ISSN 2348-3156 (Print)
International Journal of Social Science and Humanities Research ISSN 2348-3164 (online)
Vol. 6, Issue 3, pp: (927-939), Month: July - September 2018, Available at: www.researchpublish.com

A COMPARATIVE STUDY OF THE TWO PRINCIPAL LEGAL TRADITIONS AND THEIR EFFECT ON CONFLICT RESOLUTION IN AFRICA; CASE STUDY OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

[1]Alice Nijimbere, [2]Dr. Samuel Obino Mokaya

Jomo Kenyatta University of Agriculture and Technology
P. O. Box 62000-00200, Nairobi, Kenya

Abstract: **The multiplicity of Legal Systems is a fact, but it is still necessary to specify the extent of this phenomenon and its true meaning. Each State has its own Legal System in our world, and sometimes, even different Legal Systems can be enforced concurrently within the same State. Some non-State Communities have also their own Systems, such as Canon Law, Muslim Law, Hindu Law, and Jewish Law. There is also an International Law which aims to regulate the relations between States or those of International Trade. The Study sought to conduct a Comparative Study of the two Principal Legal Systems and determine their effect on Conflict Resolution Practice at the African Court on Human and Peoples 'Rights. The aim is to provide a guide through diversity and to facilitate the task of the Jurist or any individual who, for one reason or another, may be interested to know this or that foreign Legal System. The Study revealed that the African Court on Human and Peoples 'Rights is mainly applying International Law and International Humanitarian Law in its Dispute Resolution Practice. In addition, the Court is considering the application of the African Charter on Human and Peoples 'Rights, the Protocol to the African Charter on Human and Peoples 'Rights on the Establishment of an African Court on Human and Peoples 'Rights, the Court Rules of Procedure and any other Relevant International Legal Instrument ratified by the State-Parties. Talking about the two Principal Legal Systems, it has been observed that many of the Principles of the Common Law System are recognized under International Law and International Human Rights Norms which the Court upholds. Regarding the respective influence of the two Principal Legal Systems, the tendency is that the Common Law System predominates. The Court is drawing inspiration more from Common Law System than from the Civil Law System. In other words, the Court does not directly apply any of the two Systems. It is inspired by them case by case. On another note, it has been proven that a combination of both Common Law System and Civil Law System creates flexibility and at the same time legal certainty.**

Keywords: **Legal Systems, Common Law System, Civil Law System, Conflict Resolution Practice, Legal Instruments, The Charter, The Protocol, Rules of the Court, International Law, International Humanitarian Law, Comparative Analysis.**

1. INTRODUCTION

This publication is based on a project report entitled "*A comparative Study of the two Principal Legal Traditions and their effect on conflict resolution practice in Africa: A case study of the African Court on Human and Peoples' Rights*. The Study was in fact an emanation of the principles enshrined by the article 14 paragraph 2 of the Protocol to the African

Charter on Human and Peoples 'Rights on the Establishment of an African Court on Human and Peoples 'Rights and article 13 of the Rules of the Court. Article 14 Paragraph 2 of the Protocol is worded as follows:

2....."The Assembly shall ensure that in the Court as a whole there is representation of the Main Regions of Africa and of their Principal Legal Traditions".....

Article 13 of the Rules of the Court is worded as follows:

"In electing to office or making appointments governed by this Chapter and Part II of these Rules, the Members of the Court shall pursue, to the greatest extent possible, a policy aimed at securing a balanced representation of gender, the Principal Legal Traditions and the main regions of Africa."

The essential approach for this Study is to search for an understanding of the Civil Law and the Common Law Systems as Two Main Legal Systems in Africa in general, and especially to identify and understand the fundamental differences in their structures, in their methods of thought and in their attitudes towards the law as Legal System; particularly how they relate to Litigation Practice at the African Court on Human and Peoples 'Rights. In addition, Comparative Legal Studies would also be extremely useful in the process of unifying, or at least harmonizing the laws of African Countries. If the experience of the West is examined, it will be possible not only to modernize and modify the laws, but also to evaluate it and be highly eclectic in selecting which laws might be adopted and adapted to particular needs and conditions. On another note and as far as Africa is concerned by Legal Systems, there is an African Legal Culture. However, that Legal Culture has followed a path of development based on the creation of Legal Rule which has been described as Customary Law, whose particularity is to set and evolve without the intervention of a Central Power, such as a type of spontaneous rights.

Africa and its culture do not live through the events that create the Legal Culture as in Europe. The African Legal Culture is based on the idea that the power of the Tribal or Local leader is absolute and often legitimate by the Supernatural. However, Culture has not memorized data, which are the central mechanisms granted to Legal Professionals and which contribute to the development of Western Legal Culture. The law has therefore been applied differently in the particular circumstances but follows the general concept of Western Legal thoughts; each Country applying the Legal Tradition of its Colonizer. The cultural boundaries that have historically been used to distinguish Legal Systems are no longer important than they were in the past.

Purpose

The purpose of the study was to conduct a Comparative Analysis of the Common Law System and the Civil Law System and to determine their respective effect on Conflict Resolution Practice at the African Court on Human and Peoples' Rights based in Arusha, Tanzania.

