised objections about the content of the 'connecting' factors used to group the world legal families. They for instance, argue that the intersectionality used in dividing or grouping families are Western-sided, less attention being given to legal systems that are not within the radar of Western legal system essence.³¹ What is more, the history of classification from Esmein to date, with changing divisions reveal that much of what is classified depends on the time of

changes, and so what is good today may be unhelpful tomorrow due to changing legal landscape. In the views of Zweigert & Kotz, Esmein's classification in the 1900 was good for his time. See Zweigert & Kotz (n. 23) 64. In this respect, classification in comparative law is like taxonomy, which requires new explanatory hypothesis when aging and changes in legal culture occurs. See also, Mattei (n. 22) 5.

²⁵ Arminjon, Nolde & Wolff (n. 6) 47. In the writer's view, their division was based on substance, using originality, common elements, derivation and the like, without reference to ephemerals like race or geography.

²⁶ Rene David, *Traite elementaire de droit civil compare* (1950) 222-226, cited in in Zweigert & Kotz (n. 23) 63.

²⁷ Rene David & C. Jauffret Spinosa, *Les Grands Systemes de Droit Contemporains* (10th ed., 1992) (hereinafter referred to as *Les Grands Systemes*). The residual group consists of Jewish law, Hindu law, the law of the Far East, African and Malagasy law. Of all the classifications based on non-homogeneous factors, the Rene David four-family classification is reputed to be the most successful and virile. According to Ugo Mattei, other comparatists who have attempted to add complexity to David's simple four-family classification invariably become more complicated and so end up confirming the simple taxonomy they set out to reject. See Ugo Mattei (n. 22) 8.

²⁸ Mattei (n. 22) (suggesting the four-fold family classification by Rene David is a more plausible proposal on how to divide the world's legal family). See Rene David & C. Jauffret Spinosa, *Les Grands Systemes de Droit Contemporains*, (10th ed. 1992) cited in Ugo Mattei, (n. 22) n. 13. See also Zweigert & Kotz (n. 23); Castan Tobenas, 'Contemporary Legal Systems of the Western World' (1988) 25 *Comp. Juridical Rev.* 105.

²⁹ Zweigert & Ktoz (n. 23) 62.

³⁰ Arminjon, Nolde & Wolff (n. 24) 47.

³¹ According to Schlesinger, the essence of Western legal systems are captured in five basic characteristics, namely: (i) that law is autonomous, divorced from impurities like politics, religion, ethics, etc. (ii) law is the primary means for the resolution of disputes (iii) the rule of law prevails (iv) dispute settlement mechanism involves the application of abstract, general pre-existing rules to controversies and (v) resolution of dispute is a zero-sum affair, one party must win and the other losses, because the basic objective is not reconciliation, but a determination of right and wrong. See Schlesinger, Baade, Damaska & Herzog (n. 21) 81. See also, Christopher A. Whytock, 'Legal Origins, Functionalism, and the Future of Comparative Law' (2009) 13 *BYU* 1879 (discussing the need to consider the cultural, economic, political, and social context within which legal systems operate as providing insight into the functioning of law); Ralf Michaels, *The Functionalist Method in Comparative Law*, in Mathias Reimann & Reinhard Zimmermann (eds.) *The Oxford Handbook of Comparative Law*, 2006, 339; Gunter Frankenberg, 'Critical Comparisons: Rethinking Comparative Law' (1985) 26 *Harv. Int'l. L.J.* 428 (stating that the functionalist approach is paradigmatic of modern comparative law); Mattei (n. 22) (positing that though comparative lawyers expend effort in classifying families according to certain deep-rooted characteristics shared by them, they largely ignore the Weberian/sociological approach representing law as a tool for social organization—a perspective that clearly reveal that legal families belong to three main anthropological groups: rule of professional law, the rule of political law, and rule of traditional (religious) law. The three patterns constitute social constraints or social incentives in all legal families, but each is classified as belong to one depending on which of the constraints or incentive shows prominence in the legal system).

classification. Esmein had a five-family division. Even Rene David initially also had five, that he revised to the present simple four. What it translates to is simply this: every division invariably is a hypothesis. When it loses its explanatory and predictive powers, a new hypothesis is developed to replace it. This however, should not cause us to lose sleep anyway. Scientists do not abandon the process of hypothesizing simply because one has proved not useful. Rather, some new hypothesis is developed that carries with it explanatory and predictive powers. The same should be the case for our comparative law taxonomy. This consoles comparatists to stay on hypothesizing for new and better divisions. These shortcomings notwithstanding, this paper adopts the four macro-family divisions by David to explain the legal map of Africa. Using the roadmap, we can conveniently categorize African legal families into the common law, the civil law, the socialist law, and the other conceptions of law (residual category) families.³² Africa's history of colonialism and an anthropological survey reveals that both the common law and civil law systems are transplant legal systems from the European colonializes. Most African States permitted the transplanted systems to operate *pari passu* with either the indigenous customary or religious law of the people, with rules governing applicability.³³ For example, in Nigeria, the British allowed the enforcement of either customary law or religious (Sharia) law side by side with the received English law.³⁴ The fall of communist Russia and the dismemberment of the Soviet Union diminished traces of socialist legal system in the continent. Africa thus has a legal landscape generally mapped out by the application of the common law or the civil law (with patches of mixture as in South Africa) with indigenous (customary or religious) system applying side by side. This is representative of the situation in many other African countries today.³⁵ It therefore proper to think that Africa is home to three main systems of law—the common law, civil law and the residuary (traditional or religious) system. There is no prominently marked socialist system in the continent. Our harmonisation project therefore plotted in this paper would centre on the first two, tangential analysis will only be made to the residuary system in navigating the proposed 'ius commune' using intersectionality negotiation through Roman law.

4. Roman Law Influence on the Common Law of Western Europe

Roman law and jurisprudence are products of the ancient Roman city-state, prominent among which is Athens. There does not appear to be any other ancient city-state that produced a positive legal science or legal system of equivalent significance. It has been suggested that the Roman institution of law was unique from other traditions because of the traditionalism, realism and authoritative attitude of the Roman nobility. For unlike other systems, it developed an independent and highly objective procedure for the adjudication of social and economic conflicts. By so doing, the system liberated itself from the vagaries of rituals and impact of political and moral ideological changes not sufficiently touching on law. The development of highly objective methods of conflict resolution that eschewed theories about the concept of law is reputed to be the primary contribution of Roman law to the world, especially to western legal thought.³⁶ It is this rational character of Roman law that is its greatest contribution to the world legal systems. Unlike the chthonic and Talmudic traditions, Roman law was centred on

³² See David & Spinoza, (n. 27).

³³ *Adesobokan v. Yinusa* [1971] All NLR 227, per Ademola, CJN (stating that the provisions of the Maliki Moslem law which required a testator to distribute his property by certain prescribed portion without allowing the testator the freedom to devise as willed by him is incompatible with s. 3 of the Wills Act, 1837 and according void). See also rules of court which enjoin the applicability of native law and customs not repugnant to natural justice, equity and good conscience. For example s. 34 (1) of the High Court Law of Northern Nigeria, Cap. 49 (a statute copied into all modern court laws) provides that 'the High Court shall observe, and enforce the observance of every native law and custom which is not repugnant to natural justice, equity, and good conscience, nor incompatible either directly or indirectly or by implication with any law for the time being in force, and nothing in this Law shall deprive any person of the benefit of any such native law and custom.' Also, s. 17(1) of the Supreme Court Ordinance (Cap. 211 of the Laws of Nigeria 1948) states that: '[N]othing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce, the observance, or shall deprive any person of the benefit of any existing native law or custom, such law or custom not being repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by necessary implication with any law for the time being in force.'

³⁴ Akintunde O. Obilade, *The Nigeria Legal System* (London: Sweet and Maxwell 1979). See for example the High Court Law of Northern Nigeria, enjoining the court to apply common law, doctrines of equity, and statute of general application in force in England on the 1st day of January, 1900; and that the rules of practice be in uniformity with the practice for the time being in England; and to observe native law and customs not repugnant to natural justice, equity and good conscience nor incompatible with laws in force. (stating in s.28 '[S]ubject to the provisions of any written law and in particular of this section and ss. 26, 33 and 35 of this Law: -(a) the common law; (b) the doctrines of equity; and (c) the statutes of general application which were in force in England on the 1st day of January, 1900, shall in so far as they relate to any matter with respect to which the Legislature of Northern Nigeria is for the time being competent to make laws, be in force within the jurisdiction of the court; ' s. 33, on probate jurisdiction stating that: '[T]he jurisdiction of the High Court in probate cases and proceedings may, subject to the provisions of this Law and especially of section 34, and to the Rules of Court, be exercised by the court in uniformity with the law and practice for the time being in force in England; ' and s. 34(1) that '[T]he High Court shall observe, and enforce the observance of every native law and custom which is not repugnant to natural justice, equity, and good conscience, nor incompatible either directly or indirectly or by implication with any law for the time being in force, and nothing in this Law shall deprive any person of the benefit of any such native law and custom.'

³⁵ Most African jurisdictions continue to maintain this mixed system. For example, the Constitution of the Republic of South Africa, s. 169 (3) recognizes indigenous law. See Reinhard Zimmermann & Daniel Visser, 'South African Law as a Mixed Legal System,' in Reinhard Zimmermann & Daniel Visser (eds.) *Southern Cross: Civil Law and Common Law in South Africa* (Oxford: Clarendon Press 1996) 3 n. 16; William Tetley, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' (2000) 60 *La. L. Rev.* 677, 692-693 (stating '[T]he Republic of South Africa is a mixed jurisdiction whose legal system reflects elements of both civil and common law, as well as African tribal customary law. . . . There is also a recognition of African customary law ('indigenous law') which under the present Constitution must be applied where applicable, subject to the Constitution and any relevant legislation. ')

³⁶ Franz Wieacker, 'The Importance of Roman Law for Western Civilization and Western Legal Thought' (1981) 4 *Boston College Int. & Comp. L. Rev.* 257, 265. Theorizing about the concept of law, justice and the like, was a preoccupation of the Greeks, which of course Roman thought used to its advantage in developing its highly independent objective procedures for adjudicating conflicts.

the centrality of the person.³⁷ It was a system of law developed in the eighth century BC. Peoples adorned it because its juriconsults were able to convincingly state conditions for governing complex personal relationships. However, by the turn of the middle of the third century, its influence as a system of law suffered decline.³⁸ It was Justinian, who presided over the eastern remains of the fallen Roman Empire, towards the end of the century, who ordered a compilation of the laws. On completion, he prohibited comments on it, ordering all to treat it as law codified.³⁹ With the decline of the Roman Empire, its law also waned in the whole of Europe. The old chthonic law, all could remember then re-asserted itself. Even when Roman law was re-discovered in the eleventh century, it still had to contend with it to emerge victorious.

Medieval Roman law constitutes the root of the present continental legal system. The substantive rules in the civil law traditions largely follow those of Justinian law. However, anyone who reads Baker will conclude that the English common law developed through these years in isolation of the whole of Europe, especially the prevailing Roman law.⁴⁰ The learned writer posits that English law as developed through history proved very durable against outsider influence, especially against two significant barrages of Roman law. Certainly, English law as is known in its sophisticated form of a combination of common law and equity, appeared to have come frontally first against the Church. Thereafter, it came in collusion course against the King and Parliament. In all of these, the common law came out victorious. But the greatest attack to it came from two significant waves of Roman law which swept across the European continent. The first wave was triggered in the twelfth and thirteenth centuries by the rediscovery of Justinian *Digest*, and the blossoming of Roman legal studies in European universities, such as in Bologna and the like. The effect was that it made Roman law the common denominator of law in the continent. European lawyers, including the doctors of law at Oxford and Cambridge,⁴¹ thus treated Roman law as the common currency of law in the continent. Naturally, legal education of lawyers through university system (as opposed to the apprenticeship 'pick-up' type in the Inns) and reasoning by argumentation via the symmetry of the *Digest* brought with it distinct institutions and ways of reasoning in law. This consumed the whole continent formulary structures. But England stood in deep traditions stewed in its unconscious highly developed writ system, with attendant peculiarities that needed little or no argumentation from continental ideas. The existence from 1066 C.E. of central and itinerant royal courts was all England had (within a unified system of government with a legal system well developed) to stay away Roman influence before the wave of professional university-trained lawyers with continental roots could seriously question the epistemic structure and institutions of the common law. According to Baker, quoting from history, 'while the other nations of Western Europe were beginning to adopt as their own the ultimate results of Roman legal history, England was unconsciously reproducing that history.'⁴²

With the rise of rationalism associated with logically ordering of law encouraged by the civil law, comes the second significant wave of Roman law about the fifteenth century. Again, England appeared prepared for the challenges. Through a process of pleadings, common lawyers built a near rational system of law around existing writs that were the focus of pick-up training for lawyers. The business of training lawyers was not university-based, but located in the Inns between London and Westminster Hall, where trainees were schooled through the writs system and elaborate pleading weaved around them.⁴³ It has been suggested that having withered the Roman storm, the common law became a rival system that competed with the civil in transplant context to colonies. What emerges from this would appear to suggest a large degree of isolation of the common law from Roman influence. But that is an overstatement, for while it is true that there was no comprehensive reception of Roman law into the English system, there certainly were significant interrelationship than acknowledged by Baker. Yes, to a large degree it is factual to suggest that the common law resisted the substantial reception of Justinian's law and the unrestricted dominance of 'academic-trained' jurist appointed by the sovereign, but it cannot be seriously doubted that Roman law was significant in growing the roots of the common law. The doctrines of the glossators and those of post-Bolognese medieval

³⁷ The chthonic tradition was identified with the sacred character of the cosmos, while the Talmudic relied on the Torah. For detail discussion, see, Patrick Gleenn, *Legal Traditions of the World* (Oxford Univ. Press, 2000) chapters 3 & 4.

³⁸ Gaius famous Institutes was written just before the decline of Roman law in the middle third century CE. See, Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Oxford: Oxford Univ. Press 2001); Geoffrey Samuel, *Law of Obligations and Legal Remedies* (2nd ed. Cavendish Pub. 2001)

³⁹ Even though that was the position ordered by Justinian in the 6th century, it must be admitted that the compilation (known as the Digest or the Pandect-Greek word for all is included), was nothing but the opinion of jurists, with no systematic design, did not capture the whole of Roman law.

⁴⁰ Baker (n. 18) 33

⁴¹ Baker (n. 18) 193 (suggesting that these doctors of Oxford and Cambridge was a college of advocates with exclusive audience in the medieval ecclesiastical and admiralty courts, prior to 1857, when the establishment of secular divorce and probate wiped out the ecclesiastic jurisdiction of the courts. These advocates who were doctors of Civil law (D.C.L at Oxford or L.L.D. at Cambridge) were admitted to practice by ecclesiastic authorities in the ecclesiastical and admiralty courts, and they belonged to the society of 'Doctors' Common.' However with the coming of secular divorce and probate courts in 1857, they lost the monopoly of appearance in the court, and just soon thereafter, 1859, they suffered a similar fate in admiralty. With these fatal blows, coupled with the fact that it was much easier to become a barrister, no new member were admitted to Doctors' Common, and the society went into extinction in the opening part of the twentieth century).

⁴² Baker (n. 18) 34 (quoting Pollock & Maitland, *History of English Law before the time of Edward I* (1895; 1968 ed.) vol. II, 558).

