THE INFORMAL SECTOR UNDER OHADA: IMPLICATIONS FOR LAW AND DEVELOPMENT

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Signed by candidate

William J. O’Malley
30 September 2016
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ABSTRACT

This dissertation evaluates the Organization for the Harmonisation of Business Law in Africa (OHADA) in relation to the informal sector in West Africa. Means to improve links between OHADA formal laws and institutions to the realities of the majority of Africans living and operating in the informal sector are suggested. The paper also considers the challenges to successful legal reform arising from the interaction of African cultural and social values with imposed formal law. These topics are explored within a thematic context of desiring to enhance the development prospects for the people in the region.
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# LIST OF ACRONYMS

<table>
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<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<tr>
<td>AEC</td>
<td>African Economic Community</td>
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<tr>
<td>CCJA</td>
<td>Common Court of Justice and Arbitration</td>
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<tr>
<td>CEMAC</td>
<td>Central African Monetary and Economic Community</td>
</tr>
<tr>
<td>CSR</td>
<td>Corporate Social Responsibility</td>
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<tr>
<td>ECOWAS</td>
<td>Economic Community of West African States</td>
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<tr>
<td>ERUSMA</td>
<td>Regional Training Centre for Legal Officers</td>
</tr>
<tr>
<td>FDI</td>
<td>Foreign Direct Investment</td>
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<td>ICA</td>
<td>International Co-operative Alliance</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>JO</td>
<td>Journal Officiel</td>
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<tr>
<td>OCDC</td>
<td>U.S. Overseas Cooperative Development Council</td>
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<tr>
<td>OHADA</td>
<td>Organisation for the Harmonisation of Business Laws in Africa</td>
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<tr>
<td>RCCM</td>
<td>Registre du Commerce et du Crédit Mobilier</td>
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<tr>
<td>UA-ST</td>
<td>Uniform Act on Secured Transactions</td>
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<td>UA-GCL</td>
<td>Uniform Act on General Commercial Law</td>
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<td>UA-CS</td>
<td>Uniform Act on Cooperative Societies</td>
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<td>UEOMA</td>
<td>West African Economic and Monetary Union</td>
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INTRODUCTION

If development is seen, not as a continuing process and one where the aim is to improve the lot of the individual, but as something commanded and imposed from above, then it will engage the support of those who wield the levers of power centrally, and they will wield these levers with scant regard to the declared aims which they purport to espouse.¹

Most people in Africa earn their livelihoods and obtain the goods and services they need within a social network outside the formal, regulated sectors of society. Therefore, any legal reform effort intended to foster economic development must address the realities of the informal sector. With this in mind, this dissertation evaluates the Organization for the Harmonisation of Business Law in Africa (OHADA) in relation to the informal sector in West Africa.² The fundamental question is what impact does OHADA have, or could have, on the informal sector actors and, consequently, what is OHADA’s impact on the economic development of the region. For the purposes of this paper, the litmus test for effectiveness of OHADA is whether its formal laws are able to assist those living and working in the informal sector in the region. My premise is that there can be no true development in any meaningful sense of the word unless those lives are improved. This paper is also concerned with the challenge to successful legal reform arising from the interaction of African customary laws and social values with imposed formal law of foreign origin. The socially embedded informal institutions, norms, and practices in West Africa have a significant impact on legal reform and on the prospects of development in the region. In a broader sense, this paper seeks to understand what role private economic law has or could have in enhancing development and contributing to poverty alleviation.

Chapter One introduces background concepts and an analytical framework regarding the complex relationship between laws and development generally and in the African context specifically. OHADA is evaluated with reference to that framework. Chapter

² The acronym is from the French: l’Organisation pour l’Harmonisation en Afrique du Droit des Affaires. Evidence from other sub-Saharan African countries is also considered. Unless otherwise specified, Africa refers to sub-Saharan Africa.
Two explores the scope and characteristics of the informal sector in Africa, including the ubiquitous informal networks and institutions extant in West Africa. A detailed description of the tontine is provided as an exemplar of an effective informal and indigenous mutual aid association. Chapter Three presents an overview and critique of pertinent aspects of OHADA as well of some of its foundational assumptions. The primary concern is OHADA’s irrelevance to the large informal sector in the region and, consequently, the diminished prospects for development. A functional approach to laws and law reform is recommended. In Chapter Four, ways to improve links between OHADA formal laws and institutions to the realities of the informal sector are explored. Such links would benefit informal sector actors and might also improve the understanding and acceptance of OHADA laws. Two possible linkages are the addition of mediation as an alternative dispute resolution mechanism and the incorporation of stakeholder-oriented, corporate social responsibility norms into OHADA laws. Recent legislation regarding cooperatives offers the most significant opportunity to improve links between OHADA and the informal sector and to enhance the prospects of development in the region. Finally, the goal of reintegration of African societies is discussed as a way of summary.
CHAPTER ONE – LAWS AND DEVELOPMENT

1.1 What is Development?

We first need a clear notion of what we mean by development: what is its purpose and whom is it for? Development is too often defined only in terms of economic development, as growth or increase in resources or other factors, as measured by GDP or some other index. Growth itself is not economic development, and economic development, although necessary, is not sufficient. Development is a continuing improvement in the interrelated economic, social, and political conditions and institutions in a state which enables or allows for the individual capability of its citizens. This definition reflects the ‘human capability’ concept of Amartya Sen and Martha Nussbaum, for whom the concept of development is most fundamentally about ‘the achievement of a better life’ for human beings. Development is the enhancement of certain human ‘functionings’ and the expansion of human capabilities to so function. Economic growth, however measured, is but a means for other things concerning human ‘well-being.’ Economic development is ultimately about the effective freedoms and capabilities that people have in the economic sphere, in particular to have basic economic needs fulfilled. Economic development must also be sustainable. Sustainable economic growth requires that a country have inclusive political and economic institutions. Fundamental to the creation or development of inclusive institutions is the existence of a pluralistic society wherein competing interests and values have a voice. Ultimately

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3 Allott op cit (n1) 2, 4.
5 Ibid at 587. Under this view, all countries are therefore developing ones.
6 Ibid.
9 Ibid.
development is what people in a given society want and the meaning they give to it. Since this paper addresses the relationship between commercial laws and economic activities, it is most directly concerned with economic development, but with a view towards development in its deeper sense as outlined above.

1.2 Rule of Law and Legal Pluralism

1.2.1 Rule of Law

‘The “rule of law” is an ideal that does not mean any single thing.’\(^{10}\) While there is agreement on the necessity of the rule of law, there is no agreement on its essential characteristics.\(^{11}\) In a minimalist conception, the rule of law means that all citizens and government officials and agents are bound, and generally abide, by enforceable rules.\(^{12}\) The rule of law also requires at least some basic level of personal and civic safety and security. More expansive concepts of the rule of law expect governing institutions, including the formal legal system, to bring about various desired objectives, such as stability, predictability, transparency, accountability, and even democracy. Most rule of law projects focus on institutional reform of the judicial system as a means to bring about those objectives. Many rule of law projects promote market liberalism, with emphasis placed on the enforcement of private property rights and contracts, operating under the presumption that the rule law is an instrument of economic development. (OHADA is an example of such a rule of law project, as will be shown in Chapter 3.)

Rule of law projects are implicitly informed by the unstated assumption that law will (and must) be consolidated within the state.\(^{13}\) The current rule of law theory is largely fixated on formal institutions, and the projects are often disconnected to the actual


\(^{11}\) H. Patrick Glenn ‘Sustainable Diversity in Law’ (2011) 3 HJRL 39 at 44.

\(^{12}\) Brian Z Tamanaha ‘The Rule of Law and Legal Pluralism in Development’ (2011) 3 HJRL 1 at 2.

\(^{13}\) Ibid at 14.
results of their implementation.\textsuperscript{14} Rule of law reforms also ignore the majority of Africans living in accordance with customary laws under traditional authority.\textsuperscript{15} For Sen, any conception of the rule of law must consider peoples’ substantive freedom to exercise their rights and entitlements, and not only legislation and formal laws.\textsuperscript{16}

Most contemporary legal theory also presumes an underlying problem of conflict and a need for uniformity, with the rule of law as means of conflict resolution.\textsuperscript{17} However, it is not clear that a multiplicity of laws and the contact of legal orders must generate conflict.\textsuperscript{18} In many instances there is ‘not a conflict so much as a search for accommodation.’\textsuperscript{19} Because the rule of law has become a ‘contested concept,’ Glenn suggests replacing it with the ‘rule of laws.’\textsuperscript{20} A rule of laws approach, however, requires ‘active support of the means of the conciliation’ among these laws.\textsuperscript{21} The conciliation among laws in Africa is critically important, since the ‘conciliation of laws may well provide a major means of conciliation of peoples.’\textsuperscript{22}

1.2.2 Legal Pluralism

The term legal pluralism describes the situation in which a population observes more than one body of law and the phenomenon of law beyond the state.\textsuperscript{23} Multiple normative orders exist within every society, including (contemporary) traditional or customary

\textsuperscript{14} Glenn op cit (n11) 45.
\textsuperscript{15} Joseph M Isanga ‘Rethinking the Rule of Law as Antidote to African Development Challenges’ in David K Linnan (ed) \textit{Legitimacy, Legal Development and Change: Law and Modernization Reconsidered} (2012) 60.
\textsuperscript{16} Sen op cit (n7) 39.
\textsuperscript{17} Glenn op cit (n11) 53.
\textsuperscript{18} Ibid. For instance, there was little confusion and no perceived conflict in English legal history until the emergence of the nation state from the seventeenth century. Multiple laws co-existed in non-conflictual relationships, even within the same territory.
\textsuperscript{19} Ibid at 54.
\textsuperscript{20} Ibid at 56.
\textsuperscript{21} Ibid.
\textsuperscript{22} Ibid at 53.
\textsuperscript{23} Ibid at 46.
systems. Legal pluralism is a prominent feature in African states and has increased with continuing globalisation. A pluralist view of law requires one to distinguish between law and laws – between a single global law and a plurality of laws. Legal pluralism itself is neither a solution nor a problem, but is rather the empirical fact or default position of African legal systems. Rule of law reforms often increase legal pluralism. Land titling projects are a prime example of this as people are confronted with two competing legal systems: state law granting individual, freehold ownership and customary laws granting communal rights.

According to Glenn, since non-state law can never be eliminated, diversity of laws is inevitable and should be seen as sustainable. Sustaining the diversity of laws requires abandoning the presumption that law is defined in terms of state law, and it also requires that the law of the state be ‘normatively justified in local circumstance.’ The idea of sustainable diversity in law, however, is incompatible with the most conceptions of the rule of law. Effective law reform needs to recognise and pay attention to all the ‘legal formants,’ which are all the elements that constitute the living law of a people or a state, which may or may not be in harmony (and may diverge) with each other.

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24 Tamanaha ‘Rule of Law’ op cit (n12) 5, 7.
25 Ibid at 9.
27 Glenn op cit (n11) 46-47.
28 Tamanaha ‘Rule of Law (op cit n12) 11
29 Ibid.
30 Glenn op cit (n11) 47-48.
31 Ibid at 50.
32 Ibid at 53.
1.3. Economic Development and Legal Reform

Although a positive correlation between the rule of law and economic development has been demonstrated, serious doubts exist as to which specific factors in a rule of law measure account for this correlation and there are unresolved questions about causality.\textsuperscript{34} The interrelationships between an economic system and the legal system are extremely complex.\textsuperscript{35} The importance of law and legal institutions for economic growth is generally accepted, but broader research is needed on the nature of institutions and legal rules that promote growth.\textsuperscript{36} The optimal legal rules depend upon the underlying economic situation, and the legal and judicial system need to be flexible in order to adopt those rules to an evolving economy.\textsuperscript{37} Many different types of legal systems can satisfy economic needs and selected improvements in economic performance can be made without a comprehensive legal system.\textsuperscript{38} Informal norms and institutions often supplement and even supplant formal law in the facilitation of business transactions.\textsuperscript{39}

1.3.1 Assumptions

We must be cautious about our assumptions about the role of law in development and must remain aware of the background norms and culture that influence the efficacy of formal laws.\textsuperscript{40} ‘There is a great deal of evidence suggesting that an efficient judiciary and clearly defined property rights are often of limited relevance to entrepreneurs in

\textsuperscript{34} Tamanaha ‘Primacy of Society” op cit (n10) 227-229.
\textsuperscript{37} Cross op cit (n36)1771-72 (‘more law is not necessarily better than less law’).
\textsuperscript{38} Tamanaha ‘Primacy of Society’ op cit (n10) 230-231.
\textsuperscript{40} David Kennedy ‘Laws and Developments’ in John Hatchard and Amanda Perry-Kessaris (eds) \textit{Law and Development: Facing Complexity in the 21st Century} (2010) 20. (‘Many ideas about law expect the legal order to perform feats we know it can rarely accomplish.’)
developing countries.\footnote{Kevin E Davis and Michael J Trebilcock ‘The Relationship between Law and Development: Optimists versus Skeptics’ (2008) 56 Am. J. Comp. L. 895 at 936.} Many of the assumptions underlying development programs have remained practically untested in the African context.\footnote{Julie Paquin Legal Reforms and Business Contracts in Developing Countries: Trust, Culture, and Law in Dakar (2012) 4.} There are good reasons, for instance, to doubt that contract enforcement institutions play the central role attributed to them by law and development experts.\footnote{Ibid at 126. (Findings based on qualitative data gathered from extensive interviews with 30 micro-operators in Dakar, focused on their contracting practices and dispute resolution preferences.)} Local, informal institutions can often substitute for formal, third-party contract enforcement.\footnote{Glenn op cit (n11) 56.} Paquin found that the frequency of contractual violations among micro-enterprises in Dakar is caused by the uncertainty in the local business environment, and that the inefficiency of legal institutions did not account for the little use made of formal law mechanisms in the resolution of business disputes.\footnote{Paquin op cit (n42) 6, 126. (Findings based on qualitative data gathered from extensive interviews with thirty micro-operators in Dakar, focusing on their contracting practices and dispute resolution preferences.)} The micro-operators in Senegal, where a high value is attached to negotiation and compromise, tend to interpret contractual obligations as ‘good faith best efforts.’\footnote{Ibid at 124.}

While property rights might be important for economic growth, the substantive nature of those rights is critical.\footnote{Cross op cit (n36) 1771. (‘One cannot even generally say that more or stronger property rights are better than fewer or weaker property rights.’)} There are different bundles of legal entitlements associated with property rights in different societies.\footnote{Ibid at 1743.} Moreover, titling ownership in real property has not always been economically beneficial.\footnote{Ibid at 1772.} The meaning and consequence of real (immovable) property ownership prevalent in African society are very different from countries where freehold or fee simple ownership is the norm. In many African communities, members possess differing rights to use land in various
capacities. Because these customary rights are not recognised by ‘standard’ legal titles, the process of titling can extinguish them.\textsuperscript{50} Furthermore, if used as collateral, land will be lost and re-distributed when loans are not duly paid.\textsuperscript{51} Since community life is anchored to, and revolves around, the land, dispossession upends the social life of the community; members can lose their homes, livelihoods, and possibly even food source.\textsuperscript{52} Standard land titling can also enable traditional leaders to sell or encumber land, and to thereby possibly dispossess community members or alter access to and the distribution of land in ways that were not possible under customary systems.\textsuperscript{53} In addition, when reduced to a single titled owner, ownership rights often favour men to the detriment of women.\textsuperscript{54}

\subsection*{1.3.2 Choices}

An idea of what is intended by development must be specific to the prevailing market conditions and institutional and cultural settings.\textsuperscript{55} Development policy needs to be grounded in an understanding about how particular political and economic ‘distributive choices’ will put resources into the hands of those whose return on their use will cause development to occur.\textsuperscript{56} Without knowing what could be achieved with alternative institutional arrangements, it is impossible to choose sensibly among them.\textsuperscript{57} While a legal regime can offer an arena to view and contest distributive choices, it cannot substitute for them.\textsuperscript{58} As a development strategy, the rule of law offers the ‘false

\begin{footnotesize}
\begin{enumerate}
\item Tamanaha ‘Primacy of Society’ op cit (n10) 239-40.
\item Ibid.
\item Ibid.
\item Tamanaha ‘Rule of Law’ op cit (n12) 11
\item Ibid.
\item Kennedy ‘Laws and Developments’ op cit (n40) 18, 21.
\item Ibid.
\item Coase op cit (n35) 30.
\end{enumerate}
\end{footnotesize}
promise’ that it can substitute for all these difficult, normative political and economic choices.\textsuperscript{59}

1.3.3 Demand for Law

A more complete understanding of the relationship between law and economic activity must also account for the demand for law, and not only its supply.\textsuperscript{60} ‘The significance and effectiveness of legal reforms depends almost entirely on whether local constituencies demand it.’\textsuperscript{61} The demand for law and the ability to voice that demand is significantly affected by the organization and functions of the legal system, a point we will return to (infra 4.3).\textsuperscript{62} A legal system must serve the needs of its people if it is to gain the requisite respect and support. The specific result also depends on which constituencies are demanding the law or in control of the reform process. Most often it is the political or legal elites rather than the broader population who are in charge and calling for law reform and most rule of law initiatives are dominated by the agendas of the promoters on the delivery or supply side.\textsuperscript{63}

1.4 Law and Development

The phrase ‘law and development’ is used when the objective in rule of law reform is explicitly about improving economic development in less developed countries and where ‘the development of law is promoted as a means to achieve the economic development end.’\textsuperscript{64} Law and development projects are always presented as being for the benefit of recipient countries and their people, but they are rarely by or of those countries or

\textsuperscript{59}Kennedy ‘Political Choices’ op cit (n58) 168; Kennedy ‘Laws and Developments’ op cit (n40) 19.

