A Gap Is a Gap Everywhere? An African Contribution to the Taxonomy of Legal Gaps

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I. THE CURRENT TAXONOMY OF LEGAL GAPS

A legal gap is normally not defined in the leading legal dictionaries. Some references to gaps in international law or in contractual law can be found, but nothing is said with reference to gaps in the legal systems.

It has been noted that the concept of a legal gap has different meanings. Lawyers often speak of a gap in a case which is covered by a general rule but where, they believe, the author of the rule has forgotten to make an exception. These kinds of gaps are called axiological gaps. There is a second meaning according to which a legal gap exists in a case which is not covered by any legal rule at all. This is called a normative gap, and there is in such a case an absence of law.[1]

This Article intends to approach the concept of legal gaps from a non-Western perspective, exploring what could be an African approach to the filling of lacunae in the law, and to see how this can contribute to a taxonomical approach to the concept of legal gaps. The aim is to explore the possibility of a pluralist approach to the taxonomy of legal gaps. The Article is therefore conceived as adding a different point of view to the discourse on normative gaps; it will not discuss axiological gaps, which are usually dealt with under legal interpretation or judicial decision-making.

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1. C.E. ALCHOURRON & E. BULYGIN, NORMATIVE SYSTEMS (Wien, Springer 1971); A. SOETEMAN, *On Legal Gaps*, *in* E.G. VALDES, W. KRAWIETZ, G.H. VON WRIGHT & R. ZIMMERLING, NORMATIVE SYSTEMS IN LEGAL AND MORAL THEORY 323-32, at 324 (Berlin, Duncker & Humblot, 1997).

The concept of normative gaps coincides with the general idea of a legal gap occurring where no regulation exists for a concrete case, i.e., when such a concrete (or even a hypothetical) case is not explicitly covered by a legal norm. The expression 'legal gap' is normally considered a synonym for lacuna in law. It is normally understood that there is a lacuna in a legal system only when a case is not explicitly regulated by a norm. In particular, there is a lacuna of law when 'in a given legal system there is a missing rule which the judge may invoke in case he has to solve a dispute brought to his judgment.'[2]

The definition of the lacuna as the absence of an explicit norm allows the existence of a lacuna to be empirically verified. It is easier to identify the existence of a lacuna when no written expression exists or when no explicit normative act which should regulate that social behaviour is found.

The problem of lacuna has constantly drawn the attention of jurists, because the law claims to be complete and should offer a solution for any possible case the judge has to decide. The claims to completeness, however, have been challenged by most theorists and the existence of lacunae in positive law is no longer doubted. Any insistence on denying the existence of lacunae in law is reminiscent of the strictly positivist doctrine of the lawmaker's omnipotence. It is therefore clear that in the expression 'lacuna of law', the term 'law' means 'legal system'.

Even if the possibility of incomplete written law was acknowledged from the very beginning, the issue of lacunae in law is very sensitive in the countries belonging to the Romano-Germanic legal tradition because they are characterized by a positivist approach to law. In his *Discours préliminaire*, Portalis indicated that completeness in the field was one of the three fundamental principles on which a code should be built, though he immediately acknowledged that a code can never really be complete.[3] When enacted, the Code Napoléon was nearly complete in the field it was intended to cover, but it goes without saying that the 1804 *Code* would not, at least not in its original form, still be capable of governing private relations in contemporary society. The legislature had to amend and expand it by separate statutes, but despite these modernization

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2. N. BOBBIO, CONTRIBUTI AD UN DIZIONARIO GIUNDICO 89 (Giappichelli, Turin, 1994) ("quando manca in un dato ordinamento giundico una regola cui il giudice possa nchiamarsi per risolvere una determinata controversia" (translation by the author)).

3. "*Un code, quelque complet qu'il puisse paraître, n'est pas plutôt achevé, que mille questions inattendues viennent s'offrir au magistrat. Car les lois, une fois rédigées, demeurent telles qu'elles ont été écrites. Les hommes, au contraire, ne se reposent jamais; ils agissent toujours*". P.A. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 463, 469 (Paris, tome 1, 1836).

efforts, the *Code* became more and more incomplete and not capable of covering all different needs of the modern social life.[4] One of the most remarkable passages of the *Discours préliminaire* describes what role the courts will play in a codified system of law. Among the roles judicial decisions played, as conceived by Portalis, were 'to clarify what is obscure in the law and to fill its gaps'[5] and 'to adjust law to the evolution of the society and, to the extent possible based on the existing texts, to provide against the inadequacy of the law in the face of contemporary problems'.[6]