2. RESEARCH METHODS

The research design adopted was correlational which enabled establishment and explanation of the relationship between the Conflict Resolution Practice at the African Court on Human and Peoples 'Rights and each of the two Principal Legal Systems and to ascertain the causal effect of one variable upon the other. The target population covered was: Judges of the Court, the Registry Staff and the Legal Division Staff of the Court. The study collected both qualitative and quantitative data through questionnaire, observations and interviews with focus groups and individual respondents. The collected data was analyzed by using descriptive and inferential statistics to help describe variable characteristics and explain their relationships.

3. RESULTS AND DISCUSSION

From the discussion held with Judges and Legal Officers of the Court, they have a unanimous opinion: The African Court on Human and Peoples 'Rights is upholding International Law and International Human Rights Norms under which many of the Principles of The Common Law System are recognized. In addition, the Court is applying International Law which is a blend of different Legal Systems which includes Common Law and Civil Law, although it may be agreed that the Common Law influence on International Law is significant. The response rate was of 65 % in total.

Nationals of Civil Law System and those of Mixed Jurisdiction System responded at a high response rate (45%) and (10%), while the response rate of Common Law Nationals was lower(10%) compared to the number of Common Law

System Nationals. The African Court on Human and Peoples 'Rights is composed of eleven Judges, Nationals of Member States of the African Union. Only the President of the Court resides and works on a full time basis at the seat of the Court, while the other ten judges work on a part time basis. In the accomplishment of his duties, the President is assisted by a Registrar and a Deputy Registrar who perform registry, managerial and administrative functions of the Court. The Organizational Structure of the Court has two main Units or Divisions: The Legal Division Unit and the Finance and Administration Unit. Each Division has a multicultural staff, men and women, coming from different Legal Systems, speaking different languages, but despite that diversity in terms of workforce, the Court is organized harmoniously.

From a total of 44 questionnaires distributed, only 20 Respondents were able to respond but 13 Respondents effectively responded; and among the 13 Respondents, only two were Female. Judges responded on a rate of 30%; The Registrar Office responded on a rate of 10%; the Legal Division Unit responded on a rate of 25%. The male Respondents represented 55%, while the Female participation was only of 10%.

Conflict Resolution Practice and the two Principal Legal Systems

The Study pursued indicated the status of Applications filed to the AFCHPR with regards to the Origin of the Respondent States (Legal System) in accordance with Article 5.3 of the Protocol during the Period 2008 to 2017; as well as the relationship between Common Law System and Civil Law System and their effect on Contentious matters at the AFCHPR, it established the influence of Common Law System on Conflict Resolution Practice at The African court on Human and Peoples 'Rights; determined how Civil Law System affects Conflict Resolution Practice at the African Court on Human and Peoples 'Rights; and conducted a Comparative Analysis of the two main Legal Systems in Conflict Resolution Practice at the African Court on Human and Peoples 'Rights.

Table 2: Status of Applications Regarding Origin of Respondent States in accordance with the Article 5.3 of the Protocol from 2008 to 2017

Number of Applications filed	Yr. of Application filing	Common Law State-Respondent	Civil Law State	Mixed Jurisdiction State	NGOs	The Commission	Inter-gornemental Organizations
1	2008	0	1	0	0	0	0
13	2011	4	7	0	1	0	2
7	2012	4	1	2	0	0	0
7	2013	4	3	0	0	0	0
3	2014	0	3	0	0	0	0
34	2015	28	5	0	1	1	1
84	2016	79	5	0	0	0	0
32	2017	19	13	0	0	0	0

The results show that the Court is receiving Applications from Common Law System, Civil Law System and Mixed Jurisdiction System. However, Common Law Applications are recorded on a high degree, compared to Civil Law Applications and Mixed jurisdiction Applications.

On a total of 181 Applications filed from 2008 to November 2017:

- 138 cases were filed against Common Law System States;
- 38 cases were filed against Civil Law System States;
- 2 cases were addressed to Mixed Jurisdiction States;
- 2 cases were addressed to NGOs;
- 1 case was addressed to the African Commission;
- 3 cases were addressed to the African Union.

The above findings can be explained by the fact that among the 54 African States Members of the African Union, only 30 States ratified the Protocol to the African Charter on Human and Peoples 'Rights on the Establishment of an African Court on Human and Peoples 'Rights. Among the 34 Countries who ratified the Protocol, only 8 Countries made a

ISSN 2348-3156 (Print)
International Journal of Social Science and Humanities Research ISSN 2348-3164 (online)
Vol. 6, Issue 3, pp: (927-939), Month: July - September 2018, Available at: www.researchpublish.com

Declaration accepting the Competence of the Court to receive cases under article 5 (3) of the same Protocol. This comes to a conclusion that the Court shall not receive any Petition under article 5 (3) involving a State Party which has not made such a declaration. Countries which already made the declaration are Tanzania, Benin, Burkina Faso, Mali, Ghana, Malawi, Cote d'Ivoire and Tunisia.