\textsuperscript{60}Milhaupt, Curtis J ‘Beyond Legal Origin: Rethinking Law’s Relationship to the Economy – Implications for Policy’ (2009) 57 Am. J. Comp. L. 831 at 839.

\textsuperscript{61}Ibid at 843.

\textsuperscript{62}Ibid at 839.

\textsuperscript{63}Tamanaha ‘Primacy of Society’ op cit (n10) 220, 244.

\textsuperscript{64}Ibid at 225
people. Efforts at law and development have failed to promote economic development and, moreover, there is no consensus on how to bring about development. The failure of the developmental legal theories in Africa runs parallel to the increasing underdevelopment of the countries involved. The failures appear to be conceptual, and not from the lack of talent or money.

There is an unsettling lack of consensus about the role of law in development and unresolved uncertainty about the validity of basic assumptions underlying efforts to promote legal reform. Under these circumstances there is a distinct possibility that not only will legal reform not have any positive impact on development but that the resources invested in legal reform might have been deployed in some other fashion that would have a greater impact on development. Therefore, the label ‘law and development’ is misleading and will be disappointing if it suggests that law in and of itself has a special ability to deliver desired development goals.

Notwithstanding the failures of law and development, legal development continues. Legal development, however, is not about developing the rule of law as such, but rather it is about getting legal institutions to adequately address basic legal needs. Legal development must be seen as a constitutive part of the development process, and not merely as a means to some other the end. Law and development doctrine has evolved since the mid-1990s, and now acknowledges (at least rhetorically) the importance of existing local institutions and conditions and also recognises the social, structural, and human dimensions of development.

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65 Tamanaha ‘Primacy of Society’ op cit (n10) 243.
66 Ibid at 229, 231-232; Kennedy ‘Laws and Development’ op cit (n40) 19.
67 Vanderlinden op cit (n26) 1052.
68 Glenn op cit (n11) 40.
69 Davis & Trebilcock op cit (n41) 937.
70 Tamanaha ‘Primacy of Society’ op cit (n10) 247.
71 Ibid at 244.
72 Sen op cit (n9) 40.
little or no attention to customary laws and other informal legal institutions.\textsuperscript{74} This new paradigm offers a more ‘holistic’ view of development where the ‘constitutive dimensions (economic, social, political, and legal) are viewed interdependently.’\textsuperscript{75} There is also an emphasis on consensus building and increasing participation of all stakeholders that was missing in previous doctrinal ‘moments.’\textsuperscript{76} Nevertheless, the justification for formal law remains centred on its presumed role in attracting investment and promoting growth.\textsuperscript{77} As will be seen in Chapter 3, it appears that OHADA reforms were conceptualised under the sway of older, now discredited, law and development ideology.

1.4.1 Foreign Direct Investment

One pillar of law and development doctrine is the belief that improvements in the legal institutions in a host country will lead to an increase in the inflow of foreign direct investment (FDI) into that country. This belief is based upon the theory that investors are attracted to States with effective legal systems – those which implement laws efficiently and predictably.\textsuperscript{78} Underlying this theory is the assumption that economic actors structure their activities in order to reduce transaction costs, which are said to arise through the inefficient or unpredictable enforcement of laws.\textsuperscript{79} Although this theory predicts that foreign investors should be attracted to states with effective legal systems there is little empirical evidence to suggest that they are so attracted.\textsuperscript{80} The ability of a state to improve FDI inflows is likely constrained by the characteristics of investors, who

\textsuperscript{74} Davis & Trebilcock op cit (n41) 916.
\textsuperscript{75} Trubek & Santos op cit (n73) 12.
\textsuperscript{76} Ibid.
\textsuperscript{77} Rittich op cit (n39) 203, 224.
\textsuperscript{78} Amanda Perry ‘Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence’ (2000) 49 Int’l & Comp. L.Q. 779 at 782. (‘Legal reform in the absence of more information may be as likely to produce net costs, as it is to produce net benefits.’ Id 799.)
\textsuperscript{79} Ibid at 782-783. Predictability is best ensured where laws are stable, accessible and clear. Transaction costs are all those costs associated with undertaking any transaction – search, information, bargaining, and enforcement costs. Legal systems sometimes impose additional costs.
\textsuperscript{80} Ibid at 783-784.
may be ‘insensitive’ to the effectiveness of legal systems.\textsuperscript{81} It appears that the nationality of an investor, the size of the investment, and whether an investor is export-oriented could be other factors which determine the sensitivity of foreign investors to endogenous legal reform.\textsuperscript{82} In addition, many economic actors depend upon mechanisms outside the formal legal system to structure and implement their economic activities, which might not be justifiable on a transaction cost analysis.\textsuperscript{83}

1.5 Aspects of Law Reform

1.5.1 Interconnectedness of Law

Law (its qualities, character, and consequences) is connected to and influenced by every aspect of the surrounding society, and thus the legal system in every society is unique.\textsuperscript{84} Accordingly, the following maxims should be kept in mind when promoting legal reform: (1) there can be no standard formula for the law; (2) a good law in one location may have negative effects or be dysfunctional elsewhere; and (3) it is hazardous to extrapolate experiences from one situation to the next.\textsuperscript{85} Improving the law depends upon a multitude of supportive social, cultural, political, and economic conditions.\textsuperscript{86} The interconnectedness of law also means we must be cautious about destroying existing institutions, social networks, and economic patterns.\textsuperscript{87}

1.5.2 Standardisation of Law

The standardisation (or unification) of law is expected to accelerate the ‘process of legal convergence’ – the supposed benefits of which are the reduction of transaction costs for

\textsuperscript{81} Perry op cit (n78) 798.
\textsuperscript{82} Ibid at 792-796.
\textsuperscript{83} Ibid at 788-790.
\textsuperscript{84} Tamanaha ‘Primacy of Society’ op cit (n10) 214, 219.
\textsuperscript{85} Ibid at 219, 222, 232.
\textsuperscript{86} Ibid at 231.
\textsuperscript{87} Kennedy ‘Political Choices’ op cit (n58) 154.
transnational investors and the improved quality of domestic legal institutions. The underlying premise is that well-designed legal standards once adopted by domestic governments will change the behaviour of individuals and entities and thereby influence the path of future economic development. According to Pistor, the quest for standardisation ignores a central feature of successful economic development, which is the ‘constant change, innovation, and adaptation of institutions and organizations in a competitive environment.’ Standardisation may, in fact, undermine the development of effective legal systems due to the interdependence of legal rules and concepts and the fact that law is a ‘cognitive institution.’ The interdependence of legal rules means that most rules are not freestanding and can only be understood and applied with reference to other legal rules which either must already exist or must be created. ‘Without ensuring complementarities between the new law and pre-existing legal institutions, harmonisation (sic) may distort rather than improve the domestic legal framework.’ The notion that law is a cognitive institution means that for law to be effective, it must be fully understood and embraced by all those who are subject to, use, or enforce the law (its constituents). The external supply of standardised or uniform law ‘sterilises the process of law-making from political and socioeconomic development’ and ‘thereby distances it from the process of continuous adaption and innovation.’ Standardisation reduces the

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88 Katharina Pistor ‘The Standardization of Law and Its Effect on Developing Economies’ (2002) 50 Am. J. Comp. L. 97. (Standardisation considered by the author involves non-binding international laws and rules of corporate governance and finance. The term ‘standards’ refers to the specificity of legal rules.) Although not identical concepts or activities, legal standardisation and legal unification are similar enough in method and affect to treat them as equivalent for expositional purposes.

89 Ibid at 112. The adoption of a law, moreover, is not a guarantee that it will affect behaviour, or that it will affect behaviour in the intended fashion.

90 Ibid at 98.

91 Ibid.

92 Ibid.

93 Ibid.

94 Ibid.

95 Ibid.
choices for domestic lawmakers in developing their own legal solutions, which might be a better fit for the problems they face or for the institutional capacities they have.  

1.5.3 Legal Transplantation

Wholesale, ethnocentric legal transplantations fail because: (1) they are not accessible to the majority of people; (2) they are not adapted to prevailing legal and economic circumstances and cultures; (3) they are grafted onto legal systems that suffer from systemic problems; or (4) they lack sufficient resources and local stakeholders committed to the success of the law. Law reform poses a particular challenge for external initiatives because the ‘social embeddedness’ of law can be nearly imperceptible from the outside. The fact that most legal rules can be understood only in the context of a given legal order is a serious constraint for legal transplantation, because the meaning of legal statements is a function of social norms, not of the speaker’s intention. The import of foreign concepts thought of as global concepts can aggravate the existing circumstances that were sought to be remedied.

1.5 Institutional Perspective

An institutional perspective on development has become increasingly prominent. Institutions are any form of ‘constraint’ that humans devise to shape human interaction. For purposes of this paper, institutions are those organisations or entities (formal and informal) in a society that are responsible for making, administering, enforcing, or adjudicating its laws and policies. Their major role is to reduce uncertainty by establishing a stable (but not necessarily efficient) structure to human interaction in

96 Pistor op cit (n88) 106.
97 Tamanaha ‘Primacy of Society’ op cit (n10) 225.
98 Ibid at 231, 243.
100 Vanderlinden op cit (n26) 1052.
everyday life.\textsuperscript{102} For North, institutions, and the incentives they create, are the underlying determinant of the long-run performance of economies.\textsuperscript{103} Although this theory is now the consensus, more knowledge is needed about the specific channels through which institutions affect growth.\textsuperscript{104} There is less consensus about which legal institutions are important and about how to improve legal institutional quality.\textsuperscript{105} Because informal institutions are embodied in customs, tradition, and codes of conduct, they are not susceptible to deliberate efforts at reform or to changes in the formal rules.\textsuperscript{106} The resulting tension between altered formal rules and the persisting informal institutions has important implications for the way law and economies change.\textsuperscript{107} Therefore, legal reform must operate within a complex set of ‘context-dependent particularities (economic, political, social, and cultural)’ which affect the nature and scope of feasible institutional reforms.\textsuperscript{108}

1.6.1 Path Dependence

The centrality of path dependence is a key consideration in determining how to change dysfunctional or ineffective institutions.\textsuperscript{109} Path dependence theory describes how over time the reinforcement of a given set arrangements or way of doing things (a path) raises the cost, and thus difficulty, of changing that path.\textsuperscript{110} This is true even if the current path is inefficient and generates sub-optimal outcomes. As more and more people invest in a given path, these investments (time, money, skills, expectations) add up and the relative

\textsuperscript{102} North op cit (n101) 6, 25.
\textsuperscript{103} Ibid at 107, 135.
\textsuperscript{104} Davis & Trebilcock op cit (n41) 944.
\textsuperscript{105} Ibid.
\textsuperscript{106} North op cit (n101) 45.
\textsuperscript{107} Ibid.
\textsuperscript{109} Ibid at 342.
\textsuperscript{110} Ibid at 350.
costs of exploring alternatives (switching costs) steadily rise. Moreover, switching costs also may reflect deeply embedded cultural practices that are resistant to change. Although path dependence theory is not deterministic, it does mean that institutional change will be only incremental and will occur at the margins. Therefore, ‘ambitious, across-the-board legal reforms carry a significantly greater risk of failure than more modest or incremental reforms.’

1.7 Customary Law Considerations

Customary laws continue to regulate nearly every facet of life of Africans who exist outside the formal structures of the state. State law in Africa generally has only a limited impact on many people’s lives. Customary institutions are deeply entrenched sources of norms of solidarity and community and represent legitimacy to Africans. They might either undermine or supplant formal legal norms and legal institutions. Therefore, it is important to understand and give due consideration to customary or traditional institutions and their influence on legal reform and development. Titling land, for instance, is a complex and monumental task in Africa that cannot be equitably or efficiently accomplished without first understanding and addressing traditional rights.

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111 Prado & Trebilcock op cit (n108) 351. Feedback effects and switching costs generate reinforcement, or increasing returns. The key insight associated with path dependence theory is that economic and other activities may be subject to increasing returns, whereby the benefits of engaging in them increase, rather than decrease over time.

112 Ibid at 370.

113 Ibid at 358, 367

114 Ibid at 377.

115 Isanga op cit (n15) 70.


117 Isanga op cit (n15) 71-72.

118 Davis & Trebilcock op cit (n41) 932.

and obligations related to land tenure. Moreover, ‘reforms that adapt traditional institutions may mitigate problems of cultural dissonance.’