The problem of lacunae is considerably less perceived in common law jurisdictions, considering the creative role attributed to jurisprudence. Emblematic in this respect is Lord Denning's view that judges should not refrain from correcting what they see as defects in the law. They should not wait for Parliament to act, since the judiciary should 'fill up the gaps and make sense of the enactment'.[7]

The problem of lacunae becomes relevant when a source of law, the statute (or better the official state law), purports to be superior to all other sources. Anyone who is familiar with African law can immediately understand the consequences of such an assumption if considered in the African context.

Indeed, it must be remembered that any social group has a patrimony of legal norms gathered over time. These norms may come from traditions, from the orientation of the dominant class and from jurisprudence and/or doctrine. The breadth of this patrimony varies depending on the complexity of the society under consideration. Depending on the strength that these sources may have in a given social reality, the possible alternative sources to which the adjudicating authority can resort to fill a legal gap may be more or less numerous.

II. LEGAL GAPS AND AFRICAN LAW

This Article began with the Western concept of a legal gap, i.e., a lacuna in the written law that the judiciary is called upon to fill using different ways and methods largely depending on the powers granted by the law (and sometimes going beyond them whenever more 'creativity' is

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4. A. Tunc, *Methodology of the Civil Law in France*, 50 TUL. L. REV. 459 (1975-76).

5. "*C'est à l'expérience à combler successivement les vides que nous laissons. Les codes des peuples se font avec les temps; mais, à proprement parler, on ne le fait pas*". FENET, *supra* note 3, at 476.

6. For a list of examples where the French jurisprudence played a creative role in filling legal gaps created by the development of the social life, see Tunc, *supra* note 4.

7. Lord Denning in *Magor & St Mellons R.D.C. v. Newport Corp.* [1950] 2 All ER 1226, 1236.

needed to fill the gap). This concept, however, seems inadequate if used in an environment such as that presented by African legal cultures and systems which are characterized by a strong official and unofficial legal pluralism. Here the same concept of gap becomes more uncertain due to the presence of concurrent legal orders from which solutions could be borrowed to fill a gap. Sometimes the gap arises from the way official law approaches a specific issue, and borrowing a solution from the informal law could help bring the official law closer to the needs of the population. Comparatively speaking, solutions can be—and have been—borrowed (consciously or unconsciously) from other African traditions or experiences.

It is therefore necessary to move from a different starting point to consider legal gaps from an African perspective.

As has been noted above, it is normally understood that there are legal gaps whenever in a given legal system rules are lacking that a judge can use to solve the case before him. It has been observed that there is a lacuna also when the norm which exists in the system of law is not appropriate, satisfactory or correct;[8] because in such a situation the legal system does not offer any normative solution for a concrete case. The first type of gap is the so-called 'true gap', coming from a simple assessment of the situation, while the second is the so called 'false gap', since it derives from a decision, a voluntary act of the person who decides to refuse the application of the rule.[9]

In Africa, law was originally (and to some extent still is) verbal; there was no written law before the arrival of the European colonizers.[10] When written laws were promulgated, they left part of the population under the regime of traditional law. Two legal orders were applicable at the same time, and the concurrence of those orders determined the first legal gaps. The official law was deficient in many of the rules necessary to be applied in the African environment, but it also had no appropriate rules for the local people. Traditional law was not prepared to address the new social needs born in Africa after the transplant of the Western model there.

The situation remained substantially unchanged despite the development of African countries after colonization. The only remark-

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8. P. Foriers, *Les lacunes du droit*, *in* LE PROBLÈME DES LACUNES EN DROIT. ÉTUDES DE LOGIQUE JURIDIQUE 9 (C. Perelman ed., Bruxelles, Bruylant, 1968).

9. *Id.*

10. There were a few exceptions. The most famous case is that of the *Fetha Negast* in Ethiopia.

able variation lies in the official law, where colonial law has been replaced by the official law of the different African countries.

It is then possible to consider these two possible variants of legal gaps.

Legal gaps are found in the official law, which is inevitably unable to deal with all possible issues. Here the problem is to understand from which system the principle necessary to fill the gap has to be picked.