Considering the number of State Parties who made the Declaration accepting the competence of the Court to receive cases under article 5 (3) of the Protocol to the African Charter on Human and Peoples 'Rights on the Establishment of an African Court on Human and Peoples 'Rights; on a total of eight (8) Countries, five (5) Countries are from the Civil Law System, while three (3) Countries are of from the Common Law System. The Court should normally expect to receive more cases from Civil Law Countries, but unlikely, most of the cases already recorded concern the Republic of Tanzania; this can be explained by the easy access to the Court by Tanzanian citizens (factor of geographical proximity). But the geographical proximity should not pose a problem for the Citizens of other Countries who filed the Declaration, because the Court is very flexible in this respect: It can receive referrals online.

Even if the high number of Applications is filed by Tanzanian Citizens, this does not mean that in Tanzania there are more violations of Human Rights compared to other African Countries. The only factor which can justify the fact is that Tanzania ratified the Protocol and made the Declaration. But the ultimate factor which can justify the fact is the proximity of the Court to the Tanzanian Citizens.

On another note, cases involving NGOs and Intergovernmental Organizations are very few. As for Applications files by Individuals, both Applications filed against Common Law Countries and Civil Law Countries were very few from 2008 to 2014, and the number of Applications has relatively increased for the years 2015 , 2016 and 2017 for Common Law Countries; but 90% of the cases were filed against Tanzania. For the same period, Civil Law Applications remained very few.

There is a way of assuming that the Court needs to increase Sensitization Missions which are already part of its on-going efforts to interact with different Stakeholders in order to deepen their understanding of the Court's mission and to encourage States to ratify the Protocol establishing the AFCHPR and to deposit the declarations under article 34(6) which allows direct access to the Court by NGOs and Individuals. As to date, 28 Sensitization Missions have been already conducted.

Table 3: Statistical Analysis of the Relationship between Common Law System and Civil Law System and their effect on contentious matters at the AFCHPR

Years	Common Law Applications (X)	Civil Law Applications (Y)	XY	X^2	Y^2
2008	0	1	0	0	1
2011	4	7	28	16	49
2012	4	1	4	16	1
2013	4	3	12	16	9
2014	0	3	0	0	9
2015	28	5	140	784	25
2016	79	5	395	6241	25
2017	19	13	247	361	169
TOTAL	138	38	826	7434	275

By applying the formula;

$$r = \frac{\sum xy - \frac{\sum x . \sum y}{n}}{\sqrt{\left(\sum x^2 - \frac{(\sum x)^2}{n}\right) . \left(\sum y^2 - \frac{(\sum y)^2}{n}\right)}}$$

ISSN 2348-3156 (Print)
International Journal of Social Science and Humanities Research ISSN 2348-3164 (online)
Vol. 6, Issue 3, pp: (927-939), Month: July - September 2018, Available at: www.researchpublish.com

$$r = \frac{826 - \frac{(138\ x\ 38)}{8}}{\sqrt{\left(7434 - \frac{(138)^2}{8}\right).\left(275 - \frac{(38)^2}{8}\right)}}$$

$$r = \frac{826 - 656}{\sqrt{(7434 - 2380).(-2019)}}$$

$$r = \frac{170}{\sqrt{(5054x(-2019))}}$$

$$r = \frac{170}{\sqrt{-10.204}}$$

$$r = \frac{170}{-101}$$

$$r = -1.6$$

It has been found that R is negative. This means that there is an inverse or indirect relationship between the two Independent Variables. Hence, since the correlation R is of -1.6, and as it is known, if R is equal to 1 or -1, there is a perfect correlation. For the present case, the value of R is beyond the margins of a perfect correlation. It can be therefore concluded that there is No Correlation between the two Independent Variables.

Table 4: Statistical Analysis of the Influence of the Common Law System on Conflict Resolution at the AFCHPR

Periods	Common Law Applications	Finalized Applications	Applications transferred to the Commission	Struck out Applications	Pending Applications
2008	0	0	0	0	0
2011	4	3	1	0	0
2012	4	3	0	1	0
2013	4	3	0	1	0
2014	0	0	0	0	0
2015	28	2	0	0	26
2016	53	0	0	0	53
2017	19	0	0	0	19
TOTAL	**112**	**11**	**1**	**2**	**98**

Source: Table 2

The statistical analysis related to the Common Law Applications qualified as (X), with regards to finalized applications qualified as (Y), by applying the formula;

$$r = \frac{\sum xy - \frac{\sum x.\sum y}{n}}{\sqrt{\left(\sum x^2 - \frac{(\sum x)^2}{n}\right).\left(\sum y^2 - \frac{(\sum y)^2}{n}\right)}}$$

$$r = \frac{92 - \frac{(112\ x\ 11)}{8}}{\sqrt{\left(4002 - \frac{(112)^2}{8}\right).\left(31 - \frac{(11)^2}{8}\right)}}$$

ISSN 2348-3156 (Print)
International Journal of Social Science and Humanities Research ISSN 2348-3164 (online)
Vol. 6, Issue 3, pp: (927-939), Month: July - September 2018, Available at: www.researchpublish.com

$$r = \frac{92 - \frac{(1232)}{8}}{\sqrt{\left(4002 - \frac{12544}{8}\right).\left(31 - \frac{(121)}{8}\right)}}$$

$$r = \frac{92 - 154}{\sqrt{(4002 - 1568)(31 - 15)}}$$

$$r = \frac{-62}{\sqrt{2434\ x\ 6}}$$

$$r = \frac{-62}{\sqrt{14604}}$$

$$r = \frac{-62}{120}$$

$$R = -0.5$$

The value of R is negative and is equal to–0.5; this means that the relation between the Common Law System and the Conflict Resolution at the African Court is indirect and intermediate, because it is lying between -0.25 and - 0.75.