1.6.1 African Customary Law

Customary law is generally defined as a ‘normative order (or a body of interrelated norms, rules or principles) observed by a population, having been formed by regular social behaviour and the development of an accompanying sense of obligation.’ It is important to emphasise the strong normative aspect of what is called ‘custom’ and not merely its observable practices. Customary laws are deeply rooted beliefs in differing normative orders or legal traditions, which are not just rules but entire ways of life. Customary laws are ‘inextricable parts of the local, indigenous cultures that form the basis of members’ identities, but have varying degrees of mandatory force’ and are subject to constant change. They coexist with state laws throughout Africa, and they continue to be generally observed, whether or not they are in accord with state laws. Although there is no single system of African customary law, there is sufficient similarity among systems to treat African customary law as a coherent unit. Allott identifies several ‘postulates of African law’: (1) everyone belongs by nature to a variety of human communities – territorial and familial; (2) membership gives individuals the right to draw on the resources of the community, but with a countervailing obligation to respect the underlying and continuing (paramount) needs of the rest of the community; (3) an

120 Prado & Trebilcock op cit (n108) 371.
121 Woodman op cit (n116) 10.
122 Glenn op cit (n11) 42-43.
123 Ibid at 49.
124 Woodman op cit (n116) 13.
125 Ibid at 20-21.
individual is entitled to the fruits of his own labour; and (4) disputes must be resolved in such a way that the future harmony of the community is restored.127

Everyone living under customary law belongs to a kinship or family group, but there is considerable variation in the size and composition of the group and in the degree of collective action which such a group undertakes.128 While African customary laws don’t contain modern legal conceptions of juristic personality, the notion of ‘joint-ness’ in customary groups is strong and they often function as corporate legal entities.129 Although African laws historically emphasised group and community rights and powers, individuals were always accorded legal capacity to hold interest in property, to negotiate with each other, and to appear as principals in litigation.130 There is no general theory of obligations or modern sense of contracts under African customary law.131 But enforceable agreements, such as contracts of agistment, tenancy, service, and manufacture have always existed.132 Moreover, the settlement of disputes usually rests on a basis of agreement.133 The content of the customary laws of Africa has changed significantly in the past and continues to change today, with the increasing degree of incorporation of African communities into national, regional, and international communities as the cause of most changes.134 Modern economic activities are generally governed by versions of received law, only sometimes adapted to meet local

127 Allott ‘African Law’ op cit (n126) 150. (Of course, not everyone was treated the same in all contexts.)
128 Ibid. Territorial and political units, such as ‘tribes’ and village communities also exercised powers in many societies.
129 Ibid at 139, 151.
130 Ibid at 147.
131 Mancuso op cit (n119) 16.
132 Allott ‘African Law’ op cit (n126) 149-150. These agreements had only so much form as was necessary to publicise their existence, such as the ceremonious giving, receipt, and sharing of the drink.
133 Ibid.
134 Woodman op cit (n116) 16.
circumstances.\textsuperscript{135} (Ignoring customary law in regard to modern economic activities is problematic, as will be discussed infra 3.4.2.)

1.6.2 Conceptual Difficulties

Several aspects of customary law (in addition to its constantly changing nature) make it difficult to analyse and write about. First, it is oral and the very act of recording what one believes customary law to be likely distorts it.\textsuperscript{136} Secondly, there is disagreement about the meaning and appropriate use of different terminology – traditional, customary, native, or indigenous. The phrase ‘originally African law’ has been suggested.\textsuperscript{137} Thirdly, there is a divergence between customary law as it has been sanctioned or enforced by the state (official customary law) and customary law under which the relevant community is actually operating (living customary law). Fourthly, there is sometimes an ideological or political aspect to the conception of customary law. For instance, one view is that customary law is not merely indigenous African law but rather is the result of particular historical circumstances and is relatively recent in origin.\textsuperscript{138} Notwithstanding the difficulties involved with conceptualising customary law, it is critical to do so because of its role in Africa with regard to legal development and the relationship between these laws and economic development. Reference to ‘customary law’ throughout this paper is meant to capture the concept of contemporary, living customary laws that, although evolving, are mostly indigenous to traditional African societies.

\textsuperscript{135} Woodman op cit (n116) 26.

\textsuperscript{136} Vanderlinden op cit (n26) 1065; Mancuso op cit (n119) 4.

\textsuperscript{137} Mancuso op cit (n119) 3 (droits originellement africaine).

\textsuperscript{138} Francis G Snyder ‘Colonialism and Legal Form: The Creation of “Customary Law” in Senegal’ in Colin Sumner (ed) \textit{Crime, Justice and Underdevelopment} (1982) 90-91 (Customary law in Africa was an ideology that usually accompanied and formed part of colonial domination.)
CHAPTER TWO – THE INFORMAL SECTOR

2.1 Definition of the Informal Sector

The informal sector plays a dominant role in African economies and is a central issue for economic development, but relatively little is known about the complex reality of informal sector institutions. The term ‘informal’ in this context originated in the 1970s as a way of conceptualizing the unregulated activities of the poor in Third World cities. The distinction between formality and informality in economic activity is a much criticised ‘constructed duality,’ but it has been useful in analysing the phenomenon and structuring official statistics. The problems with the concept of informality arise in part from the multiplicity of definitions and the plurality of measurement methods. Moreover, the formal and informal ends of the economic continuum are often ‘dynamically linked.’ Informality should be viewed, therefore, as being a matter of degree, lying on a continuum best captured by a range of indicators. The current official definition of ‘informal sector’ adopted by the International Labour Organisation

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139 Nancy Benjamin and Ahmadou Aly Mbaye The Informal Sector in Francophone Africa: Firm Size, Productivity and Institutions (2012) 1, 4. Findings based on a study of the urban, informal sector in three capital cities: Dakar (Senegal), Cotonou (Benin), and Ouagadougou (Burkina Faso), as being representative of West Africa, employing a mix of quantitative and qualitative methods using data obtained in 2007 and 2009 from surveys of 900 firms, interviews with stakeholders, and standard national accounts and other public databases.


142 Sindzingre op cit (n140) 5.


144 Benjamin & Mbaye op cit (n139) 25-26.
(ILO) is based on characterizing an enterprise as informal, and empirical studies have largely followed this approach.145

[The informal sector] consists of units engaged in the production of goods or services with primary objective of generating employment and incomes to the persons concerned [that] typically operate at a low level of organization . . . and on a small scale. Labour relations . . . are based mostly on casual employment, kinship or personal and social relations . . .

There are three related official statistical terms and definitions which are often used imprecisely and interchangeably—for informal economy, informal employment, and the informal sector.146 Informal employment and the informal sector are measured differently and involve somewhat different policy issues and responses.147 The informal sector, which is a subset of the broader informal economy, is the concern of this paper. The term ‘micro-enterprise’ will be used to refer to an entity or firm—with or without employees—conducting commercial activities or transactions and operating almost entirely within the informal sector, and the term ‘micro-operator’ will be used to refer to the individual actor(s) who own or are in control of such micro-enterprises. The informal sector is where the small, usually unregistered, own-account workers that dominate West African economies operate in an environment characterised by the ease of entry, with little capital and equipment, and no access to formal markets or credit, to


147 Ibid. The causes of informality are beyond the scope of this paper and important gender issues are not addressed.
A significant dimension in the concept of informality is the notion of informal as being outside the reach of different levels and mechanisms of official governance. But informal norms and practices are not so much in opposition to formal laws as they are reflective of a different reality and responsive to different needs.

2.2 Scope of the Informal Sector

There is a lack of sufficient data on the size, composition, and contribution of the informal sector, and also problems that limit the international comparability of data. Moreover, many countries exclude agriculture from their measurements of the informal sector, while others measure only the urban informal sector. There is no single statistical aggregate that corresponds to the concept of informality. Nevertheless, what is clear is that the informal sector is the most significant portion of the economies of Africa and is increasing both in terms of overall employment and as a share of the total economy. In West Africa as much as 90 per cent of total employment and up to 60 per cent of gross domestic product is produced by informal activities. The ILO calculated informal sector employment to be 70 percent in Côte d’Ivoire (2008) and 71 percent in Mali (2004), for instance. Informal traders in the African countries for which data is available account for between 85 and 99 per cent of total employment in trade and

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149 Guha-Khasnobi, Kanbur & Ostrom op cit (n141) 5.
150 Chen ‘Rethinking’ op cit (n143) 80.
151 Ibid at 81.
152 Sindzingre op cit (n140) 61.
153 Benjamin & Mbaye op cit (n139) 48.
between 46 and 70 percent of total value added in trade.\textsuperscript{155} About half of those operating in the informal sector are poor, own-account operators.\textsuperscript{156} Some of the largest and fastest growing sectors in West African economies (wholesale and retail trade, transportation, restaurants, and construction) are dominated by informal firms, with retail trade being the largest of informal sector activities.\textsuperscript{157}

2.3 Nature of the Informal Sector

The United Nations Commission on Legal Empowerment of the Poor report published in 2008, ‘Making the Law Work for Everyone’ states that ‘informality is here to stay and is an essential feature of the global economy.’\textsuperscript{158} The report also notes that lack of protection by the legal system renders micro-enterprises and their operators vulnerable and insecure.\textsuperscript{159} On average, compared to formal workers, informal workers have lower earnings and face higher risks, are less likely to enjoy economic opportunities and legal protections, and are less able to exercise economic rights and collective voice.\textsuperscript{160} The vast majority of the informal sector workforce have never held a job in the formal sector and are often engaged in hereditary or traditional occupations.\textsuperscript{161} A large segment of micro-operators in West Africa are highly mobile without a fixed work-place.\textsuperscript{162} Micro-operators cannot separate personal assets from business assets and they have difficulties offering secure collateral for loans.\textsuperscript{163} Therefore, access to formal sector credit is limited


\textsuperscript{156} Michal Lyons ‘Pro-Poor Business Law? On MKURABITA and the Legal Empowerment of Tanzania’s Street Vendors’ (2013) 5 \textit{Hague Journal on the Rule of Law} 74 at 77. (MKURABITA is the Swahili acronym for Land and Business Formalisation Programme.)

\textsuperscript{157} Benjamin & Mbaye op cit (n139) 49.

\textsuperscript{158} Lyons op cit (n156) 75.

\textsuperscript{159} Ibid at 77.

\textsuperscript{160} Chen ‘The Informal Economy’ op cit (n146) 20.

\textsuperscript{161} Ibid at 6.

\textsuperscript{162} Benjamin & Mbaye op cit (n139) 24.

\textsuperscript{163} Lyons op cit (n156) 75, 88.
or non-existent. Micro-operators opt for trading practices that minimise the potential for breach, and sales are thus made mostly on a cash-and-carry basis. The informal sector activities represent a survival strategy for the people involved. The more difficult the economic context, the more extensive the informal sector. The informal sector has not only grown in many countries but it has also emerged in new forms and places. Criminal activities (defined as those that operate illegally and deal in illegal goods and services) are only a small part of the entire informal economy, and most informal enterprises produce and distribute legal goods and services. Few micro-enterprises operate in complete isolation from formal firms, and many have production or distribution relations with formal enterprises. The effects of globalisation, trade, and foreign direct investment on the informal sector are uncertain. Micro-enterprises rarely export. Street vending by small-scale traders is estimated to be the largest sub-sector of the informal sector, involving many thousands of traders in any major African city. Because of relatively low barriers to entry and set-up costs, newcomers to the cities, including foreign migrants, opt for street trading as a means of survival. Street traders lack the security and advantages of a fixed location, including storage and access to sanitation and utilities, and are often subject to random restrictions and even ‘eviction’ by

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164 Benjamin & Mbaye op cit (n139) 24.
166 Chen ‘The Informal Economy’ op cit (n146) 3.
167 Charmes op cit (n148) 72.
168 Chen ‘Rethinking’ op cit (n143) 75.
169 Ibid at 80.
170 Chen ‘The Informal Economy’ op cit (n146) 12.
172 Benjamin & Mbaye op cit (n139) 120.
173 Lyons op cit (n156) 75.
174 Ibid.
This ‘spatial informality’ makes street vendors particularly vulnerable.  

2.3.1 Social Networks

The norms and institutions of the informal sector exert a powerful influence on how markets are organised in West African economies. Because of the relative absence of large corporations and public agencies in Africa, markets might even play a more prominent role in Africa than in more developed economies. But unlike the markets portrayed in standard economic theory, African markets operate amidst informal institutions that emphasise relationships and information sharing within communities and networks.  

Informality is not just about the failure to comply with legal regulations; it also necessitates the development of alternative organisational structures, which constitute ‘social networks’ or informal forms of economic organization. There is great diversity among African social networks (ethnic, religious, occupational) within a given society or region and across the continent. Although there are differing perspectives about the role of social networks, recent development studies have emphasised a positive,

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175 Lyons op cit (n156) 75.
176 Ibid.
178 Fafchamps op cit (n165) 112-115. Large corporations, government agencies and banks are all examples of hierarchies that rely on command and control to allocate resources. Africa has few and only small hierarchies that are not effective. Outside of gift exchange, which continues to play a major role in the allocation of subsistence goods in much of Africa, markets are the primary allocation and distribution mechanism.
179 Fafchamps op cit (n165) 118, 135.
181 Ibid at 556.
developmental role. Social networks are generally found to engender trust and flexibility, reduce transaction costs, and facilitate integration into the global economy. They offer risk reduction and an ‘informal mechanism of economic coordination capable of filling gaps in formal institutions and regulatory capacity.’ But they are susceptible to breakdown or fragmentation in the face of instability in the wider economic context in which they operate. Overall social networks have failed to promote broader economic development in West Africa. Meagher argues that economic and political reforms, rapid economic expansion, and the lack of support from relevant state institutions have undermined African social networks, and their economic potential has been eroded by the pressures of liberalisation, globalisation, and political opportunism.

2.4 Informal Sector in West Africa

2.4.1 Networks and Cross-Border Trade

Precolonial West Africa had the greatest indigenous economic development in Africa and there was relative unity in West African economies. Regularly scheduled and well-organised markets were ubiquitous in West Africa, involving intricate trade systems moving products from local markets to larger market systems throughout the region. Today the informal sector actors in West Africa are predominately micro-enterprises, but these micro-enterprises co-exist with some large informal firms and well-developed

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182 Meagher op cit (n180) 555. Some view social networks as mostly criminal enterprises or impediments to economic growth.
183 Ibid at 553-554, 571.
184 Ibid at 554, 557.
185 Ibid at 556, 579.
186 Ibid at 554.
187 Ibid at 579-580.
189 Ibid at 215.
trading networks. In Senegal, for example, one trader is estimated to control more than a third of the imports of rice. Social and cultural settings play a prominent role in the spread of the informal sector in West Africa. Ethnic and social/religious kinship groups are particularly significant in West Africa because of weak formal institutions and the continuing importance of kinship ties dating from the precolonial era. A major part of the informal sector in West Africa revolves around informal, cross-border trade (smuggling) to evade import barriers. The volume of unrecorded and untaxed trade between neighbouring countries in West Africa is very large. Many of the major smuggling enterprises are very large-scale operations in which kinship networks play a major role. Kinship networks often substitute for state provision of public goods and adhere to a set of informal norms of conduct and enforcement mechanisms. Because of group solidarity and mutual trust, kinship networks can help expand commercial activities by enabling contract performance, access to financing, and information exchange. On the other hand, kinship networks can be exclusionary, inefficient, and can even promote violation of the rules and norms of the formal economy. Traders belonging to such

190 Benjamin & Mbaye op cit (n139) 8. Some of these large informal firms are registered and pay taxes, but underreport sales and profits. Id 2, 7.
191 Ibid at 4.
192 Golub & Hansen-Lewis op cit (n177) 173-174.
194 Ibid. The informal sector provides almost no national government revenue resulting in an estimated loss of fiscal revenue of between 3 and 10 percent of GDP.
195 Benjamin and Mbaye op cit (n139) 5.
196 Golub and Hansen-Lewis op cit (n177) 173.
197 Golub and Hansen-Lewis op cit (n177) 173.
198 Ibid. (The authors see the informal sector as expanding to the detriment of the formal sector and stress the illegality of smuggling and tax evasion.)
networks are unlikely to make a clear distinction between the norms governing their social relations and those applicable in business matters.199

2.4.2 Ethnic and Kinship Groups: Mouride and Yoruba.

The ethnic and kinship groups in the region have specific defining commercial practices transmitted within families and the community.200 ‘[West] African trade . . . follows a system of networking in which each trading community has been for very long and so has a monopoly over a particular area or a specific product line.’201 Case studies of the Mourides in Senegal and the Yoruba in Benin illustrate the continuing importance of kinship trading networks that grew out of traditional African societies.202 The Mourides are a Muslim brotherhood originating in the nineteenth century and the Yoruba are an ethnic group predating the colonial era.203 Both groups rely on a hierarchical organizational structure and kinship ties, and the belief in Islam is a source of solidarity and motivation within both groups.204 The worldwide trading networks of the Mourides extend to Europe, Asia, and North America from Senegal and The Gambia, with their centre in the Sandaga market in Dakar.205 In addition to domestic commerce and international trade, Mourides dominate other sectors such as transport and real estate.206 For example, they own many the minivans that serve as the major mode of public transport (car rapides).207 Touba, the second largest city in Senegal, is the spiritual home of the Mouride and is de-facto a city-

199 Paquin op cit (n42) 103.
202 Golub and Hansen-Lewis op cit (n177) 190.
203 Ibid at 174.
204 Ibid at 186.
205 Ibid at 174, 178.
206 Ibid at 179.
207 Ibid.
state within Senegal. The Yorubas are one of the most populous and urbanised ethnic groups in sub-Saharan Africa, most of whom speak a common language (Yoruba). Their traditional region encompasses the central areas of Benin and Togo and the southwestern states of Nigeria, but has spread into Cote D’Ivoire, Niger, Burkina Faso, and Senegal, with their sphere of activity generally limited to West Africa where they tend to transact only with other Yoruba. The Yoruba play a leading role in smuggling between Nigeria and Benin and have been dominant in the re-export trade in most products. Yoruba traders are major players in the largest open-air market in West Africa – Dantokpa market in Cotonou, Benin – which is a centre for regional cross-border trade. The Dantokpa market, like Sandaga and other similar markets, is largely off-limits to the government. Allegiance to traditional sources of authority, such as the Yoruba chiefs and the Mouride marabouts, is often more powerful than the authority of the state.