Legal gaps are also present in traditional law. Here the approach should be considered from a different perspective. There is definitely a legal gap whenever a given traditional system has not previously faced an issue that comes up for resolution in the community. But there is—at least theoretically—a legal gap also whenever the traditional law is considered not applicable on the ground that it is contrary to those principles universally recognized, such as the principles of public order, morality, human rights and others in the Western world. In this analysis—the validity of which can obviously be questioned—traditional rules are supposedly eliminated from that legal order without being replaced with new rules.

This second kind of gap coincides with the concept of 'false gaps' considered above. Generally speaking, 'false gaps' are the result of a supposed antinomy between an existing written rule and a tacit rule emerging from the idea of justice or social interest. We can redefine this concept in the African context as a 'cultural gap', and since its roots are grounded in the ethnocentric approach of the Western pattern and the jurists applying it with respect to the African legal tradition, it is considered—we could say, by definition—inferior, folkloristic and secondary. 'Cultural gaps' are therefore a product of the colonial law, especially in those colonies where indirect rule was applied.

During the colonial period, legal gaps in the official law were generally filled by borrowing principles from the metropolitan legal system. If the legal gap was caused by an existing gap in the metropolitan system, or by a voluntary refusal to transplant a rule that could have been used there to solve the case, then the general principles of law of the metropolitan legal system were applied anyway.

The ethnocentric approach with which legal issues were considered at that time obviously made it impossible to resort to traditional law to fill gaps in the official law, since its application was limited only to cases where local people were involved. Some different examples are worth mentioning nonetheless.

An *Ordonnance* dated 14 May 1886 was issued in the Belgian Congo at the beginning of the colonial period.[11] The *Ordonnance*, entitled 'Principles To Be Followed in Judicial Decisions', was issued provisionally to determine the rules applicable to civil and commercial cases until special Congolese law was promulgated. The *Ordonnance* contained two articles only. The first established that whenever the matter was not ruled by an existing law, the cases on which Congolese judges were competent should be resolved according to local customary law and the general principles of law and equity. The second article authorised the judge to consult one or more indigenous persons chosen from the most capable local notables whenever the application of customary law was necessary.

Despite its provisional character, this law is still in force in today's Democratic Republic of Congo (DRC).[12] Unfortunately, there are no recorded cases in which the judges used traditional law to fill legal gaps, given that in the application of the *Ordonnance*, judges only resorted to the general principles of Belgian law, even though in a report presented to the Belgian king by the General Administrators of the colony, the reference to customary law as a possible source for filling gaps in the legislation was confirmed, so far as those rules were not contrary to 'the superior principles of order and civilization.'[13] It is clear that by referring the courts back to customary law and general principles of law or equity, the law clearly created a mechanism for filling legal gaps, thereby giving those sources (including then customary law) 'legislative' value.

In Eritrea, the view that colonial law was in principle 'special law' guided the transplant of Italian law into the colony. Even if Italian law was applied in the Eritrean colony, the penetration of that law—the application of which was limited mainly to the Italian settlers—should have necessarily come face to face with the complex and rooted local legal culture, whose framework would not have appeared homogenous to an Italian jurist. Moreover, the local legal framework included a Muslim law component applied in the coastal area, already evolved and divided into Hanafi and Maliki.

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11. The *Ordonnance* was approved by a Decree dated 12 November 1886.

12. A case decided by the Court of Appeal of Elisabethville on 10 November 1964 still applied the *Ordonnance* cited. More recently the DRC Supreme Court referred to the rule to justify the resort to the general principles of Belgian law to fill a legal gap.

13. On the application of the *Ordonnance* by the courts in the Belgian Congo, see V. Devaux, *Les lacunes de la loi dans le droit de l'ancien Congo Beige*, in LE PROBLÈME DES LACUNES EN DROIT. ÉTUDES DE LOGIQUE JURIDIQUE 247-74 (C. Perelman ed., Bruxelles, Bruylant, 1968).

Such a variegated framework obviously rendered impossible the simple application of the Italian laws as in the metropolitan area, especially when we consider the difficulty for an indigenous people to understand the *ratio of* the rule transplanted by the Italian colonizer.