So, by considering the Common Law Applications filed and the Finalized Applications from 2008 to November 2017, the results are shown in Table 5**.**

Table 5: Results on Filed and Finalized Applications

Periods	Common Law Applications(X)	Finalized Applications (Y)	XY	X^2	Y^2
2008	0	0	0	0	0
2011	4	3	12	16	9
2012	4	3	12	16	9
2013	4	3	12	16	9
2014	0	0	0	0	0
2015	28	2	56	784	4
2016	53	0	0	2809	0
2017	19	0	0	361	0
TOTAL	112	11	92	4002	31

Source: Table 2

Table 6: Statistical Analysis of how Civil law System affects Conflict Resolution Practice at the AFCHPR

Periods	Civil Law Applications	Finalized Applications	Applications transferred to the Commission	Struck out Applications	Pending Applications
2008	1	1	0	0	0
2011	7	2	3	2	0
2012	1	0	0	1	0
2013	3	2	0	1	0
2014	3	1	0	1	1
2015	5	1	0	1	3
2016	5	0	0	0	5
2017	13	0	0	0	13
TOTAL	**38**	**7**	**3**	**6**	**22**

Source: Table 2

ISSN 2348-3156 (Print)
International Journal of Social Science and Humanities Research ISSN 2348-3164 (online)
Vol. 6, Issue 3, pp: (927-939), Month: July - September 2018, Available at: www.researchpublish.com

Table 7: The statistical analysis related to the Civil Law Applications qualified as (X), with regards to Finalized Applications qualified as (Y).

Periods	Civil Law Applications(X)	Finalized Applications (Y)	XY	X^2	Y^2
2008	1	1	1	1	1
2011	7	2	14	49	4
2012	1	0	0	1	0
2013	3	2	6	9	4
2014	3	1	3	9	1
2015	5	1	5	25	1
2016	5	0	0	25	0
2017	13	0	0	169	0
TOTAL	**38**	**5**	**29**	**288**	**11**

Source: Table 2

By applying the formula;

$$r = \frac{\sum xy - \frac{\sum x . \sum y}{n}}{\sqrt{\left(\sum x^2 - \frac{(\sum x)^2}{n}\right) . \left(\sum y^2 - \frac{(\sum y)^2}{n}\right)}}$$

$$r = \frac{29 - \frac{(38\ x\ 5)}{8}}{\sqrt{\left(288 - \frac{(38)^2}{8}\right) . \left(11 - \frac{(5)^2}{8}\right)}}$$

$$r = \frac{29 - 24}{\sqrt{(288 - 180) . (11 - 3)}}$$

$$r = \frac{5}{\sqrt{108\ x\ 8}}$$

$$r = \frac{5}{\sqrt{864}}$$

$$r = \frac{5}{29}$$

$$r = 0.1$$

The correlation between the Civil Law and the Conflict Resolution at the African Court is positive, and is lying between 0 and 0.25. The value of R is of 0.1, meaning that there is a direct but weak correlation between the Civil Law System and the Conflict Resolution at the AFCHPR.

Further, the study revealed that Common Law System has a high degree of influence on Conflict Resolution Practice at the AFCHPR, compared to how Civil Law System affects Conflict resolution Practice at the same Court. On another note, the Civil Law System looks more practical when the Principles of States Sovereignty is strictly applied: the judges are limited by written texts to comply with the Principle. However, for the reasons of efficiency and practicality, a combination of both Systems in conflict Resolution Practice in any International Court or Tribunal like the AFCHPR, creates flexibility and at the same time legal certainty.

ISSN 2348-3156 (Print)
International Journal of Social Science and Humanities Research ISSN 2348-3164 (online)
Vol. 6, Issue 3, pp: (927-939), Month: July - September 2018, Available at: www.researchpublish.com

A Comparative Analysis of the two Main Legal Traditions

No one can deny it; there is a prevailing and continuous international competition of Legal Systems, jurisdictions and jurists. Their competitiveness is of an economic value, a source of development, an important factor of attraction not only in international investment, but also in the legal market and legal services. Thus, a prerequisite approach is required: The in-depth knowledge of the strengths or weaknesses of each System in the field concerned. For this reason, it is necessary to evaluate the real impact of the possible rapprochement of the two main Legal Systems, which is supposed to be without discussion. The differences in the nature of the Legal Systems of the Civil Law and the Common Law also manifest themselves with reference to their respective Judges and Courts. Of course, the essential objective is everywhere the same: To answer questions of law and to resolve disputes. However, in order to understand the two Systems properly, there are disparities which must be recognized and evaluated.