2.5 Tontines

One of the most important informal institutions that proliferate in West Africa is the local mutual aid association commonly called a ‘tontine.’ The Yoruba and Mourides, for instance, have a well-developed system of tontines. These associations are known by

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208 Golub & Hansen-Lewis op cit (n177) 174.
209 Ibid at 182, 186.
210 Ibid at 183, 186, 190.
211 Ibid at 187.
212 Ibid at 188.
213 Ibid at 191.
214 Ibid at 189.
215 The kind of local financial self-help association operating throughout West Africa is not really a classic ‘tontine,’ which is more of an annuity scheme. The word ‘tontine’ is derived from the name of Lorenzo de Tonti from the seventeenth century. Kent McKeever ‘A Short History of Tontines’ (2009) 15 Fordham Journal of Corporate and Financial Law 491, 492.
216 Golub & Hansen-Lewis op cit (n177) 186.
various names depending on the specific functions of the association and local idiom. Tontines can be viewed as the embodiment of the African cultural value of mutual aid and cooperation. Tontines are formed in neighbourhoods, by community, religious, or ethnic groups, or can be occupational or work-place based. They serve both an economic and a social function. Since members are personally acquainted with each other, the economic status and creditworthiness of members are known by all. This peer monitoring requires a closely knit community with high levels of social cohesion and affiliation. Tontines are the predominant form of savings organization in the informal sector and provide a significant source of capital for micro-enterprises. The regular contributions are also a way of paying a type of insurance premium for the use of a social safety net. The social security function of tontines covers rites of passage, life cycle events, spiritual and religious ceremonies, education, and sometimes even insuring members and their relatives against the consequences of illness, accident, and death. 

217 The term most often used is ‘tontine’ in francophone West Africa and ‘esusu’ in anglophone West Africa. Both are collective names, comprising various types of organizations or associations. Much of our knowledge of these associations come from studies of two ethnic groups -- the Bamileke in Northwest Cameroon and the Ibo in Southeast Nigeria. F.J.A. Bouman ‘ROSCA and ASCRA: Beyond the Financial Landscape’ in F.J.A. Bouman and O. Hospes (eds) Financial Landscapes Reconstructed: The Fine Art of Mapping Development (1994) 22-1, 22-3 available at http://www.w.sadhana.net/Adls/DocumentAndCaseStudiesMain/DeliveryMouldedPapersonline/FinancialLands/FLR22.pdf accessed on 15 August 2015.


221 Ibid at 19.

222 Ibid at 24.

223 Balkenhhol & Gueye op cit (n222) 8-9.

224 Ibid.

225 Bouman op cit (n217) 22-2.
They are autonomous institutions with voluntary participation, characterised by a high degree of self-sufficiency and self-regulation.\textsuperscript{226} Tontines facilitate social networking and information exchange.\textsuperscript{227} Tontines work, in part, because of intricate, strict rules of punctuality and procedure, observance of rituals, careful choice of members, structured social relationships, and serious sanctions.\textsuperscript{228} The effectiveness of this discipline is due to the fact that in a tight-knit community with strong cultural ties social disapproval could mean banishment from the group and the end of access to credit.\textsuperscript{229} Most significant changes in tontines are a result of the rapid evolution of urban tontines due to the influx of rural migrants, who have duplicated traditional village structures in the city to obtain some form of security and stability.\textsuperscript{230} It is estimated that more than 80 per cent of all rural migrants to cities belong to urban tontines.\textsuperscript{231} Even in urban areas tontines maintain strong links with their rural areas of origin.\textsuperscript{232} Funeral expenses are often borne by the tontine, to which every migrant must contribute on penalty of ostracism and loss of the right to burial in ancestral soil.\textsuperscript{233} According to one researcher, in Douala, Cameroon ‘thousands of women, young people and unemployed could not survive without their tontine.’\textsuperscript{234} A tontine carries out four basic types of activities.\textsuperscript{235} One is the social security fund for emergencies and life cycle events with irregular, ad hoc contributions when the need arises. The second is the Rotating Savings and Credit Association (‘ROSCA’). The third is the Accumulating Savings and Credit Association (‘ASCRA’), a type of bank or credit union. The fourth activity is that of collective investment, such as

\begin{thebibliography}{99}
\bibitem{226} Bouman op cit (n217) 7.
\bibitem{227} Hevener op cit (n218) 20.
\bibitem{228} Henry op cit (n219) 6.
\bibitem{229} Hevener op cit (n218) 20.
\bibitem{230} Bouman op cit (n217) 22-9.
\bibitem{231} Ibid at 22-4.
\bibitem{232} Balkenhol & Gueye op cit (n222) 3.
\bibitem{233} Bouman op cit (n217) 22-3.
\bibitem{234} Ibid.
\bibitem{235} Ibid.
\end{thebibliography}
a taxi or restaurant, with profits accruing to members. There are also associations that are hybrids of these four basic activities. Lending is the primary function in both the ROSCA and the ASCRA. In addition to access to credit, their economic benefits include lower transaction costs, accessibility, and flexibility. In a ROSCA, the pooled contributions are immediately redistributed. In an ASCRA, pooled savings are accumulated for a specified time, invested or lent out against interest, and then redistributed in whole or in part. The number of members in tontines varies considerably, from as few as a dozen or so to several hundred, depending on the type and purpose. The life-cycle of an ASCRA can extend into years, whereas the life-cycle of a ROSCA is usually only one year.

2.5.1 Rotating and Savings Credit Associations

Most tontines can be classed as ROSCAs. Despite their many variations, ROSCAs follow the same basic pattern. At the behest of a leader or organiser, a select group of people who share some common bond meet regularly and contribute a predetermined, fixed amount to a common fund. The amount of this fund (or pot) is distributed periodically to each participant in turn on a rotating basis. After the last member has received the pot, the ROSCA disbands or dissolves. The number of participants, the regularity of meetings, and the amount of contribution are determined based on the needs of the group. In a simple or random ROSCA, everyone contributes the same amount at

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236 Bouman op cit (n217) 22-1.
237 Hevener op cit (n218) 20, 21.
238 Bouman op cit (n217) 22-1.
239 Ibid.
240 Ibid at. 22-2.
241 Ibid.
242 McKeever op cit (n209) 561.
243 Hevener op cit (n218) 7.
244 Ibid. The order of rotation can be determined in a number of ways, including by random assignment, or by bidding/auction, or by social status.
each meeting and receives the same size pot. By the end of the ROSCA, everyone will have received, in lump sum, the total of their monthly contributions. The consumer durable ROSCA is a slight variation on the random ROSCA and is popular among women, where instead of rotating a lump sum of funds, participants receive a physical good agreed upon by the group.\textsuperscript{245} Many ROSCA meetings involve ritualistic practices and social observances and also provide opportunities for networking.\textsuperscript{246} The primary benefit of a ROSCA is the accelerated access to capital or a commodity, since participants receive money or goods sooner as a result of their membership than if they were to save individually.\textsuperscript{247} ROSCA participants are motivated by considerations of social relationships and standing.\textsuperscript{248} Although the last receiving member derives no apparent economic benefit, she does receive social benefits since her membership is a step toward building her reputation to the point where she may credible enough to organise her own ROSCA.\textsuperscript{249}

2.6 Policy Implications

For many years the dominant view in the development field was that the informal sector was ‘symptomatic of pathology’ and the key to development was to formalise all micro-enterprises.\textsuperscript{250} A newer understanding of the informal sector views it as an adaptive response to existing realities and, in some respects, as being consistent with the evolution of traditional or customary institutions.\textsuperscript{251} Consequently, the focus should not be on moving micro-enterprises from the informal to the formal sector, but rather on creating

\textsuperscript{245} Hevener op cit (n218) 8. The organiser usually obtains a discounted price for the goods in exchange for the guaranteed purchase of a certain number of goods.

\textsuperscript{246} Ibid at 20.

\textsuperscript{247} Ibid at 19-21. Distributions to all members, except the last, are technically interest-free loans.

\textsuperscript{248} Ibid.

\textsuperscript{249} Ibid.

\textsuperscript{250} Claire Moore Dickerson ‘Informal-Sector Entrepreneurs, Development and Formal Law: A Functional Understanding of Business Law’ (2011) 59 Am. J. Comp. L. 179 at 181 (author uses the term ‘nano-entrepreneur’).

\textsuperscript{251} Ibid at 182.
for them an environment comparable to what businesses in more developed economies enjoy.\textsuperscript{252} Local, informal institutions can contribute to a type and level of economic development compatible with local norms and practices.\textsuperscript{253} The challenge is to decrease the costs and vulnerabilities of working informally and to increase the benefits of working formally.\textsuperscript{254} Supporting micro-enterprises is a key to promoting growth and reducing poverty.\textsuperscript{255} Successful intervention requires multiple, back-up or complementary services.\textsuperscript{256} One criterion for policy intervention is to apply the ‘principle of subsidiarity in a multi-level system,’ the key to which is to devolve authority to the lowest level that can take effective action related to the scale of a particular issue.\textsuperscript{257} Local communities can undertake many forms of collective action more effectively by drawing on their own ‘evolved institutions.’\textsuperscript{258} Another criterion is not to replace or ‘crowd out’ informal rules evolved in self-organised groups that are generally understood and relatively effective.\textsuperscript{259} For instance, reforms could seek to assist tontines and take lessons from their positive aspects rather than to replace them or seek to integrate them into formal sector institutions. Micro-operators could be empowered through targeted capacity building, such as functional literacy and numeracy training programs.\textsuperscript{260} The approach should be to promote policies and regulations that are ‘fit for purpose’ and accessible to micro-operators.\textsuperscript{261} As will be argued in Chapter 3, OHADA

\textsuperscript{252} Dickerson ‘Functional Understanding’ op cit (n250) 182.
\textsuperscript{253} Glenn op cit (n11) 56.
\textsuperscript{254} Chen ‘Rethinking’ op cit (n143) 90.
\textsuperscript{255} Ibid at 75. For a different perspective, see Benjamin & Mbaye op cit (n139) 71 (should not focus on micro-enterprises as their potential is limited).
\textsuperscript{256} Guha-Khasnobis, Kanbur & Ostrom op cit (n141) 14.
\textsuperscript{257} Ibid at 11.
\textsuperscript{258} Ibid.
\textsuperscript{259} Ibid at 13.
\textsuperscript{260} Lyons op cit (n156) 94.
\textsuperscript{261} Ibid at 93.
does not take this approach as it ignores or seeks to legislate around informal norms and institutions.
CHAPTER THREE – OHADA AND THE INFORMAL SECTOR

3.1 Overview of OHADA

OHADA is an international organization and a supranational system of business laws in West and Central Africa. There are now 17 nations that are signatories to the OHADA Treaty: Guinea-Bissau, Senegal, Central African Republic, Mali, the Union of the Comoros, Burkina Faso, Benin, Niger, Côte d’Ivoire, Cameroon, Togo, Chad, the Republic of Congo, Gabon, Equatorial Guinea, Guinea, and the Democratic Republic of Congo (Member States). With a few exceptions, all are also members of the Franc-Zone, are French-speaking, and have a civil law tradition. Member states of the African Union may join OHADA by acceding to the Treaty; non-members of the African Union can be invited to join unanimously by OHADA Member States. OHADA is part of a larger effort at economic integration within West and Central Africa.

3.1.1 Objectives

As set forth in the Preamble to the 2008 Treaty, the goals of OHADA are:

. . .to make new progress towards African unity, and . . . to reinforce legal and judicial security in the [region], in order to guarantee a climate of trust that will contribute to making Africa a centre of


264 Martor op cit (n262) 5.

265 Ibid at 6 (Treaty, art 53). The Union of the Comoros is the only current member outside the region.

266 This includes the Economic Community of West African States (ECOWAS), the West African Economic and Monetary Union (Union Économique et Monétaire Ouest Africaine, or UEMOA), the Central African Monetary and Economic Community (Communauté Économique et Monétaire de l’Afrique Centrale, or CEMAC), and ultimately the African Economic Community (AEC) within the African Union. Unlike OHADA, these other institutions are monetary, trade, or customs unions.
development; [and] . . . to use the harmonisation of business law as an instrument to reinforce the rule of law, as well as legal and economic integration . . ..

Article 1 of the consolidated Treaty states:

The objective of the present Treaty is the harmonisation of business laws in the States Parties by the elaboration and adoption of ‘simple, modern common rules well adapted to their economies, by establishing appropriate judicial procedures, and by encouraging arbitration for the settlement of contractual disputes.’

The articulated purpose of OHADA is increasing domestic and foreign trade and investment in and among its member states in order to enhance economic development in the region. The theory is that because of their uniformity, clarity, and accessibility the OHADA laws will reduce transactions costs and thus create an environment conducive to investment. OHADA laws focus only on enhancing the predictability of business transactions at the enterprise level, not on political economy or macroeconomic issues. OHADA begins from the same premise as most rule of law projects, which is that laws must define and protect property rights and enforce contracts.

3.2 Institutional Framework

OHADA is comprised of the following institutions: (1) the Council of Ministers; (2) the Permanent Secretariat headquartered at Yaoundé, Cameroon; (3) the Common Court of Justice and Arbitration (CCJA) headquartered at Abidjan, Cote d’Ivoire; (4) the Regional Training Centre for Legal Officers (Ecole Régionale Supérieure de la Magistrature, or

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268 Dickerson (ed) *Unified Business Laws* op cit (n262) 144 (app 2). These objectives were also stated in the Preamble to 1993 Treaty.