⁴³ According to Blackstone the first areas of law to attract common lawyers' attention was the writ system. See on the influence of ancient writs (procedure) in shaping modern law, see Maitland and Emiri, *Cartulary Nature*. Some commentators posit that in a peculiar way modern common law strangely has more in common with classical Roman law than any modern civilian system with Roman roots, in that, common law emphasis on legal remedy (actio)—damages, debt, injunction and the like, put on high a study of the law of remedies as well as the principles of substantive law. In this respect it is like the Roman law in that to get a full picture of say the law of obligations would require the study of the law of actions (Book IV of Gaius) and the law of things (Book III). See Geoffrey Samuel, *Law of Obligations and Legal Remedies* (2nd ed. Cavendish Pub. 2001) 114.

Roman law influenced the intellectual organisation of English common law.⁴⁴ Common law had very useful contacts with civil law, that extended beyond the Tudor times (in 1603), when the pick-up Inns method of legal education prevailed over academic legal education in the preparation of barristers, sergeants-at-law and judges.⁴⁵ Roman law impacted on the common law in the following areas:

Legal Education

In the twelfth century England there developed a practice of using the Bolognese glossators for legal instruction. For example, during the period when Roman law was hardly known in Germany, it was taught in Oxford or Canterbury by Magister Vacarius from Bologna.⁴⁶ Sometime later, even native English scholars, began teaching and using the legal literature of the first Bolognese glossators. It was this phenomenon that aided in no small measure in imposing a disciplined structure on an otherwise disparate English writ system organised around forms of action. It helped the common law to assume intellectually discipline forms and concepts. In fact, the very early thesis of the common law in an organised form (through still structured around the then forms of action) by Glanvill and Bracton, were works of learned men trained in medieval Roman law.⁴⁷

Roman-Canon Law

Roman-canon law was the applicable law in the ecclesiastical courts with jurisdiction over matrimonial causes, defamation and succession to movables (in some periods, contracts). Its roots were a synthesis of ecclesiastical sources (the Holy Bible, the Church Fathers and the canons of ancient and medieval church councils) and of a medieval interpretation of Roman law. This greatly influenced the conscience-based jurisdiction of the chancery, a court whose members were clergymen. Since most Chancellors, until the Chancellorship of Lord Nottingham in 1673, were churchmen who applied and used canon law as barometer for measuring fairness and as model for the inquisitorial procedure of Chancery, Roman law was indirectly operational in the English legal system.⁴⁸ This is particularly so in that many of the maxims and rules of equity developed by Chancery are traceable to the *aequitas canonical* partly, or wholly, rooted in Roman law.

Commercial Law Jurisprudence

Commercial law was also area of law that had noticeable Roman influence. Trade and commerce among different nationals across the continent brought with it social and economic conflicts requiring their resolution through fair means of adjudication. Since Roman law was treated by the large section of the European continent as *ius commune*, it was adopted to deal with legal transactions of commercial nature as *lex mercatoria*. Much of this was noticeable in the sphere of shipping and maritime activities, where special courts existed in major shipping centres. It was therefore not surprising that the later special Admiralty courts established by the King mainly applied civil law. Though the jurisdictional struggle between these special commercial courts and regular common law courts led to the eventual overthrow of the special courts in the nineteenth century, the distinct 'law merchant' developed by them were engrafted by reference into the common law system. Prominent in this respect were the decisions of Lord Mansfield, who developed a large body of law merchant.

Political Separation of State from Church

With the separation of the Church of England from Rome, the pride of the ecclesiastical courts diminished in importance in the administration of justice. At about the same time period, lawyers trained from the Inn system fought against the Romanisation of the common law during the Tudor times. This however, did not spell complete death to Romanisation of the law and the legal system. The Court of Admiralty, the Star Chamber and the ecclesiastical courts continued to apply the principles of the civil law that had attained the status of 'ius commune' in maritime, penal and ecclesiastical matters; and in conflict of laws disputes, civil law was undisputedly applied without question.

Jurisdictional Struggle between King and Parliament

Roman appeal was again pressed forward during the sixteenth and seventeenth centuries, when jurisdictional struggle started between Parliament and the Kings, who sought absolute monarchy that was resisted by Parliament. The kings pushed forward the Roman proposition that supported absolute monarchy in principle. Roman law supported the proposition that whatever pleases the king has the force of law. Notable at this period of time the force of common law was weakened in favour of civil law thinking. For example, the king designed a series of royal courts and quasi-judicial bodies that eroded the strong jurisdiction of the common law. One such court was the 'Star Chamber,' a superior court with jurisdiction to try crimes of political significance. The prerogative court of Chancery also furthered royal will. One basic feature of the royal courts was that they adopted procedures that were Roman-canon based. Interestingly, the lawyers and judges in the courts were those from the special guild of Doctors Common, all trained in Roman law. What is more, the intellectual climate at the time favoured the reception of Roman law. Formalism associated with the common law, especially its writ system estranged it from the then

⁴⁴ See Charles Donahue, *The Civil Law in England* (1974) 84 *Yale L.J.* 167, Paul Vinogradoff, *Roman Law in Medieval Europe* (3rd ed. 1961) cited in Franz Wieacker, 'The Importance of Roman Law for Western Civilization and Western Legal Thought' (1981) 4 *Boston College Int. & Comp. L. Rev.* 257. See also, Brian Levak, *The Civil Law in England 1603-1641: A Political Study* (Oxford: Clarendon Press, 1073).

⁴⁵ Wieacker (n. 44).

⁴⁶ Zweigert & Kotz (n. 23) 194. It is said that the Bolognese legal method of *studium civile* is characterised by decision-making not based on precedents but by way of subsuming a case under the terms of an abstractly formulated authoritative text or statute. See also, Wieacker (n. 44).

⁴⁷ Ranulf de Glanvill, *The Treatise on the Laws and Customs of the Realm of England* (G.D.G. Hall trans. 1965); Henry de Bracton, *On the Laws and Customs of England* (G. Woodbine ed. S. Thorne trans. 1968).

⁴⁸ For detail discussion on the transformation of the Court of Chancery, see Festus Emiri & Ayuba Giwa, *Equity and Trust in Nigeria* (Lagos: Malthouse Press, 2012) 6.

humanistic and Renaissance appeal of society. Civil law in contrast stood as the system of law that was clearer and comprehensive.

Contact between Scots Law and European 'Ius Commune'

The very close contact between Scots law and the continental 'ius commune' that lasted beyond the Union of 1705 with England, in no small measure transplanted doses of the civil traditions into the common law.⁴⁹ Even today, it can be said, with some degree of confidence, that the mixed systems of Scotland, Quebec, South Africa (Cape Colony), Ceylon (Sri Lanka), British Guyana (Cooperative Republic of Guyana) and Louisiana, most of which now form part of the Commonwealth can exert a 'pull-over' effect on the common law towards continental legal reasoning.⁵⁰ But in all of this the common law defended itself from comprehensive transplant of Roman law. It was able to do so for many reasons outside the usual English conservative stickle for its ingrained traditions. For one, common lawyers teamed up with Parliament using common law as weapon against royalist and the absolute prerogative of the king.⁵¹ Also, the structured organisation of English lawyers, their high level of professionalism, and their political influence in society, all served to help them stick to the common law traditions 'on grounds of principle and profit alike.'⁵² It is further suggested that the formalistic writ structure may have provided it another bulwark to transplant influence. It is thus natural that having stood its grounds against invading system of law—Roman law, that the common law prides itself as a champion of freedom of people against arbitrariness of governments over the ages.⁵³ Notwithstanding all of this, there is no question that Roman intersections are visible in the common law. Let us examine how Roman thinking influenced the development of the law of obligations.

5. Roman Intersections in the Law of Obligations

Let us consider how Roman law provides the intersection for the law of obligations in the civil and common legal families.

Contract

How are the three private law manifestations under the common law similar or different from that of the civil law tradition? Common lawyers over the years have also divided the three obligations strands (contract, tort and restitution) into two other categories—obligations voluntarily assumed and those legally imposed. The former captures the law of contract, the latter consisting of tort and restitution. Contractual obligations have come to be treated as being almost exclusively about promises, agreements, intentions, acts of will and the like. So, by common count the function of the court is to give effect to private autonomy of contracting parties.⁵⁴ The conceptual framework dominates thinking about contract.⁵⁵ But is this a strange category to the civilian tradition? The Roman *Corpus Iuris Civilis* reveals it is not. Initially Roman jurist did not develop a law of contract or a general law of obligations. They were content with a list of specific types of contract (sale, hire, loan, stipulation and the like) provided they evince agreement (*conventio*). It is suggested that later jurist, using the notion of *conventio* and the abstract contracts such as pacts and stipulations, started the transition from the law of *contracts* to a law of *contract* i.e. moving from the inductive to deductive contract conception.⁵⁶ The result is that later civil jurist talk in terms of a general theory of contract based on consent. For example, Art. 1134 of the French Civil Code stipulates that 'contracts legally formed have force of legislation between those that have made them.' So, to a large extent both traditions recognise the place of private autonomy as the foundation of contract.⁵⁷

⁴⁹ Wieacker (n. 44).

⁵⁰ See Emiri & Giwa (n. 48) chapter 25; Jan M. Smits, 'Mixed Jurisdictions: Lessons for European Harmonization?' (2008) 12 *J. Comp. L.*

⁵¹ For history of struggle, see Emiri & Giwa (n. 48).

⁵² Zweigert & Kötz (n. 46, 195).

⁵³ See Lord Alfred Denning, *Freedom under the Law* (1949) (being part of the Hamlyn lectures by Lord Denning in 1949 on Law and Freedom, available in Sweet & Maxwell, 1999).

⁵⁴ Patrick S. Atiyah, *Contracts, Promises and the Law of Obligations* (1978) 94 *LQR* 193.

⁵⁵ Robert Cooter & Thomas, *Law & Economics* (6th ed. Berkeley Law Books 2016) 277 (stating that '[I]n the late nineteenth and early twentieth centuries, Anglo-American courts and legal commentators developed the *bargain theory of contracts* to answer the two fundamental questions of contract law. The bargain theory held that the law should enforce promises given in a bargain. To implement this answer, theorists isolated and abstracted the minimal elements of a typical bargain, and these distinctions remain fundamental to the way lawyers think about contracts. The bargain theory of contract (that law enforces promises given in a bargain) or meeting of minds concept of contract has been replaced with a taxonomy based on reliance, which better captures the evolution of contract law. For example, even though the American *Restatement*, 1932 generally embraced the bargain theory in s. 75, the present *Restatement* in s. 90 rejects the bargain theory and establishes enforceability of gifts promise upon which a reasonable person had detrimentally relied without consideration. See also, E.A. Farnsworth, *United States Contract Law*, 1990, 30 ff; but cf. Cooter & Ulen (n. 55) 286 (the purpose of contract law is to enable people to convert games with inefficient solutions into games with efficient solutions).

⁵⁶ Samuel (n. 38).

⁵⁷ William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)* (2000) 60 *La. L. Rev.* 677, 713 (interesting stating that the rule on foreseeable contractual damages in both system are the similar and that in *Hadley v. Baxendale* (1854) 9 Bx. 341, (1854) 156 E.R. 145 the court cited Pothier, as the French authority, to formulate the common law rule that, besides those damages arising naturally from the breach of contract, consequential damages include such damage as 'may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach are recoverable). For citation of Pothier as authority see (1854) 9 Bx. 341, 345-346, (1854) 156 E.R. 145, 145, 147. See Joseph Robert Pothier, *Pandectae Justinianae in novum ordinem digestae* (Paris and Chartres, 1748–1752) is a classic in the study of Roman law. In 1749 he was made professor of law at the University of Orleans. He paid particular attention to the correction and co-ordination of the text of the Pandects.

Delict

Delict (tort) under the common law belongs to the category of obligation not voluntarily assumed. Law imposes it. It governs infringement of interests protected by law independently of private agreements. Both the laws of tort and contract entitle people to claim compensation for harm or injury suffered. While the latter arises from disappointment in the bracket of promise, the former is raised outside the arrangement of promise. Like Roman law, the common law on tort started with specific types of liability for different torts. However, unlike the Roman continental system, it did not develop a general principle of delict liability. Rather common law delict formed around the separate types of circumstances and the existing writs. Even at that, it is truism that torts fall within the area covered by wrongs. Its grounds for liability are structured on fault and sometimes no-fault (as in cases of strict and vicarious liability). These underlying principles are not strange to civil law. Roman law of delict was also unsystematic. In its inception it operated more like a law of actions in that there were a range of separate delict and quasi-delict dealing with particular types of harm. Just as common law formed around wrongs based on fault and no-fault, Roman law developed a principle of blameworthiness (*culpa*) and strict liability in two forms—direct strict and vicarious liability. Many civilian codes recognise these bases. For example, on liability founded on *culpa* the Civil Code Art. 1382 states that the fault actor of a wrong is liable to make reparation.⁵⁸ Though initial Roman law emphasis on *culpa* blocked civilian recognition of strict liability, industrial revolution forced jurist to escape from a *culpa* principle towards one based on risk.⁵⁹

A notion based on risk introduces vicarious liability on the basis that profit imposes liability of risk (*ubi emolumentum ibi onus*). Whatever, the controversy surrounding this, it is now settled that a principle of strict liability exists in civilian jurisprudence.⁶⁰ So both legal systems recognise the categories of delict with identical underlying philosophy.⁶¹

Restitution or Unjust Enrichment Law

The other category of obligations legally imposed under the common law is known as the law of 'quasi-contract,' or more properly, the law of restitution (unjust enrichment law in the civilian system). This body of law analysable by jurist since the 1860's is now considered a legal category of obligations law.⁶² Initially it was the view of scholars that the category is generated by the principle of unjust enrichment.⁶³ However, it would appear that restitution could no longer be explained on that mono-casual basis. Modern jurisprudence recognises that restitution law is now fairly settled as the third leg of the law of obligations generated by restitution for the reversal of unjust enrichment or unjust benefits; restitution for the reversal of gains from acquisitive wrongs; and restitution for the vindication of proprietary rights.⁶⁴ Interestingly, the civil law also has a sub-category of the law of obligations for reversing unjustified enrichment. In fact, restitution as a category of legal thought in the common law owes its formation to civilian jurisprudence.⁶⁵ The Romans developed two main actions that were used to reverse unjustified benefits. They were the *condictio*—a freestanding *in personam* debt action, used for a number of restitutionary situations. The other was the *actio negotiorum gestorum contraria*—a remedy available to a person who has intervened on behalf of another in the interest of that other.⁶⁶ These actions were later conceptualised in civilian jurisprudence to imply that the underlying basis for liability for restitution is the notion of unjust enrichment.⁶⁷ Even at that, it is arguable that if common law restitution does not occupy the same square as unjust enrichment under the civilian system because what triggers it is multi-casual, there exist

⁵⁸ Art. 1382 & 1383 of the Civil Code provide that compensation is due for any fault, act, negligence or imprudence committed by the author. Consequently, bad faith is not required. However, the existence of bad faith might have a consequence on the scope of condemnation.

⁵⁹ Samuel (n. 38). See also, Lord Goff, 'The Future of the Common Law' (1997) 46 *ICLQ* 745.

⁶⁰ Samuel (n. 38).

⁶¹ William Tetley, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' (2000) 60 *La. L. Rev.* 677, 713 (stating that before *Donohue v. Stevenson*, [1932] A.C. 562 (H.L.) there was no general duty of care at common law. There were many tort causes of action, and the tort of negligence covered only certain special duties. Civil law, on the contrary, always recognized the general obligation not to act unreasonably in situations not governed by contract; but that the case created a general duty of care already similar to the civilian law: 'you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour').