For more specific identification of ideas, it is useful to consider five points of reference:

a) The Training and Recruitment of judges

The training and the recruitment of judges and the nature of their tenure are very important factors in determining their mode of thought, their methods of work and the ways in which they decide cases. In the Common Law Countries, there is no particular training for judges apart from the fact that it is necessary to be an Attorney or Barrister with a number of years of experience and reputation. After having succeeded as a Practitioner, they can either be appointed by the Government, or elected by the people. In a Legal System based essentially on decided cases, the judges must necessarily be practical, and the elevation of a member of the Bar to a seat on the Bench is the perfectly natural procedure. It is to be expected that their manner of thinking, working and deciding legal questions should be a continuation of what it was when they were Attorneys or Barristers.

In certain Civil Law Countries however, there is a greater difference between the judicial function and the practice of law. The Lawyer and the judge both have the same legal education at the University level; after that however, each individual must make his choice of career, and goes into the practical apprenticeship training for the branch of the legal profession he has selected. Going directly from law study into a judicial association, the future judge approaches the law primarily through the theoretical education which he has received. He finds himself with other people who envision the law in the same way as he does, that is, as a comprehensive body of legal principles coordinated at a high level of generalization and abstraction.

b) The method of deciding cases

For their point of departure, Civil Law Judges search the legislation for the controlling principle and the rules which govern the subject; this principle or rule is then applied or interpreted according to the particular facts of the case in dispute. The reasoning process is to go from the general principle to the special case. On the contrary, Common Law Judges search in the previous decisions for a similar case, and are guided accordingly. If a statute is involved and the text is clear, the judge abides by its provisions; but if doubt or ambiguity can avoid the statute's applicability, there is again resort to a search of previous decisions for Common Law authority as a basis of decision. From another point of view, it can be said that in a Common Law Country, the judge must give effect to a clearly –stated statutory rule, while a judge in a Civil Law Country is, sometimes given wide discretionary powers through broadly stated legislation. Another point of interest is that the Common Law jury trial in Civil cases left the determination of facts to the jury, so that the judicial technique of reducing the power of the jury was to broaden the scope of "matters of law" which fell within the judge's power.

In the Civil Law, a Jury in civil cases is either very rare or non-existent, so that the judge is in complete control of all phases of the trial. All this does not prevent the Common Law judge from discussing General Principles or the Civil Law Judge from taking cases into consideration. However, they do so with a difference in point of view and in method that is very significant even in situations which bear substantial resemblance to one another.

c) The personal or collective character of decisions

In the Continental Countries, judges enjoy a desirable prestige and security, but their emoluments are perhaps more modest than elsewhere. By reason of usual collegial system of their Organization and procedure, the judges always remain anonymous; consequently, the bench does not attract the strongest personalities of the profession. In many Common Law

Countries, Opinions are identified with their judicial authors; there can be dissenting or concurring opinions, and each judge has the possibility of setting forth his own point of view. In this manner, the personality of a great judge jurist makes itself felt and appreciated, and such a person makes a substantial contribution to the development of the law.

d) The manner of writing Opinions and Decisions

When it comes to the writing of Judicial Opinions and Decisions in the two Systems, the difference is very striking. In the Common Law, there is first a more or less organized exposition of all the facts that led to the controversy and that furnish the base for the analysis of the legal problem. Then an examination is made of the previous cases which resemble the present one, especially those cases which have been cited by the parties in the litigation.

All these have to be analyzed and evaluated in order to determine which are analogous to the case in hand and which are to be distinguished. Finally, the Court decides which precedents are in point, and it is on the basis of their authority that the new decision is grounded. In the Civil Law System, decisions are much shorter; it would seem that the higher the Court in the judicial hierarchy, the shorter its judgment. A merger outline of the essentially relevant facts is followed by a succinct statement of applicable principles and rules of law; then there is the conclusion which results from the application of the law to the facts of the particular case. There is a strict prohibition against the rendition of a judgment in the form of a general ruling. Thus, it is obvious how much the manner of writing opinions reflects the basic mode of thought for legal problems and for their solution.

Again, while the respective judges have different approaches in the selection of relevant authorities, it would not be correct to leave the impression of a complete differentiation between the two Systems. On the one hand, the Court reports of the Common Law may well contain important discussion and substantial development of General Principles. On the other hand, in Civil Law Systems, the record files of the judge or of the *Ministere Public* often contain all the details and the facts of the Dispute. Nevertheless, as already noted in other contexts, the point of departure and the method of approach are altogether different, again reflecting the difference in the nature of the two Legal Systems.

e) Silence or insufficiency of the written or established law

There is an important difference between the Common Law System and the Civil Law System which is found in the attitude of the judge in case of silence or insufficiency of the written or established law, the unprovoked –for case. This does not present any problem for the Common Law judge; he is then entirely within his field if he finds or makes the rule of decision. By contract for him, the difficulty arises when there is a pertinent legislative text not to his liking; the challenge then is to restrict the scope of its application.

On the other hand, by reason of the legislative basis of the Civil Law System, the judge in this System finds himself in an embarrassing situation when the written law is silent or insufficient on an essential issue. The judge cannot refuse to adjudicate under penalty of being guilty of a denial of justice. The various Civil Law Countries have adopted different formula to guide and instruct the judges in this respect. Whatever the explanation given (to fill in gaps or to effectuate the presumed intent of the parties), or the technique used (interpretation or analogy, recourse to custom or General Principles), the Civil Law judges are not always limited to a mere application of the law; in effect they are obliged to make law.