270 Ibid at 24.

271 Ibid at 40.

272 Beauchard & Kodo op cit (n262) 6.

273 See generally Martor op cit (n262) 8-17; Beauchard & Kodo op cit (n262) 10-13; Martha Simo Tumnde ‘Cameroon Offers a Contextual Approach to Understanding the OHADA Treaty and Uniform Acts’ (58-64) and Claire Moore Dickerson ‘Perspectives on the Future’ (110-17) in Claire Moore Dickerson (ed) *Unified Business Laws for Africa: Common Law Perspectives on OHADA* 2ed (2012).
ERSUMA) headquartered at Porto Novo, Benin; and, (5) the Conference of Heads of State and of Government. The Government of Senegal is the Depository Government for all Treaty instruments. The Council of Ministers, composed of the Ministers of Justice and Ministers of Finance of all the Member States, is the supreme decision-making body of OHADA with both legislative and regulatory functions. The Council may also request advisory opinions from the CCJA. The Permanent Secretariat is the executive branch, managed and directed by a Permanent Secretary who represents OHADA and assists the Council of Ministers, including in the preparation and publication of the Uniform Acts. In its judicial capacity, the CCJA is the sole supranational court regarding interpretation of the Treaty and the Uniform Acts, and CCJA also has jurisdiction to render non-binding advisory opinions and interpretations. Judgments of national courts relating to OHADA law are subject to final appeal before the CCJA, whose decisions are final and binding, although enforcement is governed by national procedures. The CCJA also acts as an arbitration centre. The main role of ERSUMA is to improve the legal environment in the member states by providing training in OHADA law. The Conference of Heads of State and of Government, composed of the heads of state of the member states, is a forum for dealing with political issues on any question relating to the OHADA treaty. OHADA is funded from annual contributions paid by the Member States and also from aid from other international organizations and foreign states. OHADA was and remains largely funded by the French government.

274 Treaty, art 3. The Conference of Heads of State and Government was created in the 2008 Treaty (art 27).
275 Treaty, art 57.
276 Dickerson (ed) Unified Business Laws op cit (n258) 144, 155 app 2 (art 40).
278 Martor op cit (n262) 6.
279 Deschamps ‘Commercial Law Reform’ op cit (n200) 43.
3.2.1 Uniform Acts

In pursuance of its aims, OHADA has so far promulgated nine standard pieces of legislation on specific areas of business law called Uniform Acts (Acts). The Acts cover general commercial law, commercial companies and economic interest groups, secured transactions, simplified debt collection and enforcement measures, bankruptcy, arbitration, accounting, carriage of goods by road, and cooperative companies. The Acts are directly applicable in all the Member States and supersede all national legislation on the same topic in each country. These laws modernise the old, mostly French business laws previously applicable in the OHADA states. The OHADA laws, with minor exceptions, are basically ‘carbon copy’ transplants from French business law. Subject matter jurisdiction under OHADA is very broad, potentially covering any other subject related to business that the Council of Ministers unanimously decides to include.

The Uniform Act on General Commercial Law (UA-GCL) provides the basic rules of business activity and covers subjects which do not fall within the ambit of the other more specific Acts, including the status of a commerçant (commercial operator, merchant, or trader), the commercial registry, the leasing of commercial premises, commercial intermediaries, the operation and sale of businesses (fonds de commerce),

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280 See Idris op cit (n277) 64-79; Tumnde op cit (n273) 38-54. The Uniform Acts (Actes Uniformes) are published in French in the OHADA Official Journal (Journal Officiel, or JO) and in the national official journals of the member states.

281 Beauchard & Kodo op cit (n262) 9.

282 Ibid at 15. (art. 10 abrogation is comprehensive).

283 Dickerson ‘OHADA Calls the Tune’ op cit (n269) 59. Among Member States, only Senegal, Guinea, and Mali had previously attempted a systematic review of business law after independence. (fn 171).


285 Dickerson (ed) Unified Business Laws op cit (n262) 144 (art 2, Treaty).
and the sale of goods. The provisions of the UA-GCL are applicable to every commercial operator or trader and economic interest group which has its place of business or registered office in any of the Member States. In addition, commercial operators must keep accounting books and prepare annual financial statements in compliance with the provisions of the Uniform Act on Accounting Law. The Uniform Act on Secured Transactions (UA-ST), which governs the conditions under which securities must be registered, is designed to spur the flow of credit within the OHADA region.

Revisions under the 2008 Treaty to the UA-ST and the UA-GCL made a few innovations that could assist micro-operators. Provisions were added in the UA-GCL creating a new category of commercial operator as an alternative to the commerçant -- the ‘entreprenant’ (enterpriser or individual entrepreneur) -- corresponding to the ‘auto-entrepreneur’ status introduced in France in 2008. The entreprenant, who is a natural person only, is not obligated to register on the trade and personal property registry, but is only required to complete a simple declaration at no cost at the local court register (greffe). When the revenues of the entreprenant exceed a specified amount, he or she must then perform all the formalities to operate as a commercial operator under the UA-GCL and must be fully registered. It appears that there have been few registrations of

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286 Martor op cit (n262) 30. A commerçant is any legal or natural person who puts goods into circulation or who provides any services with a profit motive – who engages in actes de commerce (commercial transactions). (Treaty, art 2, 3).

287 Ibid at 29 (Treaty, art 1).

288 Ibid at 30.

289 Beauchard & Kodo op cit (n262) 36. In many cases a registration filing is required to perfect the security interest.


291 Beauchard & Kodo op cit (262) 33 (Treaty, art 30).

292 Ibid.

293 Ibid.
An innovation in the UA-ST was the pledge without dispossession on tangible assets, designed to use stock or any other means of production as collateral without depriving the grantor of the use of the pledged asset, which could provide much needed assistance to micro-enterprises in obtaining credit. The most significant change to OHADA laws in regard to the informal sector is the addition of a Uniform Act on Cooperative Societies, which is discussed in Chapter 4.

3.2.1(a) Commercial Registry

The provisions relating to the trade and personal property credit registry (Registre du Commerce et du Crédit Mobilier, or RCCM) are of particular importance to the OHADA reform effort and perhaps the most significant instance of OHADA’s ineffectiveness. The principal function of the RCCM is to establish a centralised and computerised system of registration for commercial companies and operators and also for charges over movable property. Centralisation of the data held in each local registry is to be organised in a national register held in each Member State and a regional register to be held by the CCJA. The RCCM is a key institution in the development of lending and is closely linked with the UA-ST. Its purpose is to protect creditors and to provide businesses with important information for contracting purposes. In addition, a commercial entity acquires its separate legal personality only once it has been registered with the RCCM, which must be done within one month of establishing a business or

294 Hiez & Menétrey op cit (n284) 458. A major reason for lack of interest may be the lack of advantages associated with the status. The relative success of the auto-entrepreneur in France appears to be that an enrolled auto-entrepreneur is entitled to health coverage and retirement benefits which are not available in the OHADA region.

295 Beauchard & Kodo op cit (n262) 37.


297 Martor op cit (n 262) 34. The RCCM registers charges over shares, businesses (fonds de commerce), stocks, professional equipment and motor vehicles, and also clauses providing for retention of title, details of leasing contracts, and various preferential rights. Id 35.

298 Ibid (UA-GCL art 20)
incorporation, and failure to comply is a criminal offense.\footnote{Martor op cit (n262) 35} Yet no commercial registry as contemplated under OHADA exists in any Member State.\footnote{Beauchard op cit (n296) 332 Nor has any state created a proper vital records registry, which is essential for collateral registration.} The absence of electronic or computerised records at local court registries and at the RCCM along with the disparate civil status registers hamper the credit environment.\footnote{Beauchard & Kodo op cit (n262) 24.} Making the RCCM operational is going to be a long term project, and it might prove to be an ‘illusory tool in the effort to increase legal certainty.’\footnote{Ibid at 25.}

3.3 Legal Certainty

The foundational imperative of the OHADA reforms was the perceived need for legal and judicial certainty which, it was thought, could be obtained through a unified system of laws and legal institutions.\footnote{Ibid at 6.} The idea is that this new legal certainty and predictability would create an environment more conducive to foreign investment.\footnote{Charles Manga Fombad ‘Some Reflections on the Prospects for the Harmonization of International Business Laws in Africa: OHADA and Beyond’ 59(3) Africa Today 51 at 55 (2013).} ‘As the drafters themselves expressed, the fact that these unified laws are based on Western legal norms reassures potential foreign investors.’\footnote{Jean Alain Penda Matipé ‘Legal Integration in Colonial and Immediate Post-Colonial Sub-Saharan Africa’ in Claire Moore Dickerson (ed) Unified Business Laws for Africa: Common Law Perspectives on OHADA 2ed (2012) 21.} The underlying rationale for legal unification is that the diversity of laws in the region is itself the primary cause of this uncertainty and the main obstacle to trade and economic development.\footnote{Fombad op cit (n302) 55; Bamodu, Gbenga ‘Transnational Law, Unification and Harmonization of International Commercial Law in Africa’ (1994) 38(2) J. Afr. L. 125 at 128, 130.} There are several logical and empirical problems with this reasoning. First, it is a dubious proposition that the diversity of laws among the OHADA member-states is the primary reason these countries are poor or economically under-developed. Secondly, even if
diversity of laws hinders development in some regard, what is needed is a better understanding of how diversity among specific laws is an impediment to particular aspects of development. Thirdly, by creating a new, unified regime another dimension of legal diversity or pluralism has been created or intensified. OHADA adds another layer of law and complexity to the legal system. Fourthly, it presumed that there are no benefits to legal pluralism and that legal pluralism can be eliminated. Therefore, positing diversity of laws itself as the principle cause of underdevelopment seems to be a weak and unsupported justification for such a massive and expensive legal reform as OHADA.

The present situation under OHADA may actually undermine more than promote legal certainty.\textsuperscript{307} For one thing, as has been noted (supra 1.5.3), transplanted institutions create greater legal uncertainty than do domestically developed solutions.\textsuperscript{308} There is also the uncertainty caused by the possible jurisdictional overlap between OHADA and the other regional institutions involved in rulemaking related to economic matters.\textsuperscript{309} Moreover, attempted uniformity of laws within a state may actually be one of the principal causes of conflict among laws and not a solution.\textsuperscript{310} As a concrete example, the introduction of title registration systems to enhance property rights in the African context could result in greater uncertainty about those rights (supra 1.3.1).\textsuperscript{311} Thus legal insecurity may have little to do with actual state of legal institutions.\textsuperscript{312}


\textsuperscript{308} Glenn op cit (n11) 55-56.

\textsuperscript{309} Beauchard & Kodo op cit (n262) 13, 15, 17. For an analysis of the interaction of overlapping regional laws, see Salvatore Mancuso ‘OHADA Report’ 1 European Review of Private Law 169 (2012).

\textsuperscript{310} Ibid at 54.

\textsuperscript{311} Tamanaha ‘Primacy of Society’ op cit (n10) 240.

\textsuperscript{312} Paquin op cit (n42) 116. Of course, the impossibility of any system to recover money from insolvent or poor debtors must be a major factor. Id 117.
One of the presumed virtues of OHADA is that it may be able to bypass the political obstacles in the region by ‘flying under the radar’ of national governments.\textsuperscript{313} Given the corruption, rent-seeking, and extractive nature of many of the states in the region this impulse is understandable, but, even if this were possible, it is ultimately self-defeating to attempt it. Sustainable legal and economic development require the active participation of those for whom the law is made and for whom development is sought. Further weakening national structures through supranational rules and institutions will not help remedy the ‘democratic deficit’ that already exists in those countries.\textsuperscript{314} There is also a curious, circular reasoning in the idea that OHADA can bypass national, political corruption, while at the same time asserting that the ineffectiveness of OHADA is mostly a problem of political will on the part of those same nations.\textsuperscript{315} In any event, the formal law should offer means to assist in this process of conciliation of competing demands, not attempt to bypass it, as OHADA has done.

3.4 Failure of OHADA to Address the Informal Sector

Broadly speaking there are three types of challenges to law reform: 1) resource constraints, 2) cultural and social values, and 3) political economy issues.\textsuperscript{316} OHADA is negatively impacted by all three challenges. The focus in this paper is on the second of these challenges relating to the informal sector and traditional West African values and customs. There are many well-documented reasons for the ineffectiveness of OHADA, which, broadly speaking, include incomplete implementation, low utilization, jurisdictional and enforcement issues, poor dissemination and accessibility, inadequate funding, and language barriers.\textsuperscript{317} While significant, these problems are primarily issues

\textsuperscript{313} Claire Moore Dickerson ‘The Future of International Law and Development: Flying Under the Radar’ (2010) 35 N.C.J. Int’l L. & Com. Reg. 555, at 556, 560 (‘goal is to avoid the negative impact of the interplay of politics and corruption’).

\textsuperscript{314} Deschamps ‘A Grounded Outlook’ op cit (n307) 123.

\textsuperscript{315} Dickerson ‘Flying Under the Radar op cit (n313) 567

\textsuperscript{316} Deschamps ‘Commercial Law Reform’ op cit (n200) 29.

\textsuperscript{317} see Beauchard & Kodo op cit (n262) 16-32; Hiez & Menétérey op cit (n284) 444-448; Dickerson ‘Perspectives on the Future’ op cit (n269) 118-126.
of political will and resource constraints.\textsuperscript{318} Although these interrelated deficiencies have some relevance to the informal sector (e.g., the RCCM), the failure of OHADA to address the informal sector is a more fundamental problem that cannot rectified by improvements in these other areas alone. The addition of the Uniform Act on Cooperative Societies in the 2008, some 15 years after the original 1993 Treaty, is the first major reform directed specifically to the needs and realities of the informal sector, and although significant, does not change the overall institutional bias of the OHADA regime.

Lack of understanding of the informal sector is a source of confusion and mistakes about how the economy actually functions.\textsuperscript{319} The focus on formalization downplays the role of the informal sector, which is often an economically productive one that can also provide security and reliability.\textsuperscript{320} Much of the scholarly literature is critical of OHADA for its dissonance with the informal sector reality. Except in a few limited situations, what OHADA offers is simply not relevant for micro-enterprises.\textsuperscript{321} OHADA is tailored for the activities and structures of formal sector companies, and not those operating in the informal sector.\textsuperscript{322} It is large, non-African companies, mostly French, who are the primary beneficiaries of the system.\textsuperscript{323} OHADA law is inaccessible to most people and is ill-suited to the needs of African society.\textsuperscript{324} It reflects rules and principles that are foreign or too abstract.\textsuperscript{325} The Uniform Acts contain little evidence of any desire

\textsuperscript{318} Beauchard op cit (n296) 330.
\textsuperscript{319} Hiez & Menetrey op cit (n284) 451.
\textsuperscript{320} Kennedy ‘Laws and Developments’ op cit (n40) 22.
\textsuperscript{322} Deschamps ‘Commercial Law Reform’ op cit (n200) 53. A significant portion of officially registered companies are French which dominate segments of their target markets in the region, including energy, public works, distribution, transport, banking and related services, agro-industry and telecommunications.
\textsuperscript{323} Hiez & Menetrey op cit (n284) 443, 450.
\textsuperscript{324} Ibid at 441, 444, 448.
\textsuperscript{325} Ibid at 443; Deschamps ‘A Grounded Outlook’ op cit (n307) 146.
to integrate African norms or values. Although some rules were adopted to the realities of the informal sector in the 2008 Treaty, such as the introduction of the entreprenant, little has been done to ensure that OHADA comprehensively addresses the challenges faced by micro-operators. These are only piecemeal insertions whose application to those realities has yet to be seen. Since OHADA law is not adapted to, and often conflicts with, their practices and needs, it is not surprising that micro-operators do not seek its application. OHADA highlights the persisting gap and frequent conflict between economic behaviour and normative conduct on the ground and the formal business law on the books. This gap is widened by a strong and persisting oral tradition in the OHADA region. The framers of OHADA apparently assumed that the social and political institutions necessary for law reform already existed or that they were not important. In either case they were mistaken.