⁶² See the explicit recognition of restitution as a separate claim in some common law jurisdictions: Australia: *Pavey and Matthews Property Ltd v. Paul* (1987) 162 CLR 221, underlined in *David Securities Ltd v. Commonwealth Bank of Australia* (1992) 175 CLR 353. England: *Lipkin Gorman v. Karpnale Ltd* [1991] 2 AC 548; at 568-81 (HL), per Lord Goff; *Banque Financière de la Cite v. Parc (Battersea) Ltd* [1998] All ER 737 at 740 (HL) per Lord Steyn. Canada: *Degelman v. Guaranty Trust Co. of Canada* [1954] SCR 725. *Morr (James) & Sons Ltd v. University of Ottawa* (1974) 49 DLR (3d) 666 at 676 per Morden J. There is yet no explicit recognition of restitution as an independent normative category in Nigeria That explains why its private law jurisprudence could hardly resolve the question of unjust enrichment of the defendant at the plaintiff bank expense in *Savannah Bank Ltd. v. Ajilo* [1982] 5 SC 1. See Festus Emiri, *Law of Restitution in Nigeria* (Lagos: Malthouse Press 2012) 585.

⁶³ Robert Goff & Gareth Jones, *The Law of Restitution* (5th ed. London: Sweet and Maxwell 1998) 3; Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989) 17; Andrew S. Burrows, *The Law of Restitution* (London: Butterworths 1993) 1; See also *Moses v. Macferlan* (1776) 97 ER 676, per Lord Mansfield; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 61, per Lord Wright; *Lipkin Gorman v. Karpnale* [1991] 2 AC 548.

⁶⁴ Peter Birks, 'Misnomer,' in William Cornish, Richard C. Nolan, Janet O'Sullivan & Graham Virgo, (eds.), *Restitution: Past, Present and Future* (Oxford: Hart Pub. 1998) 7; Peter Birks, 'The Law of Restitution at the End of an Epoch' (1999) 28 *Univ. WALR* 13, 19; Peter Birks, 'Equity, Conscience and Unjust Enrichment' (1999) 23 *Melb. Univ. L. R.* 1; Graham Virgo, *The Principles of the Law of Restitution* (Oxford: Clarendon Press, 1999) 8-17 and Emiri (n. 62).

⁶⁵ Geoffrey Samuel, Property Notions in the Law of Obligations, (1994) *Camb. L.J.* 524.

⁶⁶ See Samuel J. Stoljar, 'Unjust Enrichment and Unjust Sacrifice' (1987) 50 *MLR* 603; Peter Birks, 'Negotiorum Gestio and the Common Law' (1971) 24 *CLP* 110.

⁶⁷ Samuel (n. 38).

sufficient civilian notion that square with the common law categories.⁶⁸ The point is well argued by Emiri.⁶⁹ We will not repeat the thread of argument here again for fear of breaching the methodology set out in this paper, namely to discuss at a level of generality a harmonisation project. But one thing that can hardly be controverted is that at least the civilians long knew restitution prior to its recent recognition in many common law jurisdictions and both systems recognize similar bases for a restitution law.⁷⁰ Where does all of this leave us? At least that both systems structure a law of obligations captured by three main categories, contract, tort and restitution under similar fundamentals.

Equitable Obligations

Where equity sits in this structure of the law of obligations can be the beginning to more questions, or what some may term more controversies. Why? This is because while the categories of the law of obligations—contract, delict and restitution—can be put on the great divide between obligations voluntary assumed and those legally imposed, and property law is explainable as generating rights *in rem*, equity is a certain, seeming, common law obligation category peculiar to the common law, with no explicit civilian equivalent. It is obligation generated by equity. Equitable obligations can be challenging to fit in in the divide. How to fits it into the divide of assumed and imposed obligations or even property law can be troublesome, talk more of how it can be brought into a common patrimony of obligations. Unfortunately, few commentators have dared to discuss its harmonisation with the other branches of obligations law.⁷¹

In the context of our harmonisation project, incorporating equitable obligations can seemingly defy civilian comparison because it is a theorising about law generally unknown to the Roman continental systems. The discretionary nature of equitable remedies somewhat belies a philosophical analysis of its underlying basis. For example, if it is assumed that the notion of 'unconscionability' triggers its jurisdiction, implicating it as founded on a notion of 'palm tree' justice. Cogent as such a counter argument might seem, we would like to quickly say a few words on this before moving on. If at a general level equitable obligations are raised by a generic notion of unconscionability, then it is plausible to ask, does this itself make its obligations hostile to civil traditional category? Our simple answer is no.⁷² That equitable obligation is a peculiarity of Anglo-American invention and theorising about property law and the law of obligations is nothing to lose sleep about. Theorising was much a Roman, and subsequently a continental practice. While it is true that much time and trouble has been devoted to the challenge of fitting equity into the Roman divide of remedies *in personam* and *in rem*, less being devoted to its place in a general law of obligations, it is respectfully argued that that is no obstacle to harmonisation and *rapprochement*. Equity's underlying philosophy is analogous to the notion of good faith (*bona fides*) in Roman law.

Some critics of harmonisation suggest that since equitable obligations, particularly trust law (express and legally imposed trust), is a distinctive feature of the common law with nothing comparable in the civil law system, it impedes any talk about harmonisation. The suggestion is more wrong than right. While there is plausible basis to think that trust institution has no Roman roots and so exacerbates the gulf between both systems, recent commentaries are beginning to reveal significant correlation between trust and some civil law institutions.⁷³ For example, it is increasingly clear that the concept of trust is no different from the civilian institution of testamentary executor. Both were lawyers' contraptions to deal with property challenges that were difficult to accommodate under strict rules of law. For instance, the *fiducia* in France and Italy were used to solve peculiar, particular problems in ways and manners closely resembling the trust institution. It therefore can be stated with a degree of confidence, that trust is merely a variation of a common continental theme.⁷⁴ This being so, argument of an absence of trust institution as supposed fundamental divide between the civil and common law system is less prevailing.

⁶⁸ Birks, 'Taxonomy' (n. 5); Birks, 'Conscience' (n. 4); Emiri (n. 20).

⁶⁹ Emiri (n. 20) (advocating for a complete overthrow of the taxonomy of equity rooted in division by reference to unity of content, with that of the common law organised by unity of cause; and stating that the overthrow (of equity's taxonomy) would enable common lawyers prune down to comprehensible size indistinguishable legal phenomena that appear in equity and the common law (differently labelled) into one logical whole – restitution law, particularly calling for more substantive fusion of law and equity, in the areas where equity generates rights that are indistinguishably restitutionary in nature).

⁷⁰ Tetley (n. 4) 713 (noting that 'the three basic requirements of unjustified enrichment under both civil law and common law are: an enrichment by the receipt of a benefit; that this benefit be gained at the plaintiff's expense; and a lack of legal cause.')

⁷¹ Atiyah (n. 54).

⁷² Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Oxford: Oxford Univ. Press, 2001) 163-182

⁷³ Zimmermann (n. 72). The history of testamentary executor provides a good example of how equity connects with the civilian system. It has been suggested that the institution of trust grew from civilian ideas of the *salman* or *trenhand* or *fideicommissum*. For reading on this connection, see, Justice Holmes, *Selected Essays in Anglo-American Legal History*, 705; William S. Holdsworth, *History of English Law*, vol. IV, p. 410-417; George W. Keeton, *The Law of Trusts* (5th ed., London: Pitman & Sons, 1949) 17; Emiri & Giwa (n. 48, chapter 10); Robert W. Lee, *Introduction to Roman-Dutch Law* (3rd ed. 1931) 372; Michele Graziadei, Changing Images of the Law in XIX Century English Legal Thought (The Continental Impulse), in Mathias Riemann (ed.) *The Reception of Continental Ideas in the Common Law World 1820 -1920* (1993) 122; *Abdul Hameed Sitti Kadija v. DeSaram* [1946] AC 208; but cf. Maitland; R.H. Helmholz, The Learned Laws in 'Pollock and Maitland' in John Hudson (ed.) *The History of English Law: Centenary Essays in 'Pollock and Maitland'* (Proceedings of the British Academy, 1996) 89, 153 (describing the place of Roman and Canon Laws in Pollock and Maitland's History of English Law and the role of European *ius commune* in the development of English law) and James B. Ames, *Essays in Anglo-American Legal History*, vol. II, 737.

⁷⁴ Zimmermann (above n. 72) 167. See generally, Alfredo Mordechai Rabello (ed.) *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (1997). In fact, The Hague Convention on the Law Applicable to Trusts and their Recognition, has generated new forms of trusts notions in civil jurisdictions, thereby bringing it closer and closer to the Anglo-American concept. Many European states are enthusiastic to introduce formally the 'fiducia' into their jurisprudence because the institution though already existing has been less articulated institutionally. See generally, Arthur Hartkamp, Martijn Hesselink, et al. (eds.), *Towards a European Civil Code* (2nd ed. 1989). According to Zimmermann, the International Working Group on a harmonised law of trust in Europe based at the University of Nijmegen point to South Africa and

Civilian Notion of Good Faith

Another supposed chasm between both systems is said to be the absence in common law jurisprudence of a general notion of civilian good faith.⁷⁵ For example, Art. 6.2 of Dutch law require parties to a contract to act reasonably and fairly.⁷⁶ Similarly, French law enjoins good faith performance for all contracts.⁷⁷ While the exact ambits of the *bona fides* requirement rooted in Roman obligations law remains controversial, one thing stands clear: it is that while it is a distinguishing characteristic of the civil tradition, its operation in practice makes it amenable to common law equivalence.⁷⁸ It is hardly contestable that the common policing of the fairness in commercial transactions by reference to moral principles, especially underlined in equity's notion of conscience works in a similar manner like the civilian *bona fide* notion. They are analytically the same in principle.⁷⁹ Since equitable obligations are likely to be more pronounced in the divide of voluntarily assumed obligations in the context of policing private autonomy in contractual agreements its harmonisation with a civil structure built on *bona fide* is possible.⁸⁰ The next part of the paper will examine how the African Continent can plot a common law of obligations using the harmonization building blocks provided by Roman law foundation.

6. Searching For Harmonization 'Cryptotypes'

A project seeking to harmonise law of obligations in Africa can only be sensible if we know what the respective law of obligations are in both traditions from where we can then begin a process of synthesising them into a logical whole. This is not likely to be any problematic. Comparative law can be helpful here. It is the branch of the law that supplies us the material for the content of private law in the different jurisdictions in the continent. As a subject, it functions to provide knowledge within different areas of a given legal system and between legal systems, while making the knowledge and problem-solving experience acquired from one system understandable and transferable to another. So it functions as the grammar that enables us to discuss homogenous problems and to propose solutions.⁸¹ That being so, knowing the respective private law in Africa is not that challenging for our harmonisation project. But that is just the starting point. If and when the law is known, then there should necessarily be a process of synthesis which facilitates its understandability and transferability into the harmonisation project. Since the continent consist of two main families, any the marriage it produces will invariably be a third legal family constructed from both, with better explanatory power. Considering the jurisprudential bent of both systems, the emergent third family will likely resemble one that closes on a science of law able to combines both abstract code stipulations with the dialectics of reasoning through a translational process and mediation between norms and social reality for the realisation of private law rights.⁸² Imposing a science structure on law and its institutions creates a better understanding of law, making it more plausible for legal controversies to yield right and determinate answers.

Scotland as providing interesting experiences of how English form-trust can take root in systems that have not historically separated law and equity. Even though both have a law of property based on Roman legal concepts, they now have a vigorous law of trusts (civilian form of trust). See Zimmermann (n. 72) 168.

⁷⁵ For common lawyers reasoning on civilian good faith notion, see generally, Jack & Daniel Friedmann, *Good Faith and Fault in Contract Law* (1995); M.G. Bridge, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?' (1984) 9 *Can. Bus. L.J.* 413. See also, *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] QB 433, 439, per Bingham LJ, where His Lordship described the civil good faith notion as metaphorically described as playing fair, coming clean or putting one's cards face upwards on the table.

⁷⁶ Art. 6.2 of the Dutch Civil Code provides that parties to an obligation should behave according to what is reasonable and fair; and that a rule binding upon parties by virtue of law, usage or legal act will not apply if it will unacceptable according to standards of reasonableness and fairness.

⁷⁷ Art. 1134 of the French Code Civil (reforming contract law [that hitherto operated since the 1804 promulgation of the Napoleonic Code], effectively October 1, 2016) provides that contract should be performed in good faith.

⁷⁸ Since the range of the application of good faith notion depends on the availability of other doctrines and scope assigned to them, such as, mutual mistakes, unconscionability, erroneous presuppositions, changing circumstances, force majeure and the like, the range of common law doctrines with reference to estoppel, implied terms, notion of undue influence, relief against forfeiture in equity, restitution for acquisitive wrongs etc. are hardly less varied. See Reinhard Zimmermann & Simon Whittaker (eds.) *Good Faith in European Contract Law*, (2000); J.F. O'Connor, *Good Faith in English Law*, (1990).

⁷⁹ *Ibid.*

⁸⁰ The use of equitable principles, especially the 'fiduciary morality' and implied terms demonstrates that the common law, like its civilian counterpart is making a paradigm shift from contract law which focuses almost exclusively on private autonomy. For example, in common law jurisdictions see, Nigeria: USA: E. Allan Farnsworth, *Good Faith in Contract Performance*, in Beatson & Friedmann (n. 75) 153; Robert S. Summers, *The Conceptualization of Good Faith in American Contract Law: A General Account*, in Zimmermann & Whittaker (n. 78) 118; Australia: *Hughes Aircraft Systems International v. Airservices Australia* (1997) 146 ALR 1; Sir Anthony Mason, *The Place of Equity and Equitable Doctrines in the Contemporary Common Law World*, (1994) 110 *LQR* 238; England: *Henderson v. Merrett Syndicates Ltd* [1994] WLR 761; P.J. Millett, 'Equity's Place in the Law of Commerce' (1998) 114 *LQR* 214;

⁸¹ Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems* (1997) 45 *Amer. J. Comp. L.* 5.