An 'atypical' Italian pattern was then developed. The lack of precise rules (and given that the 'official' application of Italian laws was very controversial) together with the lack of any systematic collection of traditional rules led the colonial judge to engage in a 'creative' effort. He was resolving cases using his personal knowledge of Italian law mediated by extremely important personal experience with customary law which he acquired locally by adjudicating previous cases brought to his attention. The colonial judge was then moved to mitigate the rules set forth in the codes whenever he thought they were not in line with the local situation. In criminal law, sanctions therefore became more like guidelines within which the judge could have acted discretionally by modulating them even below the statutory penalty, according to his personal evaluation of the circumstances.[14]

In general, during the colonial times traditional law was largely used in Africa to fill legal gaps in the official colonial law whenever this had to be applied to local people, as long as the rule borrowed from the traditional system was not considered to be contrary to the general principles of the metropolitan law.

Today, official law in African countries continues to face legal gaps. The usual way to fill them is to make reference to the legal system of the former colonial power (directly or through the filter of the 'general principles of law'). This is the easiest way for a judge to fill legal gaps, especially in the African context where in many cases the only (or almost all) available legal materials (books, cases and commentaries) are imported from Europe.

It might happen, however, that the legal system of the former colonial power has the same gap. Here some cases have been recorded where the method used to fill legal gaps in the African country is to find a solution according to the general principles of the metropolitan law,

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14. In the Eritrean criminal law (the only one published during colonial time, but never entered into force), undetermined sanctions were set forth in order to give the judge the possibility to apply sanctions borrowed from traditional law, since they were thought to be more effective for the local people. For more detail, see L. MARTONE, DIRITTO D'OLTREMARE. LEGGE ED ORDINE PER LE COLONIE DEL REGNO D'ITALIA (Milan, Giuffre, cap. II. 2009), and also S. MANCUSO, TERRA IN AFRICA. DIRITTO FONDIARIO ERITREO (Triest, EUT, 2013).

which is assumed to be the same as those of the African country where it has been transplanted, the latter deriving from the former.[15]

Sometimes the doctrinal formant plays a decisive role, even if in most of the cases this role is hidden. This happens when scholars trained in different jurisdictions bring their legal background into the system of a given country.

The above discussion leads to the following question: do African countries 'cross-fertilize' each other in filling lacunae in law? An empirical observation suggests an articulated answer.

In the African countries classified in the civil law legal tradition, the answer tends to be generally negative, even if there are some interesting examples in the other direction.

The OHADA law (Organization for the Harmonization of Business Law in Africa) is generally considered more updated and comprehensive than the domestic law of the seventeen member countries. But OHADA law too has legal gaps, and in that case, the legal system of the member country where the dispute arose is applied to the extent that it does not contravene the OHADA law.[16] The OHADA Common Court of Justice and Arbitration has clarified that the repealing effect set forth in Article 10 of the OHADA Treaty refers to the abrogation of, and the prohibition to enact, any internal law or regulation (whether it be an article of the text, a paragraph or a sentence) present or future having the same objective as a rule from a Uniform Act and being contrary to it. This leaves the remaining the domestic legislation compatible with OHADA law in force to complement it.[17] Moreover some well-drafted African legal materials have also been used, together with French law, as a source of OHADA law, like the Senegalese *Code des Obligations Civiles et Commerciales*, and the Guinean *Code des Obligations* for the OHADA law with respect to commercial sales. These texts are also a guide for the interpretation of OHADA law.

The legal system of one country can officially fill legal gaps of another country. In Eritrea, the legal system of Ethiopia which is still

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15. For a number of cases referring to the general principles of Belgian law in the former Belgian Congo, see Devaux, *supra* note 13, at 256. As mentioned above, cases continuing to make reference to the general principles of Belgian law can be found in today's DRC.

16. Examples in *Tribunal de Grande Instance du Wouri*, Judgment n. 0002/CIV of 15 Jan. 2013; *Cour d'Appel de Niamey*, Arrêt n.96 of 18 Aug. 2003.

17. Opinion n. 001/2001/EP of 30 Apr. 2001 rendered upon demand of the Ivory Coast and available in FELIX ONANA ETOUNDI & JEAN MICHEL MBOCK BIUMLA, CINQ ANS DE JURISPRUDENCE COMMENTÉE DE LA COUR COMMUNE DE JUSTICE ET D'ARBITRAGE DE L'OHADA (CCJA) (1999-2004) (Abidjan 2006).

applicable in many areas where Eritrea has not enacted its own legislation and thus officially fills legal gaps.

The same situation may occur unofficially—but openly—when the State is unable to act directly to fill legal gaps, or even to provide solutions for legal issues. In the absence of governmental bodies which could have handled the formation and registration of companies in Somalia because of the State's failure, Somalis have used companies incorporated abroad (normally Dubai), importing operating rules and legal concepts of foreign systems, which were then applied in the Somali territory in the absence of enforceable local rules.