Functional Comparison of the Legal Systems in Litigation Practice

In every Legal System, the Substantive Legal Rules do not guarantee the results of Litigation. But in addition to the often leaky character of those Rules, there are other phases of litigation which cause even greater uncertainty. Surely, the effects of different modes of trial in different countries should be of much interest to all Professionals of "Comparative Law". Yet, some Professional of Law incline to cold-shoulder that subject, but there is still a need to insist on the significance of the practical results of the Trial process in particular cases.

Thus, in the "American Science of International Law"; Kunz (1962) qualifies as "Nihilistic" those who believe that there are "no General Rules or Principles of Law". Certainly, no one can reasonably deny that the mode of trial in vogue in a given Country at any particular time sensibly affects the manner in which its Substantive Legal Rules works. A substantive rule may seem to remain the same but practically does not, in terms of results. Wise Researchers of a Foreign Legal System, therefore, will not study its Substantive Rules; they will study also its Procedural Rules to see how they

affect the substantive ones. Thus, in his Book entitled "Criminal Lawyer", Kenny (1962) said: "At one time, under Canon Law, no Cardinal could be convicted of incontinence except on the evidence of seven eye-witnesses.

In the same order of ideas, there is a way of referring to the restrictions in some Civil Law countries on the right of a party to testify in a civil suit and the power of a Court to compel him to testify. However, Procedure does not consist exclusively of Procedural Rules. To illustrate the statement; it is advisable to consider first the Roman "Praetor" and the "Judex". The Praetor told the Judex what Legal Rules he must apply to a case, but the Judex received the evidence. The Judex rendered his decision by logically applying those Rules to the facts as he ascertained them from the evidence. Many Rules and Principles of Roman Law on which much modern Civil Law still rests are found in the Praetor's Statements or in the response of the Jurisconsults.

The Common Law and the Civil Law Traditions have each their characteristic attitudes to Law which enable Comparatists to classify them accordingly albeit from more general rather than highly specific detailed criteria. Any Legal System therefore will comprise a number of Legal Traditions, which collectively, represent the heritage of a particular jurisdiction and in themselves provide an insight into the evolution of a given Legal System.

RAZI (1959) argues that a Legal System in the wide sense is not made of Rules alone, but is also characterized by its Institutions, Practices, Standards of Research and even the mental habits of Lawyers, Judges, Legislators and Administrators. If one is referring to the Common Law System or the Civil Law System, one is really using it in a wider or broader sense of a Parent Legal Family.

Procedural differences between the Common Law and the Civil Law Traditions

It is a reflection of great interest where people have quite different Legal Traditions. It makes it interesting, but sometimes it also creates certain tensions; this different approach to defining judicial function and the search for the legal truth. It has been noted that Common Law Judges are clearly more comfortable with oral hearings than their Civil Law Peers. In the Civil Law Tradition, they think that Oral hearings are not very important because they have this notion that it is the Court that knows the law and there's no purpose in having a hearing. A European Court of Justice (ECJ) judge observed that Attorneys from Civil Law Countries are often stymied when asked by the Bench to answer questions extemporaneously, expecting to simply read their statements aloud to the Court. Barristers from Common Law Countries on the other hand, are experienced with such request and handle them with great skill.

The procedural differences between Common Law and Civil Law Traditions become even more visible in the context of an International Criminal Court. Civil Law Judges and Attorneys may not be familiar with the Cross-examination of Witnesses or the notion of Inadmissibility of Hearsay evidence. Their Common Law Colleagues may find communication between judges and Counsel outside the formal setting of the Court room to be not only unfamiliar, but to their minds, a breach of ethics.

A Common Law judge on a Criminal Tribunal admits to discomfort with the role of written evidence in trial proceedings, preferring the Common Law insistence on oral testimony by Witnesses. The big fight is between written and oral evidence. Civil Law judges say that a lot of things can come in by written evidence; that there is no need to interpolate the person who saw it or heard the facts. The case of Rwanda Tribunal who struggled with its mix of Civil Law and Common Law procedure can serve as an illustration. It was suggested by some that certain Common Law procedures might even be considered as the Culprit when it comes to the Tribunal's long and drawn-out trials. One judge notes with exasperation that he finds that the Common Law approach struggles quite a bit about the admission of documents. He prefers Civil Law or Mixed Law.

4. CONCLUSIONS

In conclusion, the two Legal Systems are considered as the keys to the legal life of the world. Knowing them helps Lawyers and every human being to better understand the rights that surround them and therefore their own rights. In every Country, a Legal System is a part of the life and the culture of the people for whose needs it has developed. Its evolution, including its susceptibility to outside influences, cannot be dissociated from its own characteristics. This should never be lost from sight; this is what makes for the usefulness of Comparative Study in a world where international relations and activities are taking an increasingly important place.

As far as the African Court on Human and Peoples 'Rights is concerned, there is a way of concluding that the Common Law System and the Civil Law System are more recognized in the Composition of the Members of the Court, to comply with the Article 14 alinea 2 of the Protocol and article 13 of the Court's Rules of Procedure. The Conflict Resolution Practice of the Court is not applying the two Legal Systems. Rather, it is drawing inspiration from them if need be and case by case.