⁸² Helge Dedek, 'From Norms to Facts: The Realisation of Rights in Common and Civil Private Law' [2010] *McGill L.J.* (stating that the common law maxim *ubi remedium, ibi ius*; explains that under the common law tradition, remedy precedes rights. But in the civil system, the reverse is the case. Rights precede remedy, *ubi ius, ibi remedium*. This dichotomy is suggested to be one of the fundamental epistemological chasm between both systems that pose harmonization challenge). See also, René David & John E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (3rd ed. London: Stevens & Sons, 1985) 316-17; Geoffrey Samuel, *Law of Obligations and Legal Remedies* (2nd ed. London: Cavendish, 2001) 90; John A. Jolowicz, *On Civil Procedure* (Cambridge: Camb. Univ. Press, 2000) 83; Pierre Legrand, 'How To Compare Now' (1996) 16 *Leg. Stud.* 232; Pierre Legrand, 'Are Civilians Educable?' (1998) 18 *LS* 216; Pierre Legrand, 'European Legal Systems Are Not Converging' (1995) 45 *ICLQ* 52; Pierre Legrand, 'Against a European Civil Code' (1997) 60 *MLR* 44; Pierre Legrand, *Le Droit Compare* (PUF 1999) 75-102; Pierre Legrand, 'Legal Traditions in Western Europe: The Limits of Commonality' in Robert W. Jagtenberg, Esin Orucu & Annie J. de Roo (eds.) *Transfrontier Mobility of Law*, 1995; John Bell, 'Comparative Law and Legal Theory' in Werner Krawietz, Neil MacCormick & Georg Henrick von Wright (eds.) *Prescriptive Formality and Normative Rationality in Modern Legal Systems* (Duncker & Humblot GmbH, 1994). But cf. Geoffrey Samuel, 'Comparative Law and Jurisprudence'

It is however tempting to counterargue that the important question for a project of this sort should not be the possibility of plotting a science of law, but rather whether the project itself is desirable. We do not intend to present any lengthy justificatory arguments for the desirability of a science of law and how the science project should be constructed, but we imagine that answers to them could emerge in the general thread of the paper. Meanwhile, our major concern is to attempt a mapping through some level of epistemology how a science of the third legal family should be constructed in a manner that yields a better understanding of an African obligations law. If science is understood as a systematically organized body of knowledge about a particular subject or as an activity that is the subject of careful study and its method is a system of advancing knowledge by formulation of questions, collecting data about it through careful observations and testing of hypothetical answers, it would be tempting to say that law is itself in the category of a science. Any other view would seem to discount the legitimacy claim of law.⁸³ That was the kind of project glorified by the influential American legal educationist, Christopher Columbus Langdell.⁸⁴ The proposition that controversies between persons ought to be resolved in accordance with law is itself an insistence that law must yield to a near science.⁸⁵ Unfortunately, much as the common law prides itself of logic akin to a science, private law has often shown ugly signs of orderlessness, especially when viewed from a civilian lens.

The viability of a scientific posture for private law construct is not less prevailing. There is hardly any contest today that there is a certain transcendentalism association between science and knowledge. For example, legal economists posit that the dominance of economics over the other social sciences (including law) with its empirical methodology is testimony of how the world is crazy with rationality.⁸⁶ Even when law seeks to create an autonomous sphere, it has not disentangled itself from underlying rationality. Legal training encourages lawyers to inhibit empathic reasoning and emotions as irrelevant to legal answers to controversy. 'Thinking as a lawyer' pedagogy still constitutes the signature of legal education technique for transferring legal knowledge, skills and values.⁸⁷ It is actually reasoned that the essence of rule-of-law as a guiding principle requires that there should be strict conformity to rules. That is why lawyers are often committed to formal rationality and positivism as a predominate thinking in jurisprudence and law application. That being the case, objects and activities that are considered rational get labelled as truth, worthy of investigation. The opposite enjoys no such status.⁸⁸

Leaving the justificatory reasons for the moment, we intend to address how the science of the common law should be structured. The learned writer Geoffrey Samuel using the metaphor of a science explains how it may be constructed through two cartographic methods.⁸⁹ Using the scenario of how one can obtain knowledge of a country, the learned writer asserts that it may be either (i) by purchase of a map of the country revealing the various towns, their landscapes, distances between them and the like or (ii) by gleaning it from a series of photographs taken about the country. The advantage of the mapping knowledge (i) as opposed to the picture knowledge (ii), is a map will reveal to the reader very clearly the names of towns, distances between them, climate conditions and very many other useful information about the country. Method (ii) the picture knowledge, though less scientific in geographical precision will also yield knowledge about the country to the enquirer. What the reader does in the (ii) method is to examine the various pictures to see how towns are laid out, thereby making it possible for the viewer to form an in-depth and three-dimensional understanding of specific areas in the country.

The two approaches, metaphorically contrast, the civil law and the common law at a macro-level analysis. The former closely resembles the civilian structure in the era of *mos geometricus*, while the latter resembles the common law in the era dominated by forms of action. Much as the shape of both traditions shows signs of convergence, especially in the face the logic of syllogism, it has been difficult for both traditions to throw away these shackles of its history and '*mentalité*.' This explains why some modern legal taxonomists have sort to impose a coherent structure of private common law on a jurisprudence that often

(1998) 47 *ICLQ* 817; Christain Joerges, 'European Challenges to Private Law: On False Dichotomies, True Conflicts and the Need for a Constitutional Perspective' (1998) 18 *LS* 146. Also, on problems that would visit transplantation of one legal culture into another, see Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Law Ends Up in Divergences' (1998) 61 *MLR* 11.

⁸³ Festus Emiri & Felicia Eimunjeze, 'Law, Objectivity and Truth: A Cathedral View' (2011) 10 *Nigeria L. & Prac. J.* 1 (arguing that the logical ordering of law is intricately connected with philosophical analysis of objectivity, truth and meaning than with the nature of law and morality). See also, Brian Leiter, Law and Objectivity in Jules Coleman & Scott Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford Univ. Press, 2002) 990; Andrei Marmor, 'An Essay on the Objectivity of Law' in Brian Bix (ed.) *Analyzing Law: New Essays in Legal Theory* (Oxford, Clarendon Press, 2000) 1; Jules Coleman, 'Truth and Objectivity in Law' (1961) 31 *Leg. Theory* 38.

⁸⁴ Langdell as Dean of the Harvard Law School pioneered the case method of teaching law, because in his view law is a science whose principles and doctrines can be discovered in cases same as science discovers its theory from the laboratory. By his science, law should be derived from basic axioms and logical deduction. See Brian Bix, *Jurisprudence: Theory and Context* (4th ed. Sweet & Maxwell, 2006) 180, Dennis Patterson, 'Langdell's Legacy' (1995) 90 *Northwestern Univ. L. Rev.* 901.

⁸⁵ Darryn Jensen, 'The Problem of Classification in Private Law' (2007) 31 *Mel. Univ. L. Rev.* 516, 517 where the learned commentator suggested 'that a strong commitment to a relatively stable system of legal categories is an essential element of our commitment to the rule of law.'

⁸⁶ Robert D. Cooter, 'Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and Review of the Major Books' (1981-2) 29 *UCLA L. Rev.* 1260 (stating that economic analysis of law, with its emphasis on efficiency is superior to traditional legal reasoning based on legal science assessment)

⁸⁷ Karen Gross, 'Process Reengineering and Legal Education: An Essay on Daring to Think Differently' (2005) 49 *N. Y. Univ. L. Rev.* 435

⁸⁸ For critique using science as the model for thought about human life and society see, Richard Rorty, *Philosophy and the Mirror of Nature*, (1979) (for philosophy); Deirdre McCloskey, *The Rhetoric of Economics*, 1985 (for economics); James B. White, 'What Can a Lawyer Learn from Literature' (1989) 102 *Harv. L.R.* 2015; James B. White, *Legal Knowledge* (2002) 115 (for law and literary studies).

⁸⁹ Geoffrey Samuel, 'Can the Common Law Be Mapped?' (2005) 55 *Toronto L.J.* 271

tends and exhibits signs of orderliness. Order requires some commitment to deductive reasoning rather than inductive reasoning.⁹⁰ If the civilian era of *mos geometricus* closely aligns to a science of law it is because it exhibited the features of science. Science is known to be a systematic body of knowledge brought about by careful empirical study and observation.⁹¹ Common law resembles the picture technique because it operates as a legal system that ties *ius iuriscandi* to a body of preconceived norms. Having evolved in the manner that places high premium on judicial decisions, it invariably has to contend with the tension between the normative formulation of the ideal and its proper capture in terms of the social reality.⁹² Remedies is what attempts to bridge this tension between the ideal and the real, or what can loosely be referred to as between the law and facts.⁹³ It must not be forgotten that English common law owes much of its shape to forms of action that may be likened to what is called 'institutions' in legal parlance.⁹⁴ Institutions are formed around people (*personae*), things (*res*) and actions (*actio*).⁹⁵ It is said that these three entities form the focal points of reality for both the sociologist and the lawyer. There is hardly any disputation that people, property and courts (procedure) are the physical and legal realities that occupy the attention of lawyers in the ideal-real construct of law. Norms generate rules.⁹⁶ Rules from a semantic perspective can be described as sentence-like propositions of prescriptions. So, like any sentence it is conceivable to frame it around subjects and objects. That being the case, rules are formable around the three main objects of legal institutions, be they subject or objects as the case may be. For instance, it can be framed around a person or property as object, and around a legal remedy as subject.

7. Negotiating Law of Obligations through General Principles

Philosophy imposes a general discipline and logic on the subject of its inquiry. It is therefore plausible to reason that a general philosophy of the common law should aid its coherence and order. This is what makes important the question, what is the general philosophical grounding of private law. Its answer in no small measure helps to clarify matters, such as how a science of law should be constructed, into what categories private law should be divided, how to explain each category and how each differs from the other, and possibly, relate to one another. Such answers could make private law more comprehensive, thereby giving explanatory power to the subject. For example, it could be challenging to understand a language without first understanding its syllable and its grammar rules. In a similar vein, if the various categories of private law were likened to language, it would still be necessary to understand its rules and syllable to make the language comprehensible. The language by itself does not explain its rationale power. We still would require as in the language game, a set of syllables, how they all relate to form sentence-like structure for the language. In our case then, outside the traditional categories known as private law, we need a science or theory. Since every theory would invariably rest on propositions, a philosophy of private law must have general propositions about the relations between the various categories to give the range explanatory power.

The importance of a general theory apart from providing explanatory power to the subject category is that it can exert a great deal of influence on how certain legal issues and controversies are handled. To use the example of learned writer, Samuel, if it is taken as given for instance that a general theory of the law of obligations were to rest on say fault of the defendant, then all the categories of contract, tort and restitution, would require the court to examine the behaviour of the defendant to raise or defeat liability.⁹⁷ This will also imply a less prominent role for the differing limitation periods prescribed for the heads of obligations law. The reason is simply, since the focus would be on the behaviour of the defendant, it plausibly will be less rational to prescribe different time period for contract, tort or restitution.

An example of the extent an exerting influence of a general notion can have on a legal category is illustrated in emerging restitution law. In its early stages of development, it was reasoned that unjust enrichment or unjust benefit was the only one causal factor that could trigger restitution.⁹⁸ It was then reasoned that it could only generate rights '*in personam*.' The position

⁹⁰ Geoffrey Samuel, *Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences* in Mark V. Hoecke, *et al.* (eds.) *Epistemology and Methodology of Comparative Law* (European Academy of Legal Theory Monograph Series) 35, 54 (describing the stages of legal science, it states that 'Codes involve the movement from a universal proposition—the general—to a particular set of facts and the reasoning technique traditionally associated with going from the general to the particular is deduction.')

⁹¹ Mattei (n. 81)

⁹² Helge (n. 2).

⁹³ Helge, n. 92. See also Geoffrey Samuel, *Law of Obligations and Legal Remedies* (2nd ed. London: Cavendish Pub. 2001).

⁹⁴ David J. Ibbetson, *A Historical Introduction to the Law of Obligations*, (Oxford Univ. Press 1999) 13-23.

⁹⁵ Samuel (n. 93).

⁹⁶ Robert Cooter, 'The Theory of Market Modernization of Law' (1996) 16 *Int'l Rev. L. & Econ.* 141

⁹⁷ Samuel (n. 93) 34.

⁹⁸ Robert Goff & Gareth Jones, *The Law of Restitution* (first published 1966, 5th ed. 1998); Peter Birks, *An Introduction to the Law of Restitution* (Oxford, Clarendon Press, 1985). See also Lord Mansfield's statement in *Moses v. Macferlan* (1776) 2 Burr 1005, 1012, 97 ER 976, 981; Lord Wright in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61; *Lipkin Gorman v. Karpnale Ltd* [1991] 2 AC 548, 578 (per Lord Goff stating: '[T]he recovery of money in restitution is ... a matter of right, and ... the underlying principle of recovery is the principle of unjust enrichment. '); *Woolwich Equitable Building Society v. Inland Revenue Commissions* [1993] AC 70, 197 (per Lord Browne-Wilkinson: 'a right to recovery from a defendant who has been unjustly enriched at the plaintiff's expense, the concept of unjust enrichment lies at the heart of all the individual instances in which the law does give a right of recovery ... '); *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669, 710, per Lord Browne-Wilkinson; *Kleinwort Benson Ltd v. Glasgow C.C.* [1997] 3 WLR 923, (931 per Lord Goff, 947 per Lord Clyde); *Banque Financière de la Cite v. Parc (Battersea) Ltd* [1998] 2 WLR 475; *Kleinwort Benson Ltd v. Lincoln CC* [1998] 4 All ER 513, [1998] 3 WLR 1095, (1113 per Lord Goff, 1144 per Lord Hope); *Guinness Mahon & Co Ltd v. Kensington & Chelsea Royal London Borough Council* [1998] 2 All ER 272; *Portman Building Society v. Hamlyn Taylor Neck (a firm)* [1998] 4 All ER 202, 206, per Millett LJ. See also, *Restatement of the Law Restitution*, s. 1 (1937) published by the American Law Institute, under the authorship of Professors Warren & Austin Scott. But cf. commentaries that restitution is no longer synonymous with unjust enrichment, a position later admitted by Professor Peter Birks in his subsequent writings, e.g. Peter Birks, 'Equity, Conscience and unjust Enrichment' (Annual Meeting of the

is now discarded. It is now recognised that restitution is triggered by multi-causal factors, not necessarily confined to the structure of subtraction (unjust enrichment or benefit), but can and does, include gain-based recovery, as in cases of acquisitive wrongs.⁹⁹ Therefore, it is triggered by the presence of positive reasons for the reversal of enrichment, rather than the absence of any legal justification for the defendant's enrichment.¹⁰⁰ Recent shift of liability focus from 'presence of some unjust factors for the plaintiff's recovery,' to 'absence of any juristic reason for the defendant's retention,' is exerting a powerful influence on how the subject is now conceived. What difference can both as general principles of restitution make on the question of liability? For purposes of argument, let us examine the facts in *Deutsche Morgan Grenffell v IRC*¹⁰¹ to further illustrate the point. The plaintiff company, resident in the United Kingdom (UK), incurred corporation tax liability as a result of paying dividends to its parent company in Germany. As the law stood at the time, if both companies were resident within the UK jurisdiction, they would have had a choice to defer the tax payment for some months. After paying the tax assessed, the European Court of Justice held that advance corporation tax advantage under the statutory scheme was *ultra vires* the Revenue because, contrary to European Union law, the scheme did not give the plaintiff an option to avoid paying the tax by making a group income election and that as it was tax, it could not be grounded upon residency. It was based on this that the plaintiff sought restitution, the enrichment not being the principal sum paid, but rather the time value of the money, for but for the improper regulation, the liability to pay the tax would have arisen later and in the interim the plaintiff could have used the money as it pleases and then pay later. The House of Lords held that the plaintiff was entitled to restitution from the defendant for mistaken payment, even though the plaintiff has a statutory duty to pay the tax unless and until it validly exercised a group income election, which, because that had not been provided, it had not done. The court was confronted with identifying the nature of the injustice that makes the enrichment unjust.¹⁰² The court was of the view that the plaintiff should identify the 'presence of some unjust factors for its recovery.'¹⁰³ The plaintiff did so by referring to the mistaken payment. It was based on this that the court allowed restitution. But would the result have been the same if the court were to employ the civilian notion of 'absence of any juristic reason for the defendant's retention?' What were the facts before the court? The tax regime was valid. Even if the plaintiff and its parent company were to enjoy the option of postponing payment, they were under valid liability to pay until they actually exercised the election. So, in effect they paid pursuant to enforceable obligation. In those circumstances it would be difficult to argue that there was an absence of juristic basis for the enrichment of the defendant. The relevant tax statute constituted the basis for the impugned transfer and so provided the juristic ground for the enrichment.¹⁰⁴ What this shows is simple. Different test as general theory may produce different result.