3.4.1 Traditional Business Practices and Customary Laws

There is little recognition of indigenous business models, and OHADA fails to account for the informal manner in which commerce is conducted in the region. This failure seems particularly misguided or paradoxical since present day business practices and norms of micro-operators in the region are rooted in traditional norms and practices. OHADA reformers did not see any advantages to informal institutions in Africa as compared to formal law, and local customs were often thought to constitute impediments.

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326 Deschamps ‘A Grounded Outlook’ op cit (n307) 111, 131-32. In fact, some African jurists even have an intense disregard for indigenous legal cultures. Id (fn85).
327 Ibid at 146.
328 Ibid at 132.
329 Deschamps ‘Commercial Law Reform’ op cit (n200) 51.
330 Ibid at 66.
331 Beauchard & Kodo op cit (n262) 22.
332 Beauchard op cit (n296) 333.
333 Deschamps ‘Commercial Law Reform’ op cit (n200) 49, 50.
334 Ibid at 45.
to the transformation of African society. Customary law is generally limited to domains such as marriage, succession, and land tenure. It is generally believed that customary laws are not geared to economic objectives, but only towards the preservation of the communal group and maintenance of peace. There is a prevailing presumption that commercial activity is necessarily and rightly a subject over which state law has a monopoly. That presumption is an error. As was noted (supra 1.7) customary laws represent entire ways of life for most Africans, including their economic activities. Although customary laws and modern commercial laws occupy separate domains, the two cannot be divorced. Marital and succession laws can sometimes impact significantly on business matters as, for example, the consequence of divorce or death of key persons on the continuation or dissolution of closely-held or family-owned companies. A more inescapable connection between customary laws and modern business laws is the status of real property. For instance, under the UA-ST only a mortgage can serve as security over real property when less than five percent of the land in the region is registered. The rights in real property in Africa are predominantly controlled by customary land tenure systems and largely remain untitled. Even if the land were to be titled in a standard manner, as a practical matter, the rights of the community in the land could effectively place a cloud over the title. At the same time, the sudden introduction of title registration systems into contexts with recognised customary rules about property has significant social implications (supra 1.3.1).

335 Paquin op cit (n42) 116-117.
336 Ibid.
337 Bamodu op cit (n306) 127.
338 Mancuso op cit (n119) 16.
339 Ibid at 18 (UA-ST art 192).
340 Tamanaha ‘Rule of Law’ op cit (n12) 11.
341 Tamanaha ‘Primacy of Society’ op cit (n10) 240.
3.5 Development through OHADA

The concept of development ‘almost becomes a mockery’ in the circumstances that exist in African economies today.342 There has been no ‘systematic attempt to deal with the crisis of African underdevelopment’ and Africa is becoming increasingly marginalised within the global economic system.343 Only about 10 percent of the trade within Africa is intra-African, which is the lowest level of any region in the world.344 Any economic growth has been ‘more affected by commodity prices than any improvement in institutional frameworks.’345 For almost all OHADA countries, per capita national product is less than U.S. $700 per year.346 Given these realities, it is striking how little attention is given to development in the OHADA reforms, especially since economic development is purportedly the end goal. OHADA’s economic development strategy is still ‘haunted by colonial spirits’ in so much as it primarily serves French and other foreign interests.347 Although often touted as pro-development, there is nothing in the Treaty or in the Uniform Acts that states that the goals of OHADA include the development of the people or countries in the region.348 In fact, the term ‘development’ only appears once in the Treaty ambiguously as ‘centre of development.’349 Whatever a ‘centre of development’ might mean, the concept does not support the rhetoric about economic development in Member States. There is no reference to anything demonstrating how these reforms might cause development to occur. Development apparently takes a back seat to other objectives. A December 2013 Report to the French Minister of Economy and Finance notes that OHADA ‘is an undervalued shared asset,

342 Allott op cit (n1) 5.
344 Fombad op cit (n304) 55.
345 Isanga op cit (n15) 62.
346 Ibid at 66.
347 Deschamps ‘Commercial Law Reform’ op cit (n200) 59.
348 Hiez & Menétrey op cit (n284) 440-41.
349 Ibid.
that once mastered, can offer France a strong and open advantage vis-à-vis “Anglo-Saxon” investors, as well as English-speaking and emerging Africans. The ultimate prize is foreign investment which, one is left to assume, definitely and automatically generates economic development. The terms ‘foreign investment’ and ‘development’ are often conflated, and the casual causal connection from foreign investment to increased local development seems to be taken for granted. OHADA implicitly endorses the concept of ‘development-through-foreign investment,’ although there is little evidence to support it.

The premise that legal reform will necessarily increase foreign investment is contested as is the premise that foreign investment necessarily leads to local economic development (supra 1.4.1). Whether FDI inflows would have a positive impact on development depends on other variables. Investment in relatively labour-intensive industries will likely lead to more job creation and local growth than investment in capital-intensive industries. In Africa, the majority of FDI inflow has been in the capital-intensive, extractive sector and, if that is the case, it is unlikely to have significant impact on employment generally and in the informal sector in particular. Another variable is the type of subcontracting or other linkages the investment will have in either the formal or informal sector. If the investment requires backward linkages with local suppliers, for instance, then FDI could have a positive impact. Moreover, while foreign investment is an essential source of funds, a fundamental change in social institutions to encourage domestic economic development is equally critical.

350 Hiez & Menétrey op cit (n284) 443.
351 Ibid at 442.
352 Verick op cit (171) 13.
353 Ibid.
354 Ibid.
355 OHADA Calls the Tune op cit (n269) 29.
3.5.1 Promoting Trade

OHADA also does little to promote intra-African trade.\textsuperscript{356} To be fair, issues surrounding the existence of significant trade barriers in the region are outside OHADA’s ambit. On the other hand, increased trade is one of its articulated objectives.\textsuperscript{357} The only direct method OHADA offers for increasing trade is by way of increased certainty in private business transacting resulting from its unified laws. As a method of increasing trade it is doubtful that such enterprise level predictability, although important, could ever trump the problems caused by trade barriers or other political and macroeconomic issues. Moreover, much trade occurs in the informal sector (supra 2.4.1).

3.5.2 Impact Studies

No comprehensive study has been carried out to date on the impact of OHADA law on economic development in the region or on companies’ decisions to invest in the region.\textsuperscript{358} There does not appear to be any empirical evidence that OHADA has had any beneficial effect on the economies of the Member States.\textsuperscript{359} But there is data to suggest that there has been no positive impact. The results of one quantitative study about the effects of OHADA on growth and development were sobering.\textsuperscript{360} The author concluded that OHADA member states did not perform better overall than non-member states in the

\begin{itemize}
\item \textsuperscript{356} Fombad op cit (n304) 67-68. Nor has regional integration in general done much to promote trade. Benjamin and Mbaye op cit (n139) 48.
\item \textsuperscript{357} Dickerson ‘OHADA Calls the Tune’ op cit (n269) 20, 40.
\item \textsuperscript{358} Deschamps ‘Commercial Law Reform’ op cit (n200) 61.
\item \textsuperscript{359} Beauchard op cit (n296) 323. (Note: There is a reference to a ‘recently conducted economic impact study’ in a message from the Permanent Secretary on 19 October 2015 on the occasion of the 22\textsuperscript{nd} anniversary of OHADA, available at https://www.facebook.com/OfficialOhada/posts/908009999283097, accessed on 22 September 2016. The post claimed that average annual growth rate in member states increased from 2.74 per cent in the period 1985-1997 to 4.2 per cent in the period 1998-2011. However, no reference or links to the study were provided and no such document or publication could be located.)
\end{itemize}
post-implementation period.\footnote{361} One legal case study shows that OHADA formal laws do not have a significant impact on entrepreneurs in Cameroon.\footnote{362} Based on her research in the region, Deschamps concludes that OHADA laws ‘have either little, none, or adverse effects’ on the micro-operators in the region.’\footnote{363} The annual ‘Doing Business Report,’ published since 2004 by the World Bank, is sometimes cited as evidence of the success of OHADA, but the Report is very narrow in scope and only tangentially relates to OHADA reforms, comparing sub-Saharan Africa as a whole to other global regions.\footnote{364}

3.6 A Functional Approach

Enterprises in more developed economies generally benefit from legal structures in all phases of the business life-cycle, as well as from non-legal support structures, such as transportation, communications, electricity, and sanitation.\footnote{365} Such cumulative and complementary assistance undergirds the economy in more developed countries and provides predictability, but is often overlooked or taken for granted in analysing the role of law in facilitating business.\footnote{366} The challenge is to determine how similar laws could help micro-enterprises obtain functionally equivalent support in the African context. It is

\footnote{361} Tiemann op cit (n360) 16.


\footnote{363} Deschamps ‘A Grounded Outlook’ op cit (n307) 111-112. Findings are based on interviews with 110 stakeholders conducted in 2011 and 2012 in several cities in Benin, Cameroon, and Cote d’Ivoire, including 80 female entrepreneurs, lawyers, businessman, OHADA agents, clerks, and others. Id 115(fn11); see Deschamps ‘Commercial Law Reform’ op cit (n200) (findings based on empirical research in 2009, 2010, and 2011 with entrepreneurs, jurists, and academics in Benin, with an emphasis on female enterprises.)


\footnote{365} Dickerson ‘Functional Understanding’ op cit (n250) 187-188.

\footnote{366} Ibid.
the functionality (not necessarily the form) of these laws and structures that African countries need to replicate in their own economies.\textsuperscript{367} A functional approach to law reform is focused on outcomes rather than process and formality, shifting the emphasis from standardisation of mechanisms to functionality, responsiveness, and adaptability.\textsuperscript{368}

What is needed is a pluralistic legal framework that is responsive to the needs of micro-enterprises. In some matters the formal law should defer to local informal law. Further reforms need to include the interests of those who were previously marginalised in the formulation and administration of existing policies and institutions.\textsuperscript{369} Model laws or legislative guides might be more appropriate tools in future reforms.\textsuperscript{370} OHADA constituents must be more broadly and inclusively conceived of and attended to, and the highly diverse and socially-oriented nature of African people and societies must be taken into consideration.\textsuperscript{371} The objective should be to promote needs-based commercial law reform in the region that is attuned to local practices to allow citizens to play a more effective part in their own development and to best effectuate the human agency function.\textsuperscript{372}

Facilitating the operation of local businesses would lead to more successful sustainable development.\textsuperscript{373} Micro-enterprises need access to credit, to subcontracting links with the formal sector, and to export markets. The creation of reliable and well-functioning commercial registries would be a good step in providing the accurate information about operators or enterprises that is needed for firms to initiate relationships

\begin{thebibliography}{99}
\setlength{\itemsep}{0pt}
\bibitem{367} Dickerson ‘Functional Understanding’ op cit (n250) 187-88. The relevant law extends beyond classic business law, and non-business law ensures basic physical security of persons and property.
\bibitem{368} Milhaupt op cit (n60) 844.
\bibitem{369} Prado & Trebilcock op cit (n108) 369.
\bibitem{370} Deschamps ‘A Grounded Outlook’ op cit (n307) 124.
\bibitem{371} Beauchard op cit (n296) 325; Vanderlinden op cit (n26) 1057
\bibitem{372} Deschamps ‘Commercial Law Reform’ op cit (n200) 60. The author calls her approach ‘clinical legal pluralist’ which aims to reconcile the formal with the informal rather than integrate the latter into the former. Id 34 (fn 38).
\bibitem{373} Deschamps ‘A Grounded Outlook’ op cit (n307) 113.
\end{thebibliography}
and to properly assess transactional risk. The disadvantages stemming from the limited size of the local market and limited access to a larger pool of partners could be reduced by facilitating access to foreign and regional markets through the establishment of collaborative partnerships between local or regional micro-enterprises and foreign firms. Associations and networks that help micro-operators develop their capacities and also to better understand formal laws could be promoted. The intent is to build bridges between the formal and informal and have a ‘composite law’ that is well-suited to African realities. In Chapter 4 possible methods to build these bridges are explored.

374 Paquin op cit (n42) 127
375 Ibid.
376 Hiez & Menétrey op cit (n284) 438, 460.
CHAPTER FOUR – LINKING OHADA AND THE INFORMAL SECTOR

4.1 Mediation

Another area where OHADA missed an opportunity to incorporate African values was in its selection of arbitration as the sole alternative dispute resolution (ADR) mechanism to the exclusion of mediation. As many as 90 percent of day-to-day disputes are said to be resolved through non-state systems such as traditional authorities. The most common conclusion in legal research is that the dysfunction of the courts themselves causes there to be so little recourse to formal dispute mechanisms, but another possibility is that the methods being imposed do not fit with local realities and traditional practices. The essential role of courts is to provide effective dispute resolution fora for constituents, but OHADA fails in this role. Arbitration under OHADA is designed for large commercial enterprises. It is not really suitable for most Africans and micro-operators. The arbitration process is impersonal and removed from people’s experiences and communities – culturally and geographically. Traditional tribunals draw upon local, customary norms rather than state norms to resolve disputes and usually strive to reach consensual outcomes. Traditional dispute resolution mechanisms are more locally based, as is formal mediation. Mediation is less formal, less expensive, and is more flexible than arbitration. In the mediation process, as in traditional African dispute resolution processes, when conflicts are resolved they are ultimately settled by agreement between or among parties. Mediators, likely experienced or respected member of the local communities, facilitate the process and nudge parties toward an agreement, but they don’t impose a solution as does an arbitrator or arbitration panel. And intermediation by attorneys would not be required in mediation as it is under OHADA arbitration. By incorporating mediation into OHADA judicial reform, local actors would be involved,


378 Hiez & Menetrey op cit (n284) 450.

379 Tamanaha ‘Primacy of Society’ op cit (n10) 224.
and thus settlements more likely to be respected. In this way, the judicial process would be more integrated into the daily lives of informal sector actors. With mediated settlement agreements there is – theoretically, if not practically – enforcement recourse to the courts if necessary. But this is different than an arbitral award which is imposed and enforceable as judgment. In mediation the parties are not forced to settle, nor is a judgment (award) imposed on them as in arbitration. The essential feature of a mediated settlement agreement, as with results under customary law tribunals, is that it represents an acceptable rule for the situation at hand in the minds of all participants so that a common feeling of justice prevails. Mediation is ultimately about conciliation of competing demands. By omitting the conciliatory process and nature of mediation, OHADA fails to allow for the development of human agency through local stakeholder participation. Conciliation of disputes and conflicts over competing interests is a necessary step in the development of people’s capacity to govern themselves. The process and mechanics of the OHADA arbitration process bypass that important work. This is an instance where the OHADA legal reforms could have been more attuned to customary law and practices. Mediation could be incorporated into the OHADA regime consistent with local or customary norms. Formal mediation could be built upon or complement traditional dispute resolutions mechanisms and local tribunals. If the mediation process were formalised and adopted by local constituents it might also improve the reception of other OHADA laws. It would be a bridge between OHADA and the informal sector.

4.2 Corporate Social Responsibility

OHADA formal law could reach the informal sector if it incorporated into its norms a conception of corporate social responsibility (CSR) based on a stakeholder theory in corporate law and governance. According to the evolving stakeholder theory, a company must consider a range of interests, and not only the shareholders (owners), in its decision-

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380 Vanderlinden op cit (n26) 1053, 1061.
making and its business operations.  