On another note, it has been admitted by Professionals of Law that even though the Civil Law System and the Common Law System started from opposite extremes, it is sometimes said that as a result of the movements each has made in the direction of the other, there is no longer much difference between them. The same social needs, and similar economic and technical conditions, have led to the adoption of similar solutions for their legal problems. If it is true that the results are so close to each other, the methods used to reach them are nevertheless extremely divergent, and the matter is not that simple. Conversely, neither would it be correct to say that there has been no rapprochement between these two great Systems.

The place and function of legislation and judicial decision in the Civil Law, on the one side, and in the Common Law, on the other, are not so strict as to be mutually exclusive. Each System possesses strong characteristics of a distinct and comprehensive nature that establish its own individually. This does not prevent a Country having one of these Legal Systems from borrowing or incorporating some of the traditional features of the other. However, when this happens, the extent of incorporation is relatively so slight that it does not have the effect of altering the fundamental nature of the System, which remains in the final analysis what it has always been.

It is apparent that the purpose of the study was not to conduct a relative evaluation of these two great Legal Systems. In its own ethnic and historical framework, each System has served well the Society in which it functions in general and the African Court in particularly while rendering justice; each has its ability to satisfy the social and economic needs of a Society in constant change. Each has also maintained a balance between the elements of flexibility and adaptation, on the one hand, while assuring the essential attributes of stability and security, on the other.

5. RECOMMENDATIONS

The subject explored here is a very complex one, and this is to recognize that all its aspects could not be exhausted through this publication and anyone who could complete the Study or goes in the same way for a good cause of building an international and modern judicial world is most welcome. However, the Topic could not be closed without making some recommendations in the sense of promoting and improving the Conflict Resolution System on an international level in general and at the African Court on Human and Peoples' Rights particularly.

The ultimate wish is to see more International Courts created; because, the more International Courts will be created, the more those Courts will borrow procedural laws from one another, and the faster a Common truly International Law will emerge. In addition, the more International Courts that are created and the more precedents that they generate, the easier it will be to create new Rules. This will have a double beneficial effect:

i. First, it will reduce the significance of the tension between Common Law and Civil Law.

ii. Second, it will make it easier for a corps of International Judicial Professionals to emerge, people who are able to rotate with ease between Courts. That will go a long way toward transforming the current array of International Courts through informal communication with each other, into a full-fledged, International Judicial System.

No International Tribunal can effectively function properly without the Department of Languages. The African Court obviously has such a Department. The wish of almost my interlocutor judges is that they would like to see the team of Court Translators and Interpreters strengthened in terms of staffing (number) and expertise and that the best would be for them to have Legal background and continuous training in the judicial area.

Judges and Legal Officers of the Court are coming from different Legal Systems. Hence, those coming from Common Law System recognize that they have few notions of Civil Law System and vice versa. Each Respondent simply focused himself on the questionnaire related to his System of origin. It is therefore recommendable to organize regular on-job-trainings for all the Legal Staff of the Court as well as Judges on the aspects of "Comparative Law"; hence, the notions of Common Law and Civil Law will be acquired equally.

To find a solution to the persistent problem of poor compliance with decisions of the Court or the enforcement of the Court's decisions, it is recommendable to institute a special mechanism at Court Level, in recruiting a Court Bailiff who should be the direct Interlocutor of the Executive Council of the African Union. This could be possible in case there is an amendment of the existing Legal Instruments. In the same logic of amendment of the current Legal Instruments, it is recommendable to make a continuous monitoring and Evaluation of the Court Strategic Plan 2016-2020, especially the SWOT Analysis of the Court, by capitalizing on its Opportunities and minimizing its Weaknesses, Threats and Challenges already identified.

The extension of the Court to make an African Court of Justice and Human Rights should be effective by putting in place the three Chambers:-Human Rights Chamber,-General Affairs and International Law Chamber,-Criminal Law Chamber; and hence the two main Legal Systems could be also effectively applied. On another note, the President of the Court is the only judge serving on a full time basis and residing at the seat of the Court in ARUSHA-TANZANIA. It would be better if all the members of the Court (Judges) were appointed on a full time basis, and if the quorum of 7 judges stipulated under article 23 of the Protocol and which applies to all sittings of the Court could be reduced to 5 Judges, in order to increase the yield of the Court in terms of judgments rendered.

The last and very important recommendation is related to a prevailing issue which requires to be redressed in order to strengthen the implication of the establishment of the African Court on Human and Peoples 'Rights on Domestic Legal Systems in Africa. The issue that requires to be addressed should be therefore to give domestic effect to the existing legal instruments which are used by the Court: The Protocol and the Charter. There is a need for African States not only to ratify the Protocol, but also to make declarations under article 34 (6) thereof, accepting the right of individuals to seize the Court directly. The prevailing low ratification of the states as well as the low number of Declarations deposited are the reasons of the few referrals to the Court by Individuals.

REFERENCES

[1] *African Charter on Human and Peoples Rights*, OAU DOC CAB/LEG/67/3, rev 5, 27 June 1981.