Next, let us discuss how a general theory can provide explanatory power to a subject category. Though much of the law of obligations in the civil tradition is rooted in Roman law, medieval Roman and canon lawyers from the eleventh century onwards shifted from its remedial bent by synthesising of the rediscovered sources of Roman law (*Corpus Iuris Civilis*) to develop general principles of obligations.¹⁰⁵ For example, though Roman law had a set of specifics known as contract (law of contracts), such as hire, loan, sale, stipulation etc., it had no law of contract based on a general notion. All that mattered for them was that the list within the category of species known as contract had to have the common denominator of agreement (*conventio*) and some abstract contracts to cover situations that were outside the typical transaction, such as pacts and stipulations. But by the sixteen-century, civilian jurists moved contract from the inductive stage of a law of *contracts* to a law of *contract* (a deductive approach) by underpinning contract under a general theory based on consent.¹⁰⁶

Common law became a developed system of law in the twelfth century, even though its doctrines were not particularly articulated as a coherent jurisprudence. It was in the seventeenth century that a semblance of order started to emerge with the practice of law by some critical common lawyers who sought in a piecemeal manner an articulation of a coherent understanding

Lecture, delivered at Melbourne University on 3 September 1998, published in (1999) 23 *Mel. Univ. L. R.* 1; Peter Birks, 'Misnomer,' in William Cornish, Richard C. Nolan, Janet O'Sullivan & Graham Virgo, (eds.), *Restitution: Past, Present and Future-Essays in Honour of Gareth Jones* (Oxford: Hart Pub. 1998). See also Peter Birks, 'The Law of Restitution at the End of an Epoch' (1999) 28 *Univ. WALR* 13, 19.

⁹⁹ For discussion on a search of an independent normative criterion for restitution, see Dennis Klimchuk, *The Scope and Structure of Unjust Enrichment* (2007) 57 (4) 795; Hanoch Dagan, *The Theoretical Exploration of Unjust Enrichment* (2012) 92 *Boston Univ. L.R.* 1035; Mitchell McInnes, *The Reason to Reverse: Unjust Factors and Juristic Reasons* (2012) 92 *Boston Univ. L.R.* 1049; Ernest J. Weinrib, 'The Structure of Unjustness' (2012) 92 *Boston Univ. L.R.* 1067. See also, Lionel Smith, 'Legal Epistemology in the Restatement (Third) of Restitution and Unjust Enrichment' (2012) 92 *Boston Univ. L.R.* 899.

¹⁰⁰ This common law position differs from the civilian understanding of unjust enrichment, which emphasizes the presumption of reversibility of all enrichment unless there is juristic reason for the transfer. See Mitchell McInnes, 'The Reason to Reverse: Unjust Factors and Juristic Reasons' (2012) 92 *Boston Univ. L.R.* 1049 at 1054-1055. There are however signs that even the common law (courts and commentators) are beginning to shift grounds by using the civilian concept of 'absence of juristic reason for the enrichment' as analytical explanation of the unjust factor. See, *Garland v. Consumers' Gas Co.* [2004] 1 SCR 629 (Can.); *Pettus v Becker* [1980] 4 SCR 325 at 409 (Can.). See also, Peter Birks, *Unjust Enrichment* (2nd ed. 2005); Peter Birks, 'Comparative Unjust Enrichment' in Peter Birks & Arianna Pretto (eds.) *Themes in Comparative Law*, (2002).

¹⁰¹ [2006] UKHL 49, [2007] 1 AC 558.

¹⁰² See *Deutsche Morgan Grenffell v. IRC* [2007] 1 AC 558, 569 per Lord Hoffman, 611-13 per Lord Walker.

¹⁰³ *Ibid*, 569 per Lord Hoffman.

¹⁰⁴ Mitchell McInnes, 'The Reason to Reverse: Unjust Factors and Juristic Reasons' (2012) 92 *Boston Univ. L.R.* 1049

¹⁰⁵ Roman law operated at an inductive approach, looking more like a law of remedies. Roman law operated more like the common law in the Middle Ages, in that it protected a right only if the plaintiff could obtain a particular document of claim (formula, writ) from a non-judicial official (Praetor, Chancellor) to vindicate the claim. The leads to a situation where lawyers think less of rights than types of action, thereby emphasizing the concrete facts which square within the writ rather than elaborating the substantive law into a system based on rational method.

¹⁰⁶ Consent as the basis for modern contract law has since shifted to the reliance theory. See, Robert Cooter & Thomas, *Law & Economics*, (6th ed. Berkeley Law Books 2016) 286 (stating the American approach).

of the common law. A general theory of law for subject categories was late in emerging because most common law lawyers in its early years of development into a system of law were largely engaged in the day-to-day practice of law, either as lawyers cum politicians or royal councillors. Few, if any, were philosophers, or interested in philosophy and theory of law. It was therefore not surprising that an articulated philosophy of the common law or its systematisation was not of serious concern to them. Notwithstanding, they were able to shape an understanding of the common law reasoning through the then forms of action that served as the *vinculum iuris* for remedies.¹⁰⁷ The place of form (procedure) was emphasised over substance of law because the principles of the common law were laid, not on abstract substance of law, but grew around forms through which the king's courts centrally administered justice.¹⁰⁸ Substantive law was ancillary to pleadings and procedure. According to Baker, 'there was a law of writs before there was a law of property, or contract, or tort.'¹⁰⁹

Every litigant was to bring his litigation within the available forms of action, which by Blackstone's time, were as many as seventy to eighty. Once the choice is made, the court would determine what precedent to invoke to decide the case, how evidence would be adduced, judgment executed, etc. A choice of a wrong form would defeat a claim even on technical grounds. But in one sweep, the Judicature Act 1873 abolished the writ-system, requiring the plaintiff only to state the basis and substance of his claim in untechnical language. The Act thus did away with the need to specify a particular type of claim. It was ambitiously thought that the sweep would have buried forms of action. That however was not the case. For Maitland admitted: The forms of action we have buried, but they still rule us from the graves.¹¹⁰ It did not uproot the traditional inductive thinking of common lawyers. The categories of property law and the law of obligations remained divided up in terms of the old forms of action; so that even though forms are dead they continue to serve as method of ordering and developing the substantive private law. This is what explains the virility of *assumpsit* (undertaking) as the common denominator for the categories of the law of obligations down to our modern time.

8. Why is common law deficient in the Science Schemata?

It has been suggested that every legal system that ties judicial decision making to a set of preconceived norms must find a way to mediate between the social facts (which ordinarily constitute the bases for controversy) and the ideal (regulations, rules and principles which are the fabric of legal norms).¹¹¹ How each tradition mediates the translational process from social reality to the various normative formulae has been the subject of jurisprudential thinking.¹¹² *Ubi remedium, ibi ius* generally summarises the common law translational framework. In the reasoning of common lawyers, remedies are what translate the abstract discourse of law into the world of the disputants. For example, if D carelessly knockdown C with his motorbike causing him injury, the fact situation will require a cure for the injury. Remedies in common law are what lawyers conceive as the tangible cure for the injury. In common parlance, lawyers would speak of remedy as located in the tort (negligence) or contract or some other statutory scheme.

How effective has the translational process been? Has it contributed to building a science of law? More importantly, how do both traditions compare? The principle *ubi remedium, ibi ius* theoretically implies that remedy precedes rights and can in some case trump over rights. But the civil law adopts a different approach. It mediates between reality and the abstract through rights. It is said that in civilian jurisprudence, rights precede remedies and would ordinarily trump over it, *ubi ius, ibi remedium*. It has been suggested that the fundamental epistemological chasm between the common and civil law traditions lies in how both systems mediate between the ideal and the real.¹¹³ While the common law bridges the gap through remedies, the civil system does it through rights. This difference is a product of how both systems think, conceptualise and relate law to society. For common lawyer, addicted to vindicating wrongs through the writ procedural system, law is closely related to facts viewed from the historical context of court-ordered decisions on them. That is not how the civilian lawyer objectifies law. Law for him is nothing but an abstract normative system divorced from facts. It is a science developed through syllogism.

¹⁰⁷ Forms of action generally refer to the various compartments of law and the practice associated with the different writs, which served as pass admitting suitors to justice. Forms constituted the first object of learning for lawyers because it was the foundation on which the whole of substantive law rested and depended. *Natura Brevium* (The Nature of Writs) essentially served as students' primer during the pick-up era of legal education. See John H. Baker, *An Introduction to English Legal History* (3rd ed., London: Butterworths) 67.

¹⁰⁸ The Judicature Act, 1873, reorganized the various courts within a single Supreme Court of Judicature, consisting of the High Court of Justice and the Court of Appeal. The High Court reflecting their specialities were constituted into (i) the Queen's Bench Division (Queen's Bench, Exchequer and Common Pleas Division), (ii) the Chancery Division and (iii) the Probate, Divorce and Admiralty Division (generally referred to as the division responsible for 'wills, wives and wrecks.')

¹⁰⁹ Baker (n. 107) 64.

¹¹⁰ Maitland, *The Forms of Action at Common Law* (1936) 180, cited in K Zweigert & H Kotz, *An Introduction to Comparative Law* (3rd ed. trans. Tony Weir) 200.

¹¹¹ Even though it could be difficult to think of a system of law not founded on agreed preconceived norms as bases for resolving conflicts, it is plausible to envision a primitive adjudicating system founded on sheer rule of thumb such as mere use of the conscience to determine cases. For example, it was not until the chancellorship of Lord Nottingham in 1673 that English equity became a system of law of established rules and principles. Lord Eldon summarised the transformation of equity into a modern system in *Gee v. Pritchard* (1818) 2 Swan 402, 414 when he stated that: 'The doctrine of the court ought to be well settled, and made as uniform almost as those of the common law, laying down fixed principles, but applied to the circumstances of each case. ... Nothing would inflict me greater pain in quitting this place, than the recollection that I have done anything to justify the reproach that the equity of the court varies like the Chancellor's foot.'

¹¹² Albert Kiralfy, 'Law and Right in English Legal History' (1985) 61 *J Leg. Hist.* 49, Patrick S. Atiyah, *Pragmatism and Theory in English Law* (London: Stevens & Sons, 1987); Richard Posner, *Law, Pragmatism, and Democracy* (Cambridge, Mass: Harvard Univ. Press, 2003).

¹¹³ Helge (n. 82).

Let us now consider how the mediation through remedies and rights can produce not just a different '*mentalité*,' but also different results.¹¹⁴ The common law understanding of a notion of right in private law differs radically from how the civilian lawyer conceives the notion. So too is the notion of remedies. It is suggested that the civilian notion of subjective rights—*droit subjectif*, deviates (etymologically, conceptually and epistemologically) from the traditional notion of remedies and that the civilian lawyer used to a framework that categorises terms like substance, procedure, subjective rights, actions and execution will witness helplessness in trying to place remedies within its proper historical and theoretical space in relation to her conception of law. No wonder, why it is said that remedies is a mystery notion to the civilian. Civil law can hardly find equivalence for the word remedy. For instance, the term translated remedy in the German Civil Code (BGB) conveys the idea of a legal institution to which a claimant can avail himself, rather than the common law understanding implying court devise to rectify or correct a wrong, harm, injury, loss or damage. The effect is that for many mixed jurisdictions like Quebec that operate within a framework of substantive law strongly civilian in orientation, and law of procedure influenced by the common law, practice of law can appear kaleidoscopic.¹¹⁵ Where does this leave us? One thing is clear, common legal entitlements do not follow a predictable order. Whether a plaintiff will succeed depend much on knowing 'how' and 'what' to sue for. Such a system is freight with trouble and is unsuitable for efficiency. Generally, a system that does not deliver efficiency requires tweaking. English law has over the years. The first bold attempt to present a systematic common law was driven by Blackstone.¹¹⁶ He provided the necessary foundation for Lord Mansfield to introduce commercial reform.¹¹⁷ Industrial age and the growth of commerce in the 19th century made more reform necessary. At that time, forms of action proved inadequate to care for the complexities of the age. They were abolished for a system structured on simply cause of action.¹¹⁸ Even though this was not done through codification of rights, for it was legislative action aimed at procedural reform, it had far-reaching implications then. By no longer insisting on procedural label (such as debt, trespass, case, nuisance etc.) to attach to claims, the way was open to look at the substance of claims within a generalized procedural form. Facts were to be categorized in terms of their cause rather than in terms of form. In one-go, the stage moved from *knowing how* to *knowing what* to claim. Concepts began to play a more pronounced role, even though it still retained (had) a normative (ought) as well as descriptive (is) role. Welcoming, as these developments towards a science were desirable, they can with certain irritations. Not having a structured university system of instruction, common lawyers had to import continental categories to give their system a semblance of organization. For example, the remedial categories of debt and damages were replaced by substantive categories of contract and tort respectively. But this could hardly be a smooth model. There were certain debt and damage claims that could hard sit well within the contract bracket. While non-contractual damages could come within tort, non-contractual debt claims proved troublesome.¹¹⁹ Added to this troublesome situation, contract held too many legal phenomena strange to it. It played host to two different forms of action, breach of promise (*assumpsit*)—a count historically associated with wrong; and an action for debt—historically associated with the action for detinue. The first smells like a wrong and the second like a right. Having within its borders both *wrong* and *right* had further implications on the internal rules of contract law. It created fundamental difference between contractual liability for an action in damages and a debt. So, breach of a promise could give rise to trespass (*assumpsit*) remedy in damages as well as to a proprietary remedy of debt.¹²⁰

Flowing from this, if the facts of a case do not reveal a breach of any promise and yet there seem to be need for a remedy, the courts were forced to classify the relationship as one within the bracket of tort or equity.¹²¹ If it raises any question bordering on say mistaken payment or interference with property rights outside the promise arrangement it had to find legal expression outside the confines of contract. There was no separate category for property. But that was not considered a problem because the English did not make a distinction between possession and ownership which were properly cared for by the remedies of trespass and detinue. This explains why property notions are not strange to contract, tort and restitution. The result is that common lawyers are not bordered about traversing conceptual frontiers that seem fundamental to continental legal thought. So long as a suitable remedy exist, no special effort was put in place to explicate it in a scientific manner. This raises the question, is a science desirable for obligations law? If so, what does that entail? We make no pretence here. All this paper has attempted to do from its very beginning down to this point, and may be further, is to answer in the affirmative. While not in any way suggesting that the inductive methodology of present common law is inferior to the civilian tradition, we make bold to say that a commitment to logical ordering of a legal system (especially private law manifestations) is determined by the degree to which factual situations yield to reliable and predictable judgment about truth of its conclusion based on the assumed truth of its premises. As revealed from the discussion so far it is apparent that the civilian system is nearer to a science than the common law, a feature that renders it more susceptible to quicker dispensation of justice.¹²²

¹¹⁴ The remedies-rights dichotomy may be blurred in certain respects. See Geoffrey Samuel, 'Le Droit Subjectif and English Law' (1987) 46 *Camb. L.J.* 264.

¹¹⁵ Helge (n. 82) 4.

¹¹⁶ Blackstone's *Commentaries on the Laws of England* (1765-70) (analysing English law along the lines of Justinian's Institutes—around a system of subjective rights rather than objective remedies).

¹¹⁷ Baker (n. 107).