In the African countries affiliated with the common-law legal tradition, the borrowing of foreign rules is evident due to the ease of circulation of legal solutions offered at common law. Legal principles are often taken especially from Nigerian and Kenyan cases, and sometimes also from Ghanaian jurisprudence. They also contribute to the building of the new common law-inspired legal system in South Sudan.

South African law carries specific prestige as an African mixed jurisdiction model, and it influences the application of the law in neighbouring countries (like Namibia or—to a slightly lesser extent—Botswana) whose legal systems have been inspired by South African law. African mixed jurisdictions present extremely interesting solutions to the filling of legal gaps: in Mauritius, for example, the Supreme Court uses decisions from the French *Cour de Cassation* to create precedents for the Mauritian system.[18]

Religious law can also be a further source from which principles are taken to fill legal gaps in Africa. In Ethiopia, the *Fetha Negast* has been largely used in the past to fill legal gaps in the legal system. In Somaliland, the Islamic principles related to the capacity to be a witness are used to fill a gap in the criminal procedure code and thus to admit the evidence of certain witnesses (such as minors of age).

Cross-fertilization also occurs between different kinds of unofficial law. In the rural areas, this happens when traditional law needs to borrow solutions coming from unofficial rules developed in the urban areas. People who moved to towns from the countryside from time to time go back home, especially when they have to show to their family and community the success gained by moving to the town and finding a job there. The discussions within the community give the members the opportunity to learn the urban lifestyle. The urban model is seen as an

18. R.P. GUNPUTH, LA COUR SUPRÊME DE L'ILE MAURICE (Port Louis, Star Publ'g, 2009).

icon of success and is therefore embraced by the community. The imitation of the rules by which that model is governed follows automatically.

Traditional law to which we refer today is not the one the Africans knew before the arrival of the European colonizers. It is a law which evolved after the contacts with the colonial and post-colonial European pattern. Often it shares with the old traditional law only the features of being informal, oral, unofficial and capable of quickly adapting to the changeable and supervening social needs.[19]

Here the Western model has contributed—sometimes unofficially—to the filling of gaps in traditional law. The flexibility of customary law is so wide that it gives the customary judges room to borrow a rule inspired by the State law if deemed more suitable to the interests of the community.

III. FILLING LEGAL GAPS IN AFRICA: A NEW WAY FORWARD FOR LEGAL PLURALISM?

This African dimension to legal gaps and the consequent new approach to legal pluralism presupposes that the different normative orders present in a given country should not remain isolated and should interact cooperatively rather than a competitively. Article 4 of the Mozambican Constitution became famous—especially among legal anthropologists—because of the official recognition of the legal pluralism present in the country.[20]

The following case shows us how the traditional ways of dispute settlement can be used to solve disputes that the official judge cannot resolve, and—consequently—to fill legal gaps. It also presents an example of cooperative relationship between the different normative orders.

The Court of First Instance in Gondola, in the central Mozambican province of Manica, sentenced two youngsters to six months' prison for aggravated theft. They were found by the police having sexual relations with a goat. The judge concluded that the two youngsters committed a theft of the goat according to the Mozambican criminal code since sexual intercourse with a goat, or better its rape, is not set forth in Mozambican law, despite its being considered to be against the morals and the

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19. M. GUADAGNI, IL MODELLO PLURALISTA (Turin, Giappichelli, 1996); J. Vanderlinden, *Villes africaines et pluralisme juridique*, 42 J. LEGAL PLURALISM & UNOFFICIAL L. 245 (1998).

20. Article 4 of the Mozambican Constitution sets forth, '[T]he State recognises the different normative and dispute resolution systems that co-exist in Mozambican society, insofar as they are not contrary to the fundamental principles and values of the Constitution'.

traditional culture of the local people. Moreover, the owner of the goat claimed, as compensation for the damages suffered through the rape, the payment of the bride price (*lobolo*) for the consequent 'marriage' of the goat. He affirmed that he rears goats to sell them, and after the rape no one will be willing to buy that goat. Since, as previously mentioned, the sexual intercourse with the goat is not set forth in Mozambican law, the court declared itself not competent to judge on the matter of the compensation, and invited the owner of the goat to resort to the traditional authorities.