[2] *African Charter on the Rights and Welfare of the Child*, adopted in July 1990. Entered into force on 29 November 1999. OAU DOC CAB/LEG 153/REV 2.

[3] Andreas F. Lowenfeld (1993). *International Litigation and Arbitration"* (3rd Ed.).

[4] Segall A. *Punishing Violations of International Humanitarian Law at the National Level. A guide for Common Law States*.

[5] Antoine J. Buller (2007). *La Common Law.*

[6] Brutau (1954). *Realism in Comparative Law.*

[7] *Charter of the Organization of African Unity* (1963).

[8] *Charter of the United Nations* (1945).

[9] Dainow, J. (2013). *The Civil Law and the Common Law: some points of Comparison*: *American Society of Comparative Law, Vol 15, No 3(1966-1967)*

[10] Daniel T., Cesare P.R. Romano, and Leigh S. (2007). *The International Judge, an introduction to the men and women who decide the world's cases.* International Courts and Tribunals series.

[11] Dr. Webb P. (2015); *International Judicial Integration and Fragmentation*

[12] Frank, J. (1956). *Civil law influences on the Common Law- Some reflections on "Comparative" and "Contrastive Law".*

[13] Frans V.(2007). *International Human Rights in Africa.*

[14] Fransisco F. Martin, Stephen J. Schnably, Richard J. Wilson, Jonhathan S. Simon, Mark V. Tushnet, (2006*) International Human Rights and Humanitarian law, Treaties, cases and Analysis.*

[15] Howard, D. (2013). *Human Rights Law.*

[16] Ian R.C. Kawaley, Andrew J. Bolton, Robin J. Mayor, (2009). *Cross Border Judicial Cooperation in Offshore Litigation.*

[17] Jack, D. (2013). *International Human Rights*.

[18] John, R. (1999). *The Law of Peoples.*

[19] Kaluma, P. (2009). *Judicial Review Law Procedure and Practice*.

[20] Kofi O. Kufuor (2010). *The African Human Rights System; Origin and Evolution*.

[21] Lepaulle (1922). *The Function of Comparative Law.*

[22] Mark G. and Woiter V. Whole (2014). *Litigating Transnational Human Rights Obligations. Alternative judgement.*

[23] Menski W. (2005). *The legal Systems of Asia and Africa (2nd Ed.).*

[24] Montesquieu (1748). *Spirit of Law.*

[25] Nappramart, P. (1988). *A comparative legal study between the Common Law and the Civil law legal tradition of Thailand.*

[26] Nollkaemper, A. (2011), *National Courts and International Rule of Law.*

[27] Obiora, C.O. (2007). *The African Human Rights System; Activist Forces and International Institutions*.

[28] Peter, De C. (2006). *Comparative law in a changing world.*

[29] Pierre, L. and Georges, S. (2008). *Introduction au Common Law.*

[30] *Protocol to the African Charter on Human and Peoples' Rights on the Rights of women in Africa, adopted by the second Ordinary Session of the Assembly of the Union in Maputo*, (July 11, 2003).

[31] *Protocol to the Constitutive Act of the African Union on the Establishment of an African Court on Human Rights (*OAU DOC OAU/LEG/EXP AFCHPR/PROT (III).

[32] *The American Convention on Human Rights*.

[33] *The Charter of the United Nations and Statute of the International Court of Justice (2001)*.

[34] The Rules of the African Court on Human and Peoples' (2008).

[35] Valere, E.Y. (1996). *La Charte africaine des Droits de l'Homme et des Peuples*".

[36] William A. Schabas-Shannonbrooke Murphy (2017). *Research Handbook on International Courts and Tribunals.*

[37] Morris L. Cohen (1989). *The Common Law in the American Legal System: The challenge of Conceptual Research.*

[38] Michael, G. (2008). *Common law and Civil law Countries compared: An Empirical Critique.*

[39] Andrew P. Morris (1995). *Developing a framework for empirical research on the Common law: General principles and case studies of the Decline of Employment at Will*;

[40] Oren Bar-Gill, Omri Ben-Shahar & Florencia, Marotta-Wurgler (2017). *Searching for the Common law: the quantitative approach of the Restatement of consumer contracts*.

[41] BarGill O. (2017). *The quantitative approach of the Restatement of Consumer Contracts*.

[42] Ryan W., Brian U., Statyan M. (2017), *Common Law Evolution and judicial impact in the age of information.*

[43] Keith N. Hylton (2006). *Information, Litigation and Common Law Evolution,* As for Civil Law System, the following quotes are worthnoting:

[44] Carrie M. Meadow & Bryant, G. (2010). *Process, People, Power and Policy: Empirical Studies of Civil Procedure and Courts*.

[45] Penny G. (2012). *Building evidence–base for the Civil Justice System; Civil Justice System Framework and Literature Review Report*.

[46] Menkel C. Meadow (2010). *Empirical studies of Civil Procedure and Courts*.

[47] Heise, M. (2000). *Justice Delayed; An Empirical Analysis of Civil cases Disposition Time;*

[48] Michael G. (2008). *Common law and Civil law Countries compared: An Empirical Critique*.

[49] Andrew P. Morris (1995). *Developing a framework for empirical research on the Common law: General principles and case studies of the Decline of Employment at Will*.