¹¹⁸ Festus Emiri & Evelyn Aluta), 'Integrating Property and Obligations: An Epistemic Reflection,' in Tonwe and Oho, *Developments in Law: Essays in Honour of Bozimo CJ*, (Lagos: Malthouse Press 2010) 123.

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ Ibid

¹²² See generally, Charles H. Koch Jr. 'The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems' (2004) 11 *Indiana J. Global Legal Stud.* 139 (recommending the civil law design for emerging legal systems because it is a model that centralizes the role of judge in dispute resolution with several advantages). See also, Mathias Reimann, 'Towards a European Civil Code: Why Continental Jurists Should Consult Their Transatlantic Colleagues' (1999) 73 *Tul. L. Rev.* 1337.

9. Harmonization Lessons from Mixed Systems

The South African and Scotland jurisdictions experience with mixture are encouraging antitypes that the harmonisation project is possible and real. South Africa for example, did not find it difficult to bring together the Roman-Dutch (civil system) and English (common law) legal systems within a common patrimony. In the seventeenth century, Dutch variant of the European *ius commune* was transplanted in the Cape of Good Hope. This eventually came under the influence of English common law in the late nineteenth century. So, its system became neither purely Roman-Dutch nor English, though certain areas of the law exhibit tilt in one direction more than the other. For example, the law of things (property law) and matters relating to succession are mainly Roman-Dutch, while a large part of its adjectival law (evidence and procedure laws) and commercial law (especially those governed by legislation) are mainly English.¹²³ Remarkable blending is visible especially in the law of obligations. An example will do. The necessary features of a valid contract are akin to common law, but it goes beyond. It recognises contracts for the benefit of third parties, penalty clauses and rejects consideration as a prerequisite for a valid contract, even though the common law considers these principles as fundamental.¹²⁴ The South African experience is at least a statement that the emergence or possibility or both of a modern private *ius commune* is not a mirage.¹²⁵ Scotland legal tradition has equally been shaped by the two great legal families, with interesting experiences which is useful to construct the new *ius commune*.¹²⁶ Both jurisdictions also teach that interaction between the two great legal families enables thinking that the emergence of a 'third legal family' is possible; and that the supposed chasm between the common and civil law is merely smoke without fire.¹²⁷

Also, aside the mixed experiences of South Africa and Scotland, there are abundant evidence to suggest that both the common and civil law traditions are to certain extent mixed, both in content and in style. For example, the common law grew out of the intermingling of English native customs and ideas with elements from the sophistry of Roman intellectualism.¹²⁸ The same is true of the civilian system. At its early stages of development through the Middle Ages, it was formulated from a mixture of Roman law, local customs, mercantile customs, and Canon law and natural law theory. That being so, the emergence of a third family is nothing more than a synthesis of the past.¹²⁹

Further pointer of success for the project emerges from the use of taxonomic concept of a law of obligations in common law jurisdictions. The changing tide of employing Roman *genera* to social manifestations rather than *species* categories (of contract, tort and, restitution) is pointer to greater *rapprochement*.¹³⁰ This is so because the use of the term provides a sort of conceptual *lingua franca* for lawyers in different jurisdictions to understand one another's formulation. The great interest in the study of

¹²³ For detail reading, see, Reinhard Zimmermann & Daniel Visser (eds.) *Southern Cross: Civil Law and Common Law in South Africa* (1996).

¹²⁴ Ibid

¹²⁵ Ibid. See also Vernon V. Palmer (ed.) *Mixed Jurisdictions of the World: The Third Legal Family*; Jacques du Plessis, 'The Promises and Pitfalls of Mixed Legal Systems: The South African and Scottish Experiences' [1998] *Stellenbosch Law Rev.* 338.

¹²⁶ For useful reading, see William M. Gordon, *Scotland and France: The Legal Connection* (1994) 22 *Index* 557; Peter Stein, 'The Influence of Roman Law on the Law of Scotland' [1993] *Juridical Rev.* 205; Kenneth Reid and Reinhard Zimmermann (eds.) *A History of Private Law in Scotland*, vol. i: Introduction and Property; vol. ii: Obligations (2005); Robin Evans-Jones, 'Reception of Law, Mixed Legal System and the Myth of the Genius of Scot Private Law' (1998) 114 *LQR* 228; Robin Evans-Jones, 'Roman Law in Scotland and England and the Development of one Law for Britain' (1999) 115 *LQR* 605; Hector L. MacQueen, *Scots Law and the Road to the New Ius Commune (Ius Commune Lectures on European Private Law)*, vol. i. (2000); Hector L. MacQueen (ed.) *Scots Law into the 21st Century: Essays in Honour of W.A Wilson* (1996).

¹²⁷ Palmer (n.125).

¹²⁸ David J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford Univ. Press) 1999.

¹²⁹ Geoffrey Samuel, *Law of Obligations and Legal Remedies* (2nd ed. London: Cavendish Pub. 2001) 524; Reinhard Zimmermann, 'Roman law and European Legal Unity, Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science' (1996) 112 *LQR* 576 (stating that Roman law not only informs both traditions but also provides the focal point for a project of harmonization to achieve *ius commune* in Europe). See also Peter Stein, 'Continental Influences on English Legal Thought 1660-1900' in Peter Stein, *The Character and Influence of the Roman Civil Law*, (1988), Hambledon, 234. But cf. John H. Baker, *An Introduction to English Legal History* (3rd ed., London: Butterworths) 35 (arguing that English developed in a manner uninfluenced and in isolation from Europe). For detailed reading disputing the position of Baker, see F Pringsheim, 'The Inner Relationship between English and Roman Law' [1985] *CLJ* 347; F. Pringsheim, 'The Unique Character of Classical Roman Law' (1944) 34 *J. Roman Stud.* 60; Michel Villey, *La Formation de la Pensée Juridique Moderne* (4th ed. 1975); Zweigert & Kötz, *An Introduction to Comparative Law* (3rd ed. Oxford: Oxford Univ. Press, 1998, trans. Tony Weir) 186; Geoffrey Samuel, *The Foundations of Legal Reasoning* (Antwerp, Belgium: Maklu, 1994) 191; Geoffrey Samuel, *Epistemology and Method in Law* (Aldershot, UK: Ashgate, 2003) 125-38 [Epistemology]; Salter, 'Towards a Phenomenology of Legal Thinking' (1992) 23 *J. British Society Phenomenology* 167, 172; Tony Weir, 'Contracts in Rome and England' (1992) 66 *Tulane L. Rev.* 1615.

¹³⁰ Ibid. It has been suggested that the Roman description of a law of obligations was first muted by Lord Diplock in *Moschi v. Lep Air Services Ltd* [1973] AC 331, 346 when he stated that 'the law of contract is part of the law of obligations and the English law of obligations is about their sources and the remedies which the court can grant to the obligee for a failure by the obligor to perform his obligations voluntarily.' It is also possible to imagine that the coming into being of OHADA in 1993 by mainly African states that were former African colonies of France to harmonize business law and open supranational dispute institution is pointer of objective exportability to their common law counterparts under the wider AfCFTA umbrella which may well facilitate not only corporate laws in Africa harmonization, but also the possibility of a common law of obligations. For reading on OHADA, see Aubin Nzaou-Kongo, 'Refreshing the Picture of OHADA With the Treaty of Quebec of 2008' (Dec. 9, 2011) *Revue du droit des affaires-JurAfrica*, (1), 1-10, available at SSRN: <https://ssrn.com/abstract=344459>. See also, Claire M. Dickerson, 'Harmonizing Business Laws in Africa: OHADA Calls the Tune' (2005) 44 *Columbia J. Transnational L.* 1.

comparative law¹³¹ and its frequent use in the judicial process in both common and civil jurisdictions are further illustrative of thinking across systems and the development of new legal culture determined to develop a common *common* law.¹³²

10. Interrogating ‘*Mentalité*’ Change

It has been difficult to articulate the nature of common law and its reasoning into a philosophical mould. Early common lawyers addicted to pragmatism exhibited little theoretical interest. They were largely active practitioners and politicians, hardly philosophers and theorist. The development of practical skills, quick wits and mastery of forms of action were what was required to win cases. A theoretical conception was therefore of less practical value. That explains why little attention was paid to an articulation of a philosophical grounding and general theory of law to explain the nature of the common law and its reasoning within the then great philosophical moulds of either natural law or positivism. In this respect, they were unlike their civilian counterpart, who developed axioms as signpost to which all rules and maxims derive. For the common law, general principles were the underlay on which the law derived muscle. A cursory reading of many comparative law text often overstate the major differences between the common and civil law traditions.¹³³ They induce first time readers to overstate the gap between both traditions as though a gulf exist between them in thinking and resolution of disputes.¹³⁴ One such difference being the role of judges in dispute resolution—that between bureaucratic and technocratic judges. The impression is created that civil law judges are bureaucratic, constrained by codified law, they function to interpret and apply statute. They are said to function mechanically to interpret the political will expressed in a statute or codes.¹³⁵ On the other hand, the technocratic judge in the common law system is said to be concerned with finding the proper rule within a structure that pays loyalty to precedent. No wonder technocratic common law judges occupy a heroic central stage in a decentralised system of decision-making. The banality is impressed by the different values both traditions accord judicial precedent and its cousin *stare decisis*. While common law judge is venerated by lawyers and law students who quote with admiration their judgments as authority, as though gospel representative of rules, in contrast that is a role assigned the code in the civil system.¹³⁶ This is said to explain why the civilian lawyer dogmatically reasons and is more concerned with the intrinsic consistency of particular legal construction with the whole body of law. Policy evaluation is not his tool of reasoning, because that is a navigable territory for the legislature. Some commentators emphasizing the banality differences between bureaucratic and technocratic judges argue that this behavioural recipe creates such gaps that make unworkable any rapprochement and possible harmonisation of both systems and that the ‘*mentalité*’ would certainly lead to distortions when legal scenarios switch from one to the other.¹³⁷ But this (supposed) difference between both traditions is not as pronounced as is suggested. In fact, it is misleading to say the least, because this superficial impression is nothing but a hangover situated in history and early scholarship on comparative law. History perhaps explains the bases for the mythology. The French Napoleonic code was first enacted in 1804 in the wake of the popular French revolution. Since it was essentially a peoples’ revolt against bourgeoisie influence in the polity, it was reasoned that a strict separation of governmental power preserves human rights and the rule of law. Accordingly, French lawyers were quick to proclaim the dogma of separation of power and nurture the idea of law proceeding from the legislature (as the peoples’ rightful representatives, not judges masking under decision making, incrementally making law in the guise of interpreting rules). That

¹³¹ According to Lord Goff, ‘comparative law may have been the hobby of yesterday, but it is destined to become the science of tomorrow.’ (Lord Goff of Cheverly, The Wilberforce Lecture, 1997, ‘The Future of the Common Law’ (1997) 46 *ICLQ* 745). Zweigert & Kotz (n. 129) argue that comparative law offers the only way by which law can become international and consequently a science. See Zweigert & Kotz (n. 129) 15. On the Europeanization of private law as an emerging scholarship, see European Review of Private Law, published since 1993. It has even been suggested that a European civil code will in the near future replace existing national codes—see Jurgen Basedow, ‘Das BGB im künftigen europäischen Privatrecht: Der hybride Kodex (200) 2000 *AcP* 445 ff., cited in Zimmermann, *Roman Law, Contemporary Law, European Law: The Civil Tradition Today*, xix, ft 3.

¹³² For example, in *Henderson v. Merrett Syndicates Ltd* [1994] 3 WLR 776, to determine concurrent liability questions in the law of obligations the House of Lords drew comparison from the continental system in France and Germany. See at 779 where Lord Goff referred to the French doctrine of ‘*non cumul*’ and the practice in Germany to reach conclusion that concurrent remedies are permitted under the English common law. For civil law response to the problem, see, Tony Weir in *XI International Encyclopaedia of Comparative Law*, chapter 12, paras. 47-72. Also, many House of Lords judgments are cited all over Europe. (See Lord Goff (n. 132) 757.

¹³³ Zweigert & Kotz, (n. 129) 34.

¹³⁴ Pierre Legrand, ‘European Legal Systems are not Converging’ (1996) 45 *Int’l. & Comp. L. Quarterly* 52; Pierre. Legrand, *Le Droit Compare* (PUF 1999) 75; P. Legrand, ‘Legal Traditions in Western Europe: The Limits of Commonality’ in R. Jagtenberg, E. Oruici, & A.J. de Roo (eds.) *Transfrontier Mobility of Law*, (1995). On perceived problems that would beset harmonization of private law due to its inherent private nature to the extent that immunes private lawyer’s analysis in isolation of wider globalised conception, see C. Joerges, ‘European Challenges to Private Law: On False Dichotomies, True Conflicts and the Need for a Constitutional Perspective’ (1998) 18 *Leg. Stud.* 146. Also on problems that would visit transplantation of one legal culture into another, see C. Teubner, ‘Legal Irritants: Good Faith in British Law or How Law Ends Up in Divergences’ (1998) 61 *MLR* 11. But cf. J. Bell, ‘English Law and French Law—Not So Different?’ (1995) 48 *CLP* 63. Speaking from the perspective of reading and experience, Lord Goff of Chieveley, thinks that difference between both systems is to be found rather in form than in substance, and more in procedure and method of legal reasoning. His Lordship however argues that the fundamental characteristic of common law is not only proper, but likely to survive the future. See, Lord Goff, ‘The Future of the Common Law’ (1997) 46 *ICLQ* 745.

¹³⁵ For a brief historical outline of the development of civilian legal science see P. Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999) 18–20, 79–82, 119–23. See also, Martin Vranken, *Fundamentals of European Civil Law* (1997) 62 (stating that ‘[J]udges in the civil law are civil servants who display a civil service mentality.’)

¹³⁶ Mauro Cappelletti, The Doctrine of *Stare Decisis* and the Civil Law: A Fundamental Difference or No Difference at All, in *Festschrift für Konrad Zweigert* (1981) 381; Ugo Mattei, Law and Economics in Civil Countries: A Comparative Approach (1991) 11 *Int’l Rev. L. & Econ.* 265

¹³⁷ Legrand (n. 134).

was the start of what has been termed nurturing the 'idolatry of the code.'¹³⁸ Judges were therefore pictured as strict interpreters of particular to confirm symmetrically with the whole body of law enacted by the legislature. The supposed difference is however a mirage. The differences between both legal families are not as distinct as it is imagined.¹³⁹ The code is no longer the most important source of law in the civil law tradition.¹⁴⁰ A large body of disputes are resolved outside the code parameters. In fact, the number of statutes outside the code is impressive. For example, while property law was an integral part of the Napoleonic code, it is now subject to a variety of special statutes that make resolution of property disputes no longer exclusively referable to the code. Movement is not only noticeable from the civilian side (from dogmatic reasoning to dialectic of reasoning), the common law is also shifting grounds. Its landscape is dotted increasing with statutes, converting the modern common law governments to what some have described as 'the regulatory state.'¹⁴¹ The supposed differences are hangover from early studies in comparative law, whose main concern was to identify and analysis the main differences between both. The emphasis was then on differences, not on analogies,¹⁴² because it centred on topics like the role of judges in decision-making, the role of legislature in creating law, the relevance of legal education and scholarship, the codification, restatement process, in the two traditions, etc.¹⁴³ So the impression given to readers by the first generation of comparative law scholars was generally one of differences.¹⁴⁴ All of this is now changing in many respects. Textbooks analysing particular areas of law under transnational perspective are making the debut across both traditions.¹⁴⁵ But that is just the beginning of the movement. If a *ius commune* is desired, and we dare say it is, its ultimate development would have to be built on certain shared values, generally recognised legal methods, common principles and guarding maxims, shaped by willing legal actors (judges, lawyers, legislators and professors) acting in co-operation with each other.