Reconsidering the African legal culture and tradition would yield new, interesting results, useful not only for the issue of legal gaps, but also for the development of law in Africa. In the Western legal tradition, legal gaps are filled normally by judges who create the solution by considering what seems equitable, fair and appropriate to the specific situation not covered by the law.

The Court of Equity originated in the effort of the English king to carry out his duty of furnishing security and justice to all in the community, aiming at securing justice in a more efficient way than existing law would do or whenever a remedy at common law was not available, and establishing an equitable procedure through which equitable remedies could be furnished.[21]

> So he that put up his bill in the Chancery, after that he had declared the mischief wherein he is, had relief as in the solemn forum. And for so much as in this case he is without remedies in the common law, therefore he required the chancellor according to equity and reason to provide for him and to take such order as to good conscience shall appertain. And the court of the Chancery is called of the common people the court of conscience, because that the chancellor is not strained by rigour or form of words of law to judge but ex aequo and bono, and according to conscience.[22]

Equity is an instrument to mitigate the formalist rigour of common law, but also an integration or supplement to the ordinary law, an instrument by which the judge can solve a case according to what he thinks is the most equitable solution in the circumstances.

But if the African legal culture is considered, it is not so far-fetched to think that traditional law in Africa represents an African concept of equity: justice, fairness and equitable solutions grounded on the specific situation are the guiding principles inspiring the creation of the rule by which disputes are settled in the African legal culture. Given that such

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21. G. Burton Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87 (1916).
22. T. SMITH, DE REPUBLICA ANGLORUM 71 (Cambridge Univ. Press 1906).

solutions are aimed at the general need to restore peace and harmony within the community, then to some extent this approach is not too far from that of 'equity'. Denominations could even imply different concepts especially if approached with a pluralist and non-ethnocentric vision.

This is to say that traditional law can usefully fill legal gaps in Africa, whatever the background (civil law, common law or mixed system) of a given jurisdiction.

In South Africa the constitutional judge[23] introduced into the system the traditional concept of *ubuntu*—a Zulu and Xhosa word expressing the tie between the individual and the community. The concept is fully expressed as *umuntu ngumuntu ngabantu* in Zulu or *umntu ngumntu ngabanye* in Xhosa, which can be translated, 'A person is a person only through the community'. It is a general principle informing South African law and essentially an African concept of equity.[24]

More generally, the different normative orders present in the African legal systems could be used in filling legal gaps, provided that legal pluralism is considered in a totally different way. First, the hegemonic view by which the State law is considered the prevailing law over the others should be replaced by an approach where all the normative orders present in a given system have equal value and dignity. Then these normative orders should not be considered as competing, but as cooperating: this new direction would facilitate cross-pollination and borrowing of legal solutions from one normative order to another whenever a legal gap is to be filled.

Such a different way of conceiving legal pluralism might prove more advantageous if one realizes it is true that unofficial law too faces lacunae attributable to social changes. Here the innate flexibility of this kind of law enables the 'judges' to apply it to adapt unofficial law to the new needs arising from those changes, and sometimes solutions are borrowed from the official law. It has been observed that there are no legal gaps in traditional law, since the 'judge' who is requested to settle a case and does not find the precedent to apply simply creates a new rule.[25] Actually, this point of view exactly presupposes a legal gap represented by the lack of an appropriate precedent (*rectius*: rule) applicable to the case, which leads the 'judge' to create the new rule.

A pluralist approach to legal gaps definitely offers a wider range of opportunities to fill lacunae in law. Therefore the African experience

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23. S v Makwanyane 1995 3 SA 391 (CC).
24. T.W. Bennett, *Ubuntu: an African Equity*, 14 POTCHEFSTROOM ELEC. L.J. 29 (2011).
25. Foriers, *supra* note 8.

should serve to inform an approach that carefully considers the taxonomical aspect of the concept of gap. The issue is therefore to understand what we mean by the adjective 'legal' (or by the word 'law'). It must be asked whether it makes sense to continue to limit such concept to State or official legal orders only. It is also important to identify which 'judges' could contribute to filling lacunae in the law. Considering that arbitration cases and soft law are often used today by State judges to fill lacunas—for example, in those areas of commercial law where transnational principles and commercial practices are applicable to the contracts—it should not be surprising if a similar approach with regard to unofficial law is adopted by judges in Africa (and beyond) and is considered absolutely normal for filling legal gaps. This could perhaps lead to the creation of a more comprehensive, non-ethnocentric concept of legal gaps.