If a broad conception of CSR were adopted and integrated into OHADA law, larger formal enterprises might be required to address local conditions and institutions and to contribute to sustainable economic and social development. The United Nations, for instance, encourages regional organizations such as OHADA to introduce the necessary institutional and legal mechanisms to promote the adoption of CSR practices by enterprises in regard to sustainable development. One such mechanism would be for the Conference of Heads of State and of Government or the Council of Ministers to implement CSR provisions supplemental to business laws or to adopt a charter with CSR guidelines for the OHADA region. The basis for a robust conception of CSR may already exist, however, under OHADA corporate law in the concept of intérêt social.

4.2.1 Intérêt Social

Under French law, the goal of the corporation is to respect the intérêt social (translated as ‘social interest’ or ‘corporate interest’), which is a flexible, stakeholder-oriented conception of corporate governance. The majority view is that corporate interest is expansive and includes all the interests of the corporation as a whole, even the interests of third parties that have contracted with the corporation, including employees, creditors, suppliers, and customers. The concept was already present in the French corporate law that existed in the region before OHADA, and OHADA appears to have adopted the stakeholder oriented conception of corporate interest. If this conception were to be

382 Ibid.
383 Ibid at 54.
384 Ibid at 56.
385 Dickerson ‘OHADA Calls the Tune’ op cit (n26) 44 (as distinguished from the concept of shareholder primacy dominant in the United States).
386 Ibid.
387 Ibid at 45. There is not enough jurisprudence yet under OHADA to know whether an expansive view of corporate interest will be embraced.
fully embraced, OHADA norms of CSR could include affirmative obligations to provide various services to those whom its operations affect, including those operating in the informal sector.\textsuperscript{388} Corporate interest would then require balancing the perceived needs of potential investors with the interests of the citizens and local communities in the region.\textsuperscript{389} An expansive concept of corporate interest would be consistent with OHADA’s purported aim to enhance the region’s development. Moreover, a concept of corporate interest (or CSR) that values the entire community would be consistent with traditional African norms and customs.

4.3 Pro-Development Formal Law

Legal systems can be distinguished by the function law plays in support of economic activity.\textsuperscript{390} The clear allocation and protection of property rights is only one possible function.\textsuperscript{391} Another is the coordinating function of law where the focus is on the designation of actors with a right to participate in processes in which rights will be affected.\textsuperscript{392} According to Milhaupt, the ‘protective’ and ‘coordinative’ functions of law coexist, and the dominance of one or the other distinguishes legal systems.\textsuperscript{393} As we saw in Chapter 3, OHADA laws are focused on the protective function. This chapter looks at how OHADA could play a coordinative function. Dickerson argues that formal laws can be pro-development within the informal sector if they (1) impose ‘function-enhancing obligations’ on formal-sector actors who interact with micro-enterprises in the informal sector, and (2) ‘facilitate coordinative behaviour’ among informal sector actors in a

\textsuperscript{388} Dickerson ‘OHADA Calls the Tune’ op cit (n269) 45.

\textsuperscript{389} Ibid.

\textsuperscript{390} Milhaupt op cit (n60) 836.

\textsuperscript{391} Ibid at 837. In such ‘protective’ systems, the legal system devotes most attention to creation of substantive legal rights and their enforcement through legal and judicial processes. Id at 843.

\textsuperscript{392} Ibid. The German system of co-determination is an example of the ‘coordinative’ approach to economic governance. Co-determination is the legal requirement that large German firms provide half the seats on the Supervisory Board to employee representatives (fn 14).

\textsuperscript{393} Ibid at 838.
manner compatible with pre-existing norms.\textsuperscript{394} These two roles are separate but related. If coordination among micro-enterprises is facilitated, they are then in a position to make more credible demands on formal sector actors. At the same time, micro-operators who are the beneficiaries of obligations imposed on formal sector actors, will likely be in a better position to organise and coordinate their own efforts.

4.3.1 Function enhancing obligations

Some of these sorts of ‘function-enhancing obligations’ could be derived from an expansive concept of corporate social responsibility (supra 4.2). Function-enhancing obligations would have to be imposed on government agents or private, formal sector actors. One example could be the provision of a standardised commercial lease for micro-enterprises for stalls or other space, which might also contain terms requiring basic sanitation, water, and electricity.\textsuperscript{395} Such a standardised lease could reduce the costs of entering into lease agreements and possibly minimizing subsequent disputes.\textsuperscript{396} In addition, regulations at the state or local level could require decent workspace for street traders and vendors, both in terms of permanence, storage facilities, and location desirability.\textsuperscript{397} Another benefit of the provision of these basic support structures or function-enhancing obligations is that micro-enterprises would then need less capital.\textsuperscript{398} The focus in this chapter, however, is on the coordinative role of formal law.

4.3.2 Facilitating Coordinative Behaviour

Formal law can play a coordinative role by supporting existing informal networks and associations and by facilitating the creation and support of formal cooperatives.\textsuperscript{399} Coordination is critical for achieving solutions to problems, and cooperatives have great

\textsuperscript{394} Dickerson ‘Functional Understanding’ op cit (n250) 183-184.

\textsuperscript{395} Dickerson ‘OHADA on the Ground’ op cit (n321) 116-117.

\textsuperscript{396} Ibid.

\textsuperscript{397} Dickerson ‘Functional Understanding’ op cit (n250) 215

\textsuperscript{398} Ibid at 210.

\textsuperscript{399} Ibid at 214.
potential for coordinating self-help action. Cooperative structure tracks local networking norms and is consistent with the principle of subsidiarity. The creation of a strong, autonomous cooperative sector would be a catalyst to the coordinative role of formal law. OHADA formal law provides such a vehicle in the Uniform Act on Cooperative Societies.

4.4 Uniform Act on Cooperative Societies

In 2002, the International Labour Conference of the ILO adopted the Promotion of Cooperatives Recommendation (No. 193), a set of non-binding guidelines which provides a modern framework for cooperatives. The Recommendation incorporates the 1995 International Statement of Cooperative Identity and the cooperative principles of the International Co-operative Alliance (ICA). Since its adoption, over 100 countries have used Recommendation No. 193 to revise and develop their cooperative policies and laws, and it was followed in the creation of the UA-CS. Cooperative are based on the values of self-help, individual-responsibility, democracy, equality, equity, and solidarity. The core principles of cooperatives are: voluntary, open membership; democratic member control; member economic participation; autonomy and independence; education, training and information; cooperation among cooperatives; concern for the community.

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401 Dickerson ‘Functional Understanding’ op cit (n250) 214.
404 Ibid. The ICA is a non-profit, non-governmental international association established in 1895 to advance the cooperative social enterprise model, and is the apex organisation for cooperatives worldwide. http://ica.coop/en/international-co-operative-alliance.
405 Ibid at 26, 27.
407 Ibid at 6.
The UA-CS deals only with the structure and general governance of the cooperative and not specific rules regarding the activities of the cooperatives.\textsuperscript{408} The UA-CS emphasises the notion of a ‘common bond’ shared by co-operators related to a profession, an identity of purpose, or an activity.\textsuperscript{409} If the activity of the cooperatives requires a grant of authorisation from a regulatory body, then that activity is governed by the applicable rules of the authorising agency.\textsuperscript{410} Banking and financial cooperatives’ activities are explicitly made subject to national and regional laws.\textsuperscript{411} The Act grants ample freedom to co-operators in establishing by-laws and the flexibility to allow cooperatives to incorporate local or national traditions that fit with the concrete needs of the specific population.\textsuperscript{412}

The definition of a cooperative is taken directly from Recommendation 193:

\ldots an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly owned and democratically controlled enterprise according to the cooperative principles.\textsuperscript{413}

An entity could be a ‘cooperative’ as defined above without technically being a ‘cooperative society’ in accordance with the U-CS. The seven ICA cooperative principles listed above are restated in the UA-CS, and these principles must be included in the by-laws along with the agreement of the members to comply with them.\textsuperscript{414} Each co-operator has one vote regardless of the size of her shareholding or

\begin{enumerate}
\item David Heiz and Willy Tadjudje `The OHADA Cooperative Regulation` in Dante Cracogna, Antonio Fici, and Hagen Henrý \textit{International Handbook of Cooperative Law (2013)} 94, 96. (parenthetical references below are to articles of the UA-CS)
\item Ibid at 99 (art 8)
\item Heiz & Tadjudje op cit (n408) 96 (art 2).
\item Ibid at 110-111 (art 18).
\item Hiez & Tadjudge `Presentation` op cit (n410) 4 (art 4).
\item Hiez & Tadjudge op cit (n408) 95-96. (art 6, 18).
\end{enumerate}
starting date of her membership.\textsuperscript{415}

The UA-CS creates two kinds of cooperative companies: a simplified cooperative and cooperative with a board of directors.\textsuperscript{416} The cooperative only obtains its juristic personality after it has been registered with a Register for Cooperatives (based on the model of the RCCM), which must be done within one month of incorporation.\textsuperscript{417} Share capital is the contribution made by co-operators, which can be in cash, in kind, or in industry, and is reimbursed when a member leaves the cooperative, usually at a nominal value.\textsuperscript{418} Cooperatives must establish a general reserve and a reserve for training and education on cooperative principles, which reserves remain non-distributable even after dissolution.\textsuperscript{419} The causes of dissolution are much the same as under company law.\textsuperscript{420} However, upon liquidation, the assets of the cooperative must be allocated to other cooperatives, institutions, or organisations working to promote the cooperative movement.\textsuperscript{421} Payment of patronage refunds can only be considered after the legal reserves are established.\textsuperscript{422} Cooperatives are comprised of three bodies: a general meeting, a management body (committee or board of directors), and a supervisory committee or supervisory board.\textsuperscript{423} The general meeting, which includes all co-operators, is the decision-making body, and its decisions are recorded.\textsuperscript{424} Any person wishing to join a

\textsuperscript{415} Hiez & Tadjudge op cit (n 408) 101 (art 102).

\textsuperscript{416} Ibid at 96. Board members can be individuals or legal persons. Id 102 (art 295). A cooperative with a board must appoint at least one auditor when specified conditions are met. Id 103 (art 103).

\textsuperscript{417} Ibid at 98 (art. 75, 154).

\textsuperscript{418} Ibid at 9, 11 (art 11).

\textsuperscript{419} Ibid at 100-101 (art 114, 168).

\textsuperscript{420} Ibid at 106 (art 177).

\textsuperscript{421} Ibid at 107 (art 196).

\textsuperscript{422} Ibid at 101 (art 112).

\textsuperscript{423} Ibid at 101-102 (art 223, 260).

\textsuperscript{424} Ibid (art 242, 251, 104, 105).
cooperative must apply in writing and be approved by the general meeting.  

Cooperatives can be integrated into umbrella cooperatives at three different levels: unions (two or more cooperatives), federations (two or more unions), and confederations (two or more confederations). These umbrella organisations function much like primary cooperatives and, in the absence of specific provisions, are governed by the same general rules as cooperatives with boards of directors. UA-CS has established a new level of integration – ‘cooperative networks of resources and objectives’ – which can operate transnationally to implement any means to facilitate, improve, or develop the activity of their members or to promote cooperative principles.

There remains a problem regarding other societies that resemble cooperatives (e.g. mutual societies, tontines, rural associations) and that might be regulated under national laws but which are not qualified technically as cooperatives under UA-CA. This raises questions regarding the abrogation of national laws governing these institutions and whether these other institutions can or must be converted to formally compliant cooperatives. Another problem is the creation of a functioning Register for Cooperatives, which suffers from the same issues as the does the establishment of the RCCM (supra 3.2.1a), namely, it doesn’t exist. This is all complicated by the fact that any person who uses the legal form of a cooperative must

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425 Hiez & Tadjudge op cit (n408) 99 (art 10). Discrimination is forbidden, but co-operators can be excluded for specified reasons, including lack of faithfulness to the cooperative (art 6, 13).
426 Ibid at 103 (art 133, 141, 155).
427 Ibid at 104 (art 140, 150, 159).
428 Ibid (réseaux coopératifs de moyens d’objectifs, art 160).
429 Ibid at 107.
430 Ibid 108.
431 Hiez & Menétrey op cit (n284) 445-46. Only the Republic of Gabon has actually adopted the regulatory measures necessary to operate such a registry. Id 446.
comply with the UA-CS, subject to criminal liability for failing to do so.\textsuperscript{432}

4.5 Scope and Characteristics of Cooperatives

Cooperatives are significant economic force in nearly every developed country and have been major contributors to economic growth and poverty alleviation.\textsuperscript{433} In many countries cooperatives are among the largest enterprises in diverse fields, including agriculture, savings and credit, rural electricity, insurance, housing, and renewable energy.\textsuperscript{434} Membership in cooperatives is estimated to be nearly one billion with another 100 million directly employed by cooperatives, and 2,000 cooperatives in 56 countries have a total turnover of US$ 2,578.5 billion.\textsuperscript{435} There are three times as many member-owners as there are individual shareholders in investor-owned enterprises worldwide.\textsuperscript{436} Unfortunately, results have been much less impressive in less-developed countries.\textsuperscript{437}

The cooperative is a distinctly modern form of business, not a peripheral or culturally limited form of organisation.\textsuperscript{438} Cooperatives are commonly much more closely controlled by their member-owners than are investor-owned firms, but control in a cooperative is broadly diffused among its members.\textsuperscript{439} A cooperative is generally dependent on economies of scale.\textsuperscript{440} Ownership of a cooperative is rarely shared by a

\textsuperscript{432} Hiez & Tadjudge op cit (n408) 107 (UA-CS art 386).
\textsuperscript{433} OCDC op cit (n406) 6.
\textsuperscript{434} Ibid at iii.
\textsuperscript{435} Ibid op cit (n403) 22.
\textsuperscript{437} Ibid.
\textsuperscript{439} Ibid at 398.
\textsuperscript{440} Ibid at 399.
group of patrons that exhibits any substantial diversity, because the costs of collective decision-making are very high for a heterogeneous group of owners. Cooperative philosophy emphasises local responsiveness, decentralised decision making, participation and involvement, and local generation and distribution of wealth. The essential characteristic of a cooperative is that it is a democratic organization providing goods and services in the market place with the purpose of bringing sustainable prosperity to its members. Cooperatives are locally created and embedded voluntary and participatory associations whose members share a group identity and rely on local capital mobilization. Ownership and control by members is a key aspect of cooperatives and members are the prime beneficiaries of the cooperative enterprise. Cooperatives differ from other forms of commercial enterprise in that their owners invest in order to create a business that will benefit them through their patronage, not from a return on their equity. Surplus revenues are returned to members proportionate to their trade with the cooperative (patronage refunds), reinvested in the cooperative, or used to provide additional member services.

Most cooperatives in Africa are related to agricultural activities, but savings and credit cooperatives are the second largest and fastest growing cooperative sector and may be the predominant form of micro-finance institution in Africa. Established cooperatives often expand into ancillary services directly related to the core business of

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441 Hansmann op cit (n438) 395. ‘Patrons’ refers to all persons (individuals or other firms) who transact with a cooperative, either as purchasers of its products and services or as suppliers of some factor of production (capital, labour, or materials).

442 Torgerson, Reynolds & Gray op cit (n400) 9.

443 Smith op cit (n403) 19.


445 Ibid.

446 Ibid.

447 Smith op cit (n403) 19.

448 Develtere & Pollet op cit (n444) 53.
the cooperative, such as storage and packaging, and some seek expansion into the fields of insurance, credit, education and training, or medical services. In addition to the more traditional producer, worker, and consumer cooperatives, the range of areas covered by cooperatives in Africa includes housing, transport, tourism, recreation, basic infrastructure, mining, and handicrafts and other cottage industries. Cooperatives are often linked to social movements focused on poverty alleviation, social justice, and environmental issues. Participation in the Fair Trade Movement provides small producers an opportunity to participate in the global economy, especially trade in coffee, cocoa, cotton, and organic produce. Cooperatives can also take advantage of intellectual property, particularly trademarks on their products.