¹³⁸ Mattei (n. 135) 268 (stating the separation folklore was in part aimed 'against the conservative judges sitting in the parliaments that were systematically vetoing any reform favourable to the bourgeoisie').

¹³⁹ But cf. Legrand (n. 134).

¹⁴⁰ Hein Kotz, 'Taking Civil Code Less Seriously' (1987) 50 *Mod. L. Rev.* 1

¹⁴¹ Susan Rose-Ackerman, *Rethinking the Progressive Agenda: The Reform of the American Regulatory State* (1992); Guido Calabresi, *A Common Law for the Age of Statutes* (Cambridge: Harv. Univ. Press, 1982); Patrick S. Atiyah, 'Common Law and Statute Law' (1985) 48 *Mod. L. Rev.* 1; Mattei (n. 136) 268 (stating that 'even a superficial observer of common law system may notice that an orgy of statute-making is a current reality in the common law and that the process of common law adjudication is enormously affected by it.').

¹⁴² For analogical approach to comparative law, see Geoffrey Samuel, Ugo Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) 14 *Int'l Rev. Law & Econ.* 3 (economic explanation in a comparative perspective of patterns of legal change); Mattei (n. 136); R. Sacco, 'Legal Formats: A Dynamic Approach to Comparative Law' (1991) 1 *Amer. J. Comp. L.* 343

¹⁴³ Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 *Amer. J. Comp. L.* 5.

¹⁴⁴ Christopher A. Whytock, 'Legal Origins, Functionalism, and the Future of Comparative Law' (2009) 6 *Brigham Young Univ. L. Rev.* 1879 (arguing that a functional methodology-rule's intended function as opposed to the customary legal origin method-actual consequences of rules, promises a fruitful method to understand comparative law); Gunter Frankenberg, *Critical Comparisons: Rethinking Comparative Law* (1985) 26 *Harv. Int'l L.J.* 411; Ralf Michaels, *The Functionalist Method of Comparative Law* in Mathias Riemann & Reinhard Zimmermann (eds.) *The Oxford Handbook of Comparative Law* (2006) 339; Geoffrey Samuel, 'Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences' in Mark V. Hoecke, et. al. (eds.) *Epistemology and Methodology of Comparative Law* (European Academy of Legal Theory Monograph Series) 35. See also, P. Legrand, 'Comparative Legal Studies and Commitment to Theory' (1995) 58 *Mod. L. Rev.* 262 (discussing the poverty of comparative law theory); Geoffrey Samuel, 'Comparative Law and Jurisprudence' (1998) 47 *Int'l. & Comp. L. Quarterly* 817.

¹⁴⁵ Ole Lando, *Principles of European Contract Law* (1992); Ole Lando and Hugh Beale (eds.) *Principles of European Contract Law* (2000); D. J. Hayton, S.C.J.J. Kortmann & H.L.E. Verhagen (eds.), *Principles of European Trust Law* (1999); Thomas G. Watkin (ed.) *The Europeanisation of Law* (1998); Arthur Hartkamp & Martijn Hesselink et al. (eds.) *Towards a European Civil Code* (2nd ed. 1998); Jurgen Basedow, 'The Renaissance of Uniform Law: European Contract Law and its Components' (1998) 18 *Leg. Stud.* 121; Mathias Reimann, 'Towards a European Civil Code: Why Continental Jurist Should Consult their Transatlantic Colleagues' (1997) 73 *Tulane L. Rev.* 1341. See also programme pioneered by Hein Kotz, *Gemeineuropaisches Zivilrecht*, in *Festschrift für Konrad Zweigert* (1981) 498; and now implemented in Hein Kotz, *Europaisches Vertragsrecht*, vol i (1996) (English translation by Tony Weir [1997]; Christian von Bar, *Gemeineuropaisches Deliktsrecht*, vol i (1996) (English trans. 1998); Filippo Ranieri, *Europaisches Obligationenrecht* (1999). For international collaborative effort by groups of academics on harmonisation and restatements of principles of European private law, see, Jaap Spier and Olav A. Haazen, *The European Group on Tort Law (Tilburg Group) and European Principles of Tort Law*, (1999) 7 *Zeup* 469. For general commentary, see R. Zimmermann, *Roman Law, Contemporary Law, European Law Lectures: The Civilian Tradition Today*, Oxford, Clarendon Press (2001), lecture 3.

Are there signs of this? Yes. For example, in Europe international group of lawyers are collaborating on whole range of projects in drafting restatements of particular areas of law.¹⁴⁶ If anything, the birth of a general principle of international commercial contract of *lex mercatoria* is assurance that an '*ius commune*' for the law of obligations in Africa is doable.¹⁴⁷

It is expected that some sceptics will deride the African '*ius commune*' plotted in this paper. That for us is of no consequence. So great legal minds suggested that a harmonisation of European private law was doomed for failure. They pointed to what has been referred to as the great epistemological chasm between common and civil law as obstacle.¹⁴⁸ When the European Union (EU) idea was first mooted, sceptics and most minimalist derided the project. History has shown the deriders more wrong than right. Not only is the political-social map of Europe fusing, most geo-political regions, including Africa is considering more harmonisation.¹⁴⁹ Transposed in the context of this paper, we suggest, and strongly too, that the chasm is more theoretical than real and that it does not prevent genuine mixture of both.¹⁵⁰ In fact, an analysis that emphasises the supposed chasm (common—civil law dichotomy) runs risk of underrating the diversity that exists even within the civil law system. Within the civil law system there are an array of diversity, much greater than those between it and the common law.¹⁵¹ For example, though the civil law system derives its intellectual unity from Roman law, legal concepts derived directly or indirectly from it are not expressed exactly the same way in all modern codes. To illustrate, even though both French *code civil* and German *BGB* laws are derived from Roman law, the solution they apply to problems such as delict liability are quite distinct.¹⁵² To use the words of a great corporatist, 'the European legal landscape resembles a painting in many shades and colours rather than a simple monochrome snapshot.'¹⁵³ This notwithstanding, it provides the necessary building blocks for vital connection between the various diversities and possible connection between the civil and common law.

The coming into effect of OHADA by some African states with a willingness to give a percentage of their national sovereignty in order to establish a single, cross-border regime of uniform business laws, immediately applicable as the domestic laws of

¹⁴⁶ Example of political resolve to harmonise European private law, see Resolutions of European Parliament: Resolution on Action to Bring into Line the Private Law of Member States, Off J EC 1989 C158/400 of 26 May 1989; Resolution on the Harmonisation of Certain Sectors of the Private Law of the Member States, Off J EC 1994 C205/518 of 6 May 1994; cited in Pierre Legrand, 'Against a European Civil Code' (1997) 60 *MLR* 44 n. 3. A collection of directives enacted by the Council of the European Union on the law of obligations is found in Reiner Schulze and Reinhard Zimmermann, (eds.) *Basistexte zum europäischen Privatrecht* (2000). See also Stefan Grundmann, *Europäisches Schuldvertragsrecht* (1999); both cited in Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law Lectures: The Civilian Tradition Today* (Oxford, Clarendon Press 2001) 108 ft. nt. 2; de Witte, B Forder (eds.) *The Common Law of Europe and the Future of Legal Education* (1992); Reinhard Zimmermann, Savigny's Legacy: Legal History, Comparative Law and the Emergence of a European Legal Science (1996) 112 *LQR* 576; Jurgen Basedow, 'The Renaissance of Uniform Law: European Contract Law and its Components' (1998) 18 *Leg. Stud.* 121. The Max-Planck Institute for European Legal History established by Helmu Coing is providing an institutional basis for research on the sources and literature on history of European private law towards harmonisation. The European Contract Law Commission, now busy drafting restatements on contract law is inspired by the American restatement idea. The PECL published in 1998 is a project of the European Parliament towards harmonisation of members' law on contract. Presently, there are ongoing efforts by the academia to forge convergence of the legal families. See also the pioneering efforts of Professor Christian von Bar in producing a European Law of Torts.

¹⁴⁷ See the 1994 *UNIDROIT Principles of International Commercial Contracts* (codifying *lex mercatoria*) that took fourteen years by a working group of experts from civil, common law and socialist legal systems to design from both common and civilian sources, setting forth some of the fundamental concepts underlying international commercial contracts. See also, William Tetley, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' (2000) 60 *La. L. Rev.* 677 @ 716-722 (noting that UNIDROIT has been an impressive synthesis of the law of international trade, reconciling different legal traditions in a creative and beneficial fashion, to the benefit of the international business community).

¹⁴⁸ For example, Pierre Legrand in a formidable commentary in which he emphatically opposes the idea of a European Civil Code on the ground of what can be termed the plurijural nature of Europe. In the learned writer's opinion the proposal in favour of a Code is faulty on four main lines: (i) that it would be an arrogant idea to the extent that it would elevate the civilian representation of the world and social reality in codal form to the common law's world-view; (ii) that it is fallaciousness to imagine that a uniform code will bring about some re-enactment of the 'golden age' because there has never been a *jus* that is commune to Europe in the context of its cultural heteronomies; (iii) that a code proposal is a retrograde step as it privileges faith in a centralised political authority and in formalist truth. It is argued that since law cannot be neatly captured by a set of rules, it will be backward thinking to attempt to exhaust reality by reducing all lived experience to propositional knowledge in the form of a body of rules and; (iv) that it is a utopian, impracticable exercise for it supposes that the legal cultures which give normative foundation to forms of behaviour developed in historically different context can be unified. See P. Legrand, *Against a European Civil Code* (1997) 60 *M.L.R.* 44. See also Pierre Legrand, 'Legal Traditions in Western Europe: The Limits of Commonality,' in R. Jagtenberg, E. Orucu, and A.J. don Roo (eds.), *Transfrontier Mobility of Law* (1995) 63; Pierre Legrand, 'European Legal Systems are Not Converging' (1996) 45 *ICLQ* 52; Martijn W. Hesselink, 'The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience' (2006) *European L.J.* 279. The Dutch experience in incorporating European legislation can serve as pointer to how irritating and troublesome such an attempt can be for attempts to reevaluate the common law in the structure of civilian system.

¹⁴⁹ The African Union consists of 55 members. See Sirte (Libya) Declaration of September 9, 1999

¹⁵⁰ For discussion of possibilities and practicability of fusion, see Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law Lectures: The Civilian Tradition Today* (Oxford, Clarendon Press 2001) especially lecture 3 on European Private Law and its Historical Foundations @ 107

¹⁵¹ *Ibid*, 112-114

¹⁵² For example, Scotland is a civil law jurisdiction with uncodified civil law. The Republic of South Africa is a mixed jurisdiction whose legal system reflects elements of both civil and common law, as well as African tribal customary law. The new Civil Code of Quebec (Canada) enacted in 1991 reflects common law principles and institutions, such as freedom of testation, trust while still respecting the basic structure and terminology of civilian codification. The Louisiana (US) Civil Code, 1870 is a mixture of Spanish-French inspired provisions. Egypt Civil Code, 1948 reflects French influence. For a listing of diversity existing within the civil law system, see (1996) 112 *LQR* 593; Reinhard Zimmermann, *The Civil Law in European Codes*, in David L. Carey Miller and Reinhard Zimmermann (eds.) *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*, (Berlin 1997) 259

¹⁵³ Zimmermann (n. 150) 114.

each country is positive sign that an African harmonization law project is in the wings.¹⁵⁴ What is more, because the advantages of OHADA are exportable to AfCFTA, it is predictable that the incentives for harmonizing the law of obligations will force the continent to adopt a common law of obligations. Consider for once, the benefits of harmonization law of obligations. More people will become familiar with how obligations are created, interpreted and enforced all over Africa. Because the laws will become clearer and accessible, it will reduce transaction costs of creating obligations and doing business within Africa and outside the region. Potential investors, both domestic and foreign, will have greater assurance that their private arrangements will be respected. Because uniform obligations and business laws presenting a unified face to the commercial power outside Africa the economic benefits is good reason to anticipate eagerness for a harmonization project.

11. Combining A Science of Law with Dialectics of Reasoning

This now takes us to the next stage. Can the (Roman axiomatic) civil system delivers contextual justice, particularly in the context that most legal problems deal with concrete matters affect lives of people? Is sheer prediction good enough reason for preferring a science of law? This requires interrogating if the civilian system is truly scientific, without dialectics of reasoning. Or would the 'ius commune' have to rely on an alternative epistemological model that aligns more the sophisticated nature of today's world? These are some of the wider questions we will now seek to address. Some commentators say that any legislation with more than one word is bound to be ambiguous. Thus, no matter how well legal concepts, categories, institutions and notions are arranged into a structured code, gaps will be visible in areas not covered by the code. It therefore means that in areas not covered or that are ambiguous in a code, legally predictable results would be a mirage. In those areas a science of law would not be as forthcoming. Let us use as example a passage from the General Prussian Land Law on adhesion of contract made for the benefit of third parties. It states that 'a contract may have as its object the benefit of a third party' provided the third party accedes to the contract with the agreement of the principal parties.¹⁵⁵ Making the third party right depend on adhesion proved practically difficult and unsatisfactory. A legal commentator in a famous lecture in 1848 revealed the fallacy of the provision in the context of insistence on formal idealism of code application to concrete facts.¹⁵⁶ Using a farm surrender contract by an ageing farmer to dispose of his property on the condition that the purchaser pay part of the price to his sibling, he says: if there is no adhesion by the siblings then intolerable hardship would occur. The purchaser can have the property without fulfilling the bargain to the siblings because of the absence of adhesion. To prevent such an absurd result, the Prussian court found abstract principles in the code inadequate. It then contrived an independent right through 'fiction' that the promise to pay the siblings must be deemed to have been accepted by the father as 'their representative.' Analysing the decision, he concluded 'most of legal science consist of ignominious rehabilitation of moribund legislation- so repellent a business that it is surprising so many are ready to take to it.' Admittedly, this can be a draw back on the scientific bent of law sought to be plotted in this paper. Not to worry. The drawback is not that discouraging. Gaps in the code can be filled by analogical syllogism in a manner that still preserves science.

In civil law analogical reasoning constitute a tool to fill gap in a code. In common law it is regarded as the technique for applying the *ratio decidendi* of a precedent to a new case.¹⁵⁷ But analogical reason in the civil law tradition unlike the common law is at the fringes of the interpretation of the code. It goes beyond purposive interpretation in that it overtly extends an enacted rule cases not foreseen by the legislator. It uses the code as source. One thing stands out here: both traditions employ some version of argument by analogy to justify judicial decisions. That being so, it would be stating the proposition too high to say that the civilian tradition is a pure science. If analogical reasoning and arguments have a place in the system then it is tempting to think that the common law intuitivism is not that different from the continental position. The logic and common-sense dichotomy between both is fast disappearing. Civil judges are not as logical and formal as tradition seem to dictate. Arguments, precedents and interpretation play roles behind the science, even if they do not appear in the face of judgments. Interpretation is made to involve facts as well as law.¹⁵⁸ This is sign of a coming together of both systems. Under the civil tradition, analogical reason takes as starting point the code, whereas the common law system takes as its starting precedential *ratio decidendi*.¹⁵⁹

¹⁵⁴ Dickerson (n. 130). Already, for ease of business, OHADA Uniform Act includes nine laws: general commercial law, commercial companies and economic interest groups, secured credit transactions law, debt resolution law, insolvency law, arbitration law, harmonization of corporate accounting, contract for the carriage of goods, cooperatives companies law.