4.5.1 Cooperatives and Traditional Institutions

Modern cooperatives are similar to organisations of community and solidarity in Africa rooted in traditional social hierarchies, such as village associations and tontines, and they work best when the norms and values they rely on are congruent with those traditional systems. Unlike the modern cooperative form, however, these traditional systems do not have built-in mechanisms for expansion or growth and in most cases are event or hazard related and mobilised only on an ad hoc basis. The cooperative form provides a new framework that re-enforces and complements these traditional mutual support institutions. Cooperatives also often include ancillary mechanisms set-up to handle expenses related to wedding, illness, death or funerals that

449 Develtere & Pollet op cit (n444) 53.
450 Ibid at 54-55.
451 OCDC op cit (n406) 18
452 Ibid at 29.
453 Dickerson ‘Functional Understanding’ op cit (n250) 212.
455 Ibid.
456 Develtere & Pollet op cit (n444) 75.
are similar to the solidarity mechanisms that exist outside cooperatives, which are common to most African communities. 457

4.5.2 Development through Cooperatives

Cooperatives build social capital, which consists of all those aspects of social organization (institutions, relationships, attitudes, norms, and values) which govern and shape interactions and facilitate cooperation amongst the members of a community. 458 Cooperatives bring critical social services to their communities, generate economies of scale, increase efficiencies and access to information, improve the quality and value added to products, increase access to capital, and create bargaining power or leverage. 459 Cooperatives instil democratic values through member control, participatory management, self-reliance, and collective action, and they also provide opportunities for improvement of conflict management skills, all of which can contribute to the enhancement of civil society. 460 Cooperatives can offer these advantages whether or not they are incorporated under formal law. However, eventual formalization would be desirable for cooperatives to grow and remain sustainable.

Transformational development (the enhancement of human capability) requires fundamental changes in economic structures, governance, and institutions. 461 The wealth generation and social inclusion that cooperatives help foster is critical for transformational development. 462 Cooperatives are ‘the only form of organization meeting so fully all the dimensions of poverty alleviation as summarised by the

457 Develtere & Pollet op cit (n444) 75.
458 Davis & Trebilcock op cit (n41) 929.
459 OCDC op cit (n406) 8-9.
460 Ibid at 17.
461 Ibid at 8.
462 Smith op cit (n403) 3.
World Bank: opportunity; empowerment and security. Cooperatives contribute to transformational development through three primary pathways: economic (alleviating poverty, stimulating economic growth); democratic (providing a framework for democratic participation); and, social (building social capital and trust). ‘Cooperatives represent one of the few options that [micro-enterprises] have for surviving in a more concentrated and integrated global environment.’ They can consolidate the solidarity-based networks already existing in the informal sector to help ensure that communities can withstand and address the instabilities caused by globalisation. Cooperatives can have both an ameliorative and a transformative function. Cooperatives can help micro-operators organise for effective political action and to have a voice and the political power to demand better government-provided structures and services. Highlighting the contribution of cooperatives to socio-economic development, the UN declared 2012 as the International Year of Cooperatives (IYC). Building on that success, ICA developed the ‘Blueprint for a Co-operative Decade,’ which states that by 2020 the cooperative form of business will be the acknowledged leader in economic, social, and environmental sustainability, the model preferred by people, and the fastest growing form of enterprise.

4.6 Cooperative History in West Africa

The cooperative sector in Africa was introduced by colonial authorities with few, if any,
institutional links with indigenous or traditional systems, such as tontines in West Africa. A social economy model took root in many francophone countries, where groupemements collectifs, association villageois, mutuelles, producer groups, and other cooperative-type of organizations were promoted. The French opted for direct intervention in the organization and administration of local structures in West Africa, which were managed by colonial civil servants and had a large territorial base beyond the local level. Cooperative development in West and Central Africa displayed negative path dependence in continually being tied to the export crop strategy, where cooperatives were used instrumentally in the production of crops for export on behalf of colonial state authorities, and whereby governments became the prime patron of the cooperatives. Cooperatives in colonial Africa were ‘merely functional appendages’ of these semi-public agencies used for propagating public policy. Members were not the owners of the cooperatives and membership was often compulsory. Post-independence governments intensified and extended government involvement in cooperative development and reinforced this negative path by making cooperatives sub-contractors, agents, or affiliates of government controlled marketing boards. As a result, the cooperative sector lost its voluntary character completely and became subject to political and ideological imperatives. By the end of the twentieth century governments and

471 Develtere op cit (n454) 2.
472 Ibid at 27. As distinct from the social economy model of the former French colonies, the former British colonies had a more unified or integrated cooperative structure and sector, and the British played a more indirect role in the administration of cooperatives.
473 Ibid at 8. The French government passed a decree in 1910 prescribing the establishment of Native Provident Societies in French West Africa.
474 Ibid at 3.
475 Ibid at 11-12.
476 Ibid.
477 Ibid. It is estimated that at the time of independence less than 1% of the population of the former French colonies in Africa were involved in cooperatives.
478 Ibid at 14.
donors largely withdrew from the cooperative sector.\textsuperscript{479}

4.7 Challenges for Cooperatives

Statistics about African cooperatives are scarce, and the extent and the significance of the African cooperative movement is unknown.\textsuperscript{480} The penetration rate (cooperative density) is estimated to be only 7 per cent of the total population, but differences among countries is significant.\textsuperscript{481} One of the main reasons for the scarcity of data on cooperatives is the low participation of African cooperatives in international apex organizations.\textsuperscript{482} The number of cooperatives recorded in the data may be skewed higher because of the variety of business models in the region recognised as group-based economic organisations that could be counted as cooperatives.\textsuperscript{483} The impact of cooperatives on poverty reduction in African has not been studied systematically, but it appears that the general economic significance of the cooperative sector has been limited.\textsuperscript{484}

The first step in the creation of a strong, autonomous cooperative sector in the economies of West Africa is overcoming the negative legacy described above. A major challenge to successful cooperative development (which the UA-CS partly addresses) has been the lack of an enabling legal and regulatory environment and supportive institutions that promote cooperatives as private sector businesses.\textsuperscript{485} Another challenge is for cooperative members to remain the primary beneficiaries of group action for which they originally organised.\textsuperscript{486} In addition, the multiple purposes of cooperatives – making profits, providing services, and realising meaning – are often in

\textsuperscript{479} Develtre op cit (n454) 25.

\textsuperscript{480} Develtre & Pollet op cit (n444) 39, 44.

\textsuperscript{481} Ibid at 45. Total population is used for potential membership because other indices are impossible to produce in most Africa countries.

\textsuperscript{482} Ibid at 44.

\textsuperscript{483} Ibid at 42.

\textsuperscript{484} Ibid at 60, 75.

\textsuperscript{485} OCDC op cit (n406) 26.

\textsuperscript{486} Torgerson, Reynolds & Gray op cit (n400) 10.
Another concern is the status of cooperative-like organisations that are not included in the UA-CS or cooperatives that are not formalised, since we do not want to crowd out or diminish existing institutions that are adequately serving the needs of informal sector actors. Organisations can function in accordance with the cooperative principles without being formalised as cooperatives under the UA-CS. In many instances a less formal structure may provide a more flexible and appropriate organisational form for collective action.

Cooperatives are strengthened and serve their members most effectively by working together through local, regional, national, and international structures to form a more integrated cooperative sector. These secondary and tertiary structures (vertical and horizontal) bring greater benefits of economies of scale and leverage and better access to markets. The importance of cooperative networks is reflected in the UA-CS articles on unions, federations, and confederations. There has not been much integration in the cooperative sector in Africa, which historically has been fragmented and overly dependent on outside patrons. As a consequence, the voice of the cooperative constituency has been underrepresented.

The UA-CS is subject to many of the same implementation issues plaguing OHADA as whole. However, unlike the bulk of existing OHADA law, the UA-CS is geared to actors in the informal sector, and its structure and principles have been derived over many years from the experiences and aspirations of marginalised groups all over the world. Notwithstanding its formal requirements, the UA-CS is also flexible and can accommodate the various contexts and needs of potential members. In addition, cooperatives complement and are reflective of traditional African norms and institutions.

487 Torgerson, Reynolds & Gray op cit (n400) 8.
488 Bianchi op cit (n466) 32, 34.
489 Develtere & Pollet op cit (n444) 46-47.
490 Ibid at 47.
491 Ibid at 75, 80.
The cooperative form and principles also satisfy the criterion of subsidiarity and are consistent with a human capability concept of development.

4.8 Reintegration

One aspect of modern legislative action throughout Africa, including OHADA, is an attempt to restore a measure of ‘re-integration’ in contemporary African society. Allot describes the process of ‘dis-integration’ of African societies this way:

[T]raditional [African] societies, though in continuous evolution, were integrated societies. There was an intimate connection in each society between its religion, moral code, and system of thought, its social manners and conventions, its modes of economic activity, its family or social structure and its legal system. This integration was damaged, and eventually shattered, by the arrival of colonial rule and imposition of colonial law, followed by the penetration of European ideas, activities, and institutions. This disintegration within the local indigenous society was repeated higher up the scale, at the territorial level: there was little or no real unity of thought or purpose between those who happened to find themselves within the same territorial boundary. In addition, there was a gradual abandonment of a community-centred approach to life in favour of individualism. Writing shortly after the time of independence, Allott saw the movement towards unification of laws in Africa in optimistic terms as the expression in legal terms of this reintegration effort. However, unification of laws was to occur in stages -- first, harmonisation, then integration, and finally unification.

[H]armonization is . . . the reconciliation of contradictory elements between the rules and effects of two or more legal systems which continue in force as self-sufficient bodies of law. . . . [I]ntegration is . . . the making a new legal system by the combining of separate legal systems into a self-consistent whole. . . . [The combined legal systems may remain sources of law], but they cease to be self-sufficient autonomous systems. . . . [U]nification is . . . the creation of a new, uniform, legal system entirely replacing the pre-existing legal systems, which no longer exist, either as self-sufficient systems or as bodies of rules incorporated in the larger whole . . . .

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494 Mancuso op cit (n119) 8.
495 Allott ‘Unification’ op cit (n493) 389.
496 Ibid at 376.
497 Allott ‘Unification’ op cit (n493) 377.
A crucial attribute of harmonisation is that it presupposes and preserves the diversity of the objects harmonised.\textsuperscript{498} True harmonisation would respect the legal pluralism in the region, whereas forced unification is antithetical to pluralism. No real effort at harmonisation of laws seems to have ever been undertaken in Africa.\textsuperscript{499} Legal reforms, such as OHADA, seek to unify laws without working through earlier, conciliatory stages of harmonisation and integration. Moreover, these uniform laws have been imposed from outside sources rather than developed internally. For Allot, it is a question of finding an alternative new law which reconciles and unifies existing laws – when they are as various as customary law on the one hand and modern commercial law on the other.\textsuperscript{500} The key element in finding this alternative new law is the process itself of accommodation and reconciliation. The goal is to re-establish broken harmony through a collective process leading to reconciliation.\textsuperscript{501} Integration through forced unification of laws short-circuits the necessary process of the conciliation of laws and peoples. The social and political conditions necessary for unification must first exist. Law reform should create a space where there is common ground to move toward integration, wherein different legal orders are viewed interdependently and equally.\textsuperscript{502}

The introduction of mediation into OHADA and the adoption of expansive corporate social responsibility norms that consider the wider community would provide a space for African norms and values to play out. Because of their solidarity and coordinative features, cooperatives, as modern commercial enterprises, would be especially useful in creating or supporting the foundational social and political institutions needed for pluralistic legal development.

\textsuperscript{499} Matipé op cit (n303) 9.
\textsuperscript{500} Allott ‘Unification’ op cit (n493) 386.
\textsuperscript{501} Vanderlinden op cit (n26) 1064.
\textsuperscript{502} Mancuso op cit (n119) 14.
CONCLUSION

Some scholars are skeptical of the ability of OHADA to bring about development in West Africa and have reservations about the amount of money spent for the benefit of a relatively small clientele.503 While sharing those reservations, this paper has attempted to propose some ways to improve the applicability and receptivity of OHADA laws more broadly and inclusively – to link OHADA to the informal sector. The introduction of mediation into OHADA and the adoption of expansive corporate social responsibility norms that consider the wider community could be helpful in that regard. A promising and comprehensive means to make this link would be for the relevant constituents (and their governments) to fully embrace and support the UA-CS. As of this writing, there is insufficient data available about the state of the cooperative sector in the several years both before and after implementation of the Uniform Act on Cooperative Societies, and so more research is needed. Nevertheless, the benefits of cooperatives in enhancing development in the region and in linking OHADA with the informal sector could be significant.

OHADA has not been shown to be successful in promoting or causing economic development in Member States. This might be the case because OHADA laws and institutions are mostly irrelevant to the economic and social life of the vast majority of the people living throughout the OHADA region. Contrary to its stated objective to be ‘adaptable’ to the economic realities of the region, OHADA, as a whole, is not adapted to the reality of the informal sector. The enactment of the UA-CS now makes OHADA law relevant to the informal sector (at least formally, on paper) but it is too soon to know if the Act will substantively improve the overall situation.

Moreover, in seeking to unify all business laws in the region – by ignoring or attempting to supplant all existing practices and customary laws – the OHADA reform effort might itself actually impede development. Sustainable development requires the

503 Vanderlinden op cit (n26) 1070-71.
vitality and involvement of important pluralistic elements in society, including customary laws and informal institutions. Not only does OHADA fail to take into account the existing legal pluralism in the region, but OHADA reformers sought to eliminate legal diversity in commercial matters. What is needed is a functional and pluralistic legal framework that is responsive to the needs of micro-enterprises and that works toward reconciliation of the various laws and practices related to economic activity within individual countries and throughout the region. Consideration of the complex and diverse informal sector in West Africa requires us to re-examine presumptions about the relationship between the informal sector and economic development, including the presumption that informality is necessarily an obstacle to development. Regardless of one’s perspective concerning the role of informal institutions and their impact on commerce in the region, the reality of the informal sector must be understood and addressed before any successful, commercial law reform can be effectuated.

Formal law must create a structure or framework – by facilitating coordinative behaviour – within which traditional or local business norms can play out and evolve. Formal laws and institutions must also respect, accommodate, and in some cases, defer to customary laws. Modern cooperatives can provide the framework for facilitating coordinative behaviour. Cooperatives and the traditional institutions of mutuality, reciprocity, and solidarity that exist throughout West Africa share many of the same values, principles, and objectives. Tontines, for example, could be even viewed as precursors to modern cooperatives. However, the modern cooperatives form can offer improved sustainability and growth potential for its members. Cooperatives can make an important contribution to transformational and sustainable development, since collective action and mutual aid enhances the capacity and self-help agency of informal sector actors. They allow micro-enterprises to overcome various market barriers and to achieve mutual economic goals that cannot be met in isolation. By linking small-scale producers to larger markets cooperatives can improve regional, intra-African, and even international trade. They can also provide more certainty and
stability for informal sector actors. The solidarity and collective action features of cooperatives also give people a voice and a better opportunity to demand the law and institutions they need. Although the cooperative form is important, it is the substance of the law as embodied in the cooperative principles that is more significant. Micro-operators could be enticed to move toward formalization as their understanding and appreciation of the benefits of formality evolve over time. Ultimately, widespread adoption and use of the UA-CS could perform a signaling function for micro-operators throughout the region as to the benefits of formal rules and structures for conducting, sustaining, and expanding their businesses.
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