¹⁵⁵ Article 874 & 875, General Prussian Land Law. The provision is now extinct, replaced in substance by the German BGB, especially Article 328 that gives a third party right directly without need for adhesion as a requirement.

¹⁵⁶ Zweigert & Kotz, n. 133, 457.

¹⁵⁷ Katja Langenburher, 'Argument by Analogy in European Law' (1998) *Camb. L.J.* 481

¹⁵⁸ For further reading on how the civilian codal system operates as a science, see Zweigert & Kotz, n. 133, 140; F. Wieacker, *A History of Private Law in Europe*, (Tony Weir, trans. Oxford Univ. Press, 1995) 249; Geoffrey Samuel, *The Foundations of Legal Reasoning* (Antwerp, Belgium: Maklu, 1994) 83; Geoffrey Samuel, *Epistemology and Method in Law* (Aldershot, UK: Ashgate, 2003) 125-38 ['Epistemology'] chapters 1 and 2; Gerard Timsit, *Themes et Systemes de Droit*, (PUF 1986) 116. There are many instances in civil law jurisdictions such as in France and Germany, where substantial areas of the law with statutory origin have long been overhauled by appeal to the common law case law system. This has been foremost in France and Germany in the area of the law of delict. The reason is obvious. civil wrongs provisions of the Code Civile and BGB are just a few fragile sentences. For example, when the German BGB was prepared it had no provision on vicarious liability because it was then falsely believed that such stipulation would stifle industrial drive. Since they now know better, the judges have had to conjure the principle of vicarious liability through ingenuity of some sort. Judges have also had to invent in German law the tort of invasion of privacy. Using good faith provision in Art. 242 it has created a mass of equity to mitigate the rigours of the Code in a manner close to the Chancellor's English equity. See Lord Goff, *The Future of the Common Law* (1997) 46 *ICLQ* 745, 749. See also Basil S. Markesinis, *The Familiarity of the Unknown* in Robert Goff, William Swadling & Gareth Jones (eds.) *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP, 1999) 56; John Bell, 'English Law and French Law- Not So Different?' (1995) 48 *CLP* 63; Mitchel Lasser, 'Judicial (Self-) Portrait: Judicial Discourse in the French Legal System' (1995) 104 *Yale L.J.* 1325.

¹⁵⁹ Langenburher (n. 156).

There are signs that common judges are showing a willingness to adopt some measures of propositional logic in reaching decisions. For example, Lord Simon in *FA & AB Ltd. v. Lipton*¹⁶⁰ stated that judicial decision is a product of reasoning involving syllogism with major premise derived from pre-existing rule (precedent or statute) and minor premise consisting of the facts. Also, in *Home Office v. Dorset Yacht Co.*¹⁶¹ Lord Diplock expressed the opinion that legal reasoning involves a two-stage approach; first, the analytical and inductive, and the second analytical and deductive; a process not entirely deductive because policy choices are involved in the selection of relevant precedents used in analysis. That being so, the premise from which the deduction is made is not pure logic. Notwithstanding, it is a process involving syllogism. Legal propositions are applied to facts to reach conclusion. The only difference between it and the continental system being that the propositions do not exist in a purified form like that located in the code. The propositions it applies to facts result from *ratio decidendi* of cases which are ascertained by an analysis of the material facts of the case. That is why it is difficult to treat the common law as an organized system of propositions (major premise) existing in a metaphysical (or normative) world out there ready to be applied to factual situations.¹⁶²

In effect both systems show similarity in reasoning and convergence to a certain degree in reasoning, making less valid the distance between inductive and axiomatic models. The civil law no longer operates just on formal logic. More than ever before, it recognizes the humanistic bent of law, bringing together a combination of rhetoric with dialectic reasoning (argumentation, interpretation and precedent). Behind its commitment to the formality of structured syllogism, inductiveness is at play in such a manner that is not explicable as just *scientia iuris*. This hermeneutic (interpretive) method acts not only as bridge between facts and the code, but also the means by which the judges inject a system of value to the process of decision-making. For example, concepts such as fault, damage, interest and good faith have been generously employed to moderate rules under the code to meet concrete requirements of everyday social expectations. Coming from this perspective it would seem desirable not to draw a line between inductive common law and axiomatic civilian if the goal is a sort of harmonization towards legal science. Rather the search should be for a new epistemological model beyond the axiomatic that can combine a science with the concrete requirements of social life.

Some commentators have suggested that the new epistemological model should be structured in such a way that it recognizes the tension between descriptive and inductive methodology on one hand and deductive and axiomatic technique on the other, in such a way that the dichotomy between science (rules) and the object of science (facts) is seen in terms of a single geometric model. Rules are made concrete and the concrete requirement of social life is made abstract. Thus, in the final analysis, the concrete is simply the abstract rendered familiar by usage.¹⁶³ This model calls for a rethinking of conceptualism and realism in a common patrimony. The reason is simple. Whatever conceptual differences there exist between the common and civil law (or between sub-categories of the law of obligations) in the final analysis both systems recognize the place of abstract rules (legal science) and that people are more valuable than things or rule. The essence of law is to satisfy concrete focal point of justice. Once constructed, these become the desired science. A new science in this sense resembles what Rawls would refer to as the notion of 'reflective equilibrium'.¹⁶⁴ His theory seeks to produce both general theory and legal conclusions by close engagement with particular disputed facts. How would this operate in the real world? In this equilibrium, general theories are not taken as fixed. They only serve as focal points, adjustable to align with values. In the structure, both values and general principles are adjustable either way to enable equilibrium. Weight given to either values or principles would depend especially on whether allegiance to one against the other entails unacceptable consequences. Here again some would find such adjustment absurd. For them the theory smells like 'palm tree justice' and sheer strategic thinking, both a violation of commitment to neutrality. I do not share that view. Our new construct merely is an acknowledgement of concrete content in law. To use the words of Sunstein, 'judgment by human beings is inevitably a product of what human beings think, nothing need be wrong with changing one's general theory when that theory brings about results that seem to be an unacceptable part of one's approach to the subject'.¹⁶⁵ Let us see how this would work out in the extinct Prussian law on adhesion by third parties to a contract made for the benefit of strangers. By mundane formal count, the siblings cannot enforce the farm transfer fees. To evaluate their claim mere semantic classification would not do. If the statute is all that is invoked, they would be without a remedy. But the court went further by inventing a right for them within the structure of 'representatives' of the deceased. An insistence on axiomatic argument runs danger of introducing pure formalism into legal decision-making, bringing it within the cages of positivism, a theory that is now widely criticised for being divorced of values.¹⁶⁶ For example, Ronald Dworkin, the most rigorous critic of positivism argues that there is an inevitable evaluation or normative dimension to the statement 'what is law.' In his views no rational answer would be given

¹⁶⁰ [1972] AC 634 @ 658-659, per Lord Simon

¹⁶¹ [1970] AC 1004

¹⁶² See Tony Wier, *Die Sprachen des Europäischen Rechts*, (ZEuP 1995) 368, cited in Samuel (n. 129) 532. While most commentators do not doubt that on similar facts situations both systems can arrive at similar conclusions, they argue that the fundamental differences in legal reasoning between thinking rooted in the dichotomy of common-sense (realism) and sheer logic (conceptualism) marks out any meaning attempts to reconstruct both within the framework of common patrimony. See Pierre Legrand, *European Legal Systems Are Not Converging* (1995) 45 *ICLQ* 52; Pierre Legrand, 'Against a European Civil Code' (1997) 60 *MLR* 44; Pierre Legrand, *Le Droit Compare*, (PUF 1999) 75-102; Pierre Legrand, 'Legal Traditions in Western Europe: The Limits of Commonality' in R. Jagtenberg, E. Oruici, and A.J. de Roo (eds.) *Transfrontier Mobility of Law*, 1995. On perceived problems that would beset harmonization of private law due to its inherent private nature to the extent that immunes private lawyer's analysis in isolation of wider globalised conception, see C. Joerges, 'European Challenges to Private Law: On False Dichotomies, True Conflicts and the Need for a Constitutional Perspective' (1998) 18 *Leg. Stud.* 146. Also, on problems that would visit transplantation of one legal culture into another, see C. Teubner, 'Legal Irritants: Good Faith in British Law or How Law Ends Up in Divergences' (1998) 61 *MLR* 11. J. Bell, 'English Law and French Law- Not So Different?' (1995) 48 *CLP* 63. Speaking from the perspective of reading and experience, Lord Goff of Chieveley, thinks that difference between both systems is to be found rather in form than in substance, and more in procedure and method of legal reasoning. His Lordship however argues that the fundamental characteristic of common law is not only proper, but likely to survive the future. See, Lord Goff, 'The Future of the Common Law' (1997) 46 *ICLQ* 745.

¹⁶³ Geoffrey Samuel, *Epistemology and Method in Law* (Aldershot, UK: Ashgate, 2003)

¹⁶⁴ See John Rawls, *A Theory of Justice* (1971) 41; John Rawls, 'The Independence of Moral Theory' (1974-75) 48 *Proc. & Addresses of the Am. Phil. Assn.* 5

¹⁶⁵ Cass R. Sunstein, 'On Analogical Reasoning' (1993) 106 *Harv. L.R.* 741, 752.

¹⁶⁶ Festus Emiri & Felicia Eimunjeze, *Law, Objectivity and Truth: A Cathedral View* (2011) 10 *Nigeria L. & Prac. J.* 1.

without something being said about 'what it ought to be.' So when lawyers disagree as they often do, as to applicable law in a given fact situation, they are actually disagreeing about 'the best constructive interpretation of the community's legal practice.'¹⁶⁷ In the learned writers' view interpretation necessarily involves effort to make governing text as good as it ought to be, a theory now associated with integrity. That was what the Prussian court did with the adhesion contract requirement for strangers. That in no way made its conclusion less scientific. It only seeks to add proper values to it.

12. Harmonization Methodology

It is now time to discuss the familiar but thorny issue of how to supplement a code when the need arises, especially in the face of competing, applicable legislation from regional or international organisations, requiring local application. Let us draw a parallel from how some States in Europe have dealt with the challenges of Europeanization.¹⁶⁸ The Dutch experiment with codification and its interaction with Europeanization provide a parallel on this matter.¹⁶⁹ A new Burgerlijk Wetboek (BW) replaced the Dutch 1838 Code in 1992.¹⁷⁰ After the BW came into force certain European Union directives became due, especially those relating to the Internet, consumer protection and a host of commercial law directives. The choices open to the Dutch certainly ranged from whole incorporation, limited incorporation or outright rejection of the directive in pretence that they are both covered in the code, and so superfluous or treat them as unnecessary incursion on sovereignty. The Dutch legislature responded in a manner with less transplant irritation. Though most of the then directives were already integrated in the code, it pursued a programme of harmonisation of European law and directives by enacting textual adaptation to bring Dutch law in line with Europeanization policy.¹⁷¹ African States can take a clue from this as appropriate harmonization methodology. What is required is for individual states in the continent to progressively incorporate the African *ius commune* into domestic codes that foster harmonization. The project should start first by codifying the law of obligations in all Africa states using Roman law commonality on the subject. Progressively, an African *ius commune* can then be constructed with its building blocks.

13. Conclusion

Undoubtedly, harmonization of the law of obligations is particularly necessary for the continent given its relevance in relationship to trade and commerce between members of the African Union. It is a corollary to a common market and single market. To kick-start the harmonization project, it is suggested that the continent should put together a group of scholars from all countries in Africa to try to lay down a common text for a system of African law of obligations with solutions bridging the common and civil law traditions. This is the path the EU has employed over the years in forging harmonization of its private law, even though its initiative has largely been driven by private initiative. For example, one of the best-known initiatives at harmonizing European private law was undertaken by the Pavia group, a 1990 study-group at the University of Pavia, Italy.¹⁷² This is an area calling for concerted academic and governmental effort, particularly of the African Union to pursue robust and greater commerce transactions in the continent. I hope Africa will not miss this unique opportunity to move forward. This is my humble plea.

¹⁶⁷ Ronald Dworkin, *Law's Empire* (Oxford, Hart Pub. 1998).

¹⁶⁸ For discussion on the challenge, see, Nicholas W. Barber, 'Legal Pluralism and the European Union' (2006) 12 *European L. J.* 306; Nicholas W. Barber, 'Sovereignty Re-examined: The Courts, Parliament and Statutes' (2000) 21 *Ox. J. Leg. St.* 130; A. Arnaud, 'Legal Pluralism and the Building of Europe,' in H. Peterson & H. Zahle (eds.) *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth Pub. 1994); Joseph Weiler, *The Constitution of Europe* (Cambridge Univ. Press, 1999); Mattias Kumm, 'Who is the Final Arbiter of Constitutionality in Europe' (1999) 36 *Common Mkrt. L. Rev.* 351; Karen J. Alter, *Establishing the Supremacy of European Law* (Oxford Univ. Press 2001); J. Coppel & A O'Neill, 'The European Court of Justice: Taking Rights Seriously' (1992) 12 *Leg. St.* 227 and Joseph H.H. Weiler & Nicholas J.S. Lockhart, 'Taking Rights Seriously Seriously: The European Court and its Fundamental Rights Jurisprudence' (1995) 32 *Common Mkrt. L. Rev.* 51 and 579.

¹⁶⁹ Martinj W. Hesselink, 'The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience' (2006) *European L.J.* 279.

¹⁷⁰ The new Dutch Civil Code (Burgerlijk Wetboek [BW]) appears more Germanic in roots than the 1838 Code inspired by the French Code Civil.

¹⁷¹ Gian A. Benacchio & Barbara Pasa, *A Common Law for Europe* (Budapest: Central European Univ. Press, 2005, trans. Lesley Orne) 215 (stating '[C]ommunity law now constitutes an integral part of domestic law within the Member States. However, the two principle embodiments of Community law generate different situations which cannot be overlooked: whereas the Treaty provisions and the Regulations have immediate direct effect on coming into force, the Directives, on the other hand, must be implemented by the national legislature before becoming directly effective, in order to satisfy the requirements of the founding Treaty. In fact, owing to some principles which have been developed by the Court of Justice and accepted by Member States, there are some directives which national bodies are bound to apply even in the absence of a national measure of implementation.'). See also, ECJ Judgment, Nov. 19, 1991, *Franovich & Bonafaci v Repubblica italiana*, C-6/90 & 9/90 (1991), ECR I-5357 (holding that a person who sustains loss by reason of the failure of a state to implement an EU directive will recover damages for loss suffered).

¹⁷² The group is led by Prof. Giuseppe Gandolfi, aims to create a European Code of contract. See also, *The Commission on European Contract Law*, an initiative led by Prof. Ole Lando of the University of Copenhagen (a special non-government Commission made up of lawyers from all countries of the EU); *Study Group for a European Civil Code*, comprised of academic experts of EU members; *Trento Common Core of European Private Law Project*, 1993, led by Professors Ugo Mattei and Mauro Bussani at the University of Trento, and many other initiatives for harmonization. All of these projects are motivated by the desire to focus on the EU common heritage, with a view to increase the applicability of a common European private law. See Gian A. Benacchio & Barbara Pasa, *A Common Law for Europe* (Budapest: Central European Univ. Press, 2005 (trans. Lesley Orne) 285-302.