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Toward an Elaboration of a More Pluralistic Legal Landscape for Developing West African Countries: Organization for the Harmonization of Business Law in Africa (OHADA) and Law and Development

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Abstract: In Europe and especially in France, the African business law landscape, as well as the legal discourse, for developing West African countries is almost exclusively dedicated to OHADA, the Organization for the Harmonization of Business Law in Africa, created in 1993. While economic development in the Member States is the obvious underlying reason for the modernization and unification of African business law, the exact nature of such development remains uncertain, as does the manner in which a such result can or will be achieved. OHADA's Uniform Acts are, with some minor exceptions, a carbon copy of French business law. The only goal is to increase international investment, which, in turn, is expected to generate economic development, but all without taking any notice of equality or social justice issues. That, without a doubt, is the reason why OHADA is constantly criticized as a law that benefits foreign investors, while remaining ineffective, even illusory, for local traders. To go beyond the criticism, the authors have decided to focus on the relationship between law and the informal sector and to draw lines between formal and informal rules in the business sector.

Keywords: OHADA (Harmonized Business Law in Africa), informal rules, informal sector

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1 Introduction

The concept of "law and development" (sometimes herein L&D), as such, is hardly mentioned in existing French-language legal discourse.[1] Do not misunderstand, French authors such as Montesquieu and Saint-Simon have made the argument that economic development presupposes an institutional and legal framework, particularly in relation to real and personal property and contracts.[2] The political economy or, more precisely, the political-philosophical writings of Locke, Hobbes, and Rousseau are not unknown, either.[3] References to "development" are made in studies about the relationship between law and capitalism.[4] Moreover, a special literature has grown relating to the right of development; the public international law relating to the right to development emerged after UNCTAD[5] was formed and the Group of 77[6] made its claims, but

1 The expression "law and development" (sometimes L&D herein) targets those assistance programs relating to the development of legal doctrine in emerging countries. For a discussion of the important issues with respect to L&D, see D.M. Trubek, "Law and Development in the Twenty-First Century", 2009, Law and the New Developmental State (LANDS) Research Papers, p. 1, available at: <https://media.law.wisc.edu/s/c_638/myzm5/21st_century_law–brasilia_2009.pdf>, accessed 17 February 2015.

2 Several chapters of *L'Esprit des lois* are devoted to the relationship between law and economics: the first seven chapters of Volume VII address luxuries and laws relating to consumption, Volume XIII addresses taxes, Volumes XX and XXI address commerce and Volume XXII deals with currency. See V. Spector, *Montesquieu et l'émergence de l'économie politique* (Paris: Champion, 2006) and "Quelle justice? Quelle rationalité? La mesure du droit dans L'Esprit des lois", in C. Volpilhac-Auger (ed.), *Montesquieu en 2005* (Oxford: Voltaire Foundation, 2005), p. 219. Saint-Simon, *Œuvres de Claude-Henri de St-Simon* (Paris: Anthropos, 1966) broke with the then-current laissez-faire liberal framework to propose an institutional rationalization for industrial activity. See, G. Jean-Jacques, *L'émergence de la problématique des institutions en économie*, 1 *Cahiers d'économie Politique*/Papers in Political Economy, no. 44 (2003), 19.

3 D.M. Trubek and A. Santos trace the concept of L&D through the 19th century; see, D.M. Trubek and A. Santos, "The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice", in D.M. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006), p. 1.

4 G. Ripert, *Aspects juridiques du capitalisme moderne*, LGDJ, 1951, 2nd ed.; X. Lagarde, *Juste capitalisme Essai sur la volonté de croissance*, Litec, 2009.

5 Originally a single conference held in Geneva in 1964, UNCTAD (the United Nations Conference on Trade and Development) was institutionalized shortly thereafter. A conference is now scheduled every four years. See, e.g., UNCTAD's website for further information at <http://unctad.org/en/Pages/About%20UNCTAD/A-Brief-History-of-UNCTAD.aspx> (last visited 3 February 2015).

6 The so-called Group of 77 or G77, was established by seventy-seven developing countries at the original UNCTAD conference in Geneva on 15 June 1964. Although the G77 now has 134 members, it retains its name, according to its website, for its historic significance. See <http://www.g77.org/doc/> (last visited 3 February 2015)

that was done without any real reference to the existing North American work on L&D.[7] However, since the 2000s, particularly after the 2004 publication of the first *Doing Business* report, French legal scholars have come to recognize the importance of that work, which one French author has labeled "*droit et développement économique*" (that is, "law and economic development").[8]

This biased and partial acceptance of L&D work on the relationship between law and development in France can be attributed to a two-fold misunderstanding. Indeed, it is mainly in terms of an economic analysis of law that the L&D work has been received. Moreover, at least some French scholars (especially the *Association Henri Capitant des Amis de La Culture Juridique Française*[9]) have rejected outright L&D work because they believe it was based on the "legal origins" theory and only served the common law model at the expense of traditional civil law systems.[10] On top of that, very few studies have been critically reviewed, most notably those of R. La Porta, F. Lopez-de-Silanes, and

7 G. Feuer, "Techniques juridiques et valeurs morales en droit international du développement", *Mélanges A. Colliard* (Paris: Pédone, 1984), p. 242; B. Badie et M.-Cl. Smouts, *Le retournement du monde: Sociologie de la scène internationale* (2d ed., Paris: Dalloz-FNSP, 1995); M. Bedjaoui, *Pour un nouvel ordre économique international* (Paris: UNESCO, 1979); M. Benchikh, *Droit international du sous-développement: nouvel ordre dans la dependence* (Paris: Berger-Levrault, 1983); M. Bennouna, *Droit international du développement: Tiers-monde et interpellation du droit international* (Paris: Berger-Levrault, 1983); J. Bouveresse, *Droit et politiques du développement et de la coopération* (Paris: PUF, 1990). Y. Daudet, *Les Nations Unies et le développement social international* (Paris: Pédone, 1996) and *Les Nations Unies et le développement: le cas de l'Afrique* (Paris: Pédone, 1994); R.-J. Dupuy, *Le droit au développement au plan international*, Sijthoff, Leiden 1980; G. Feuer and H. Cassan, *Droit international du développement* (2d ed., Paris: Dalloz, 1991); M. Flory, *Droit international du développement* (Paris: PUF, 1977) et "Souveraineté des États et coopération pour le développement", *RCADI* 1974, I, t. 141, p. 257 à 329; A. Pellet, *Le droit international du développement* (2e éd., Paris: PUF, 1987). See also, J.-J. Israel, "Le droit au développement", *RGDI publ.*, 1983, p. 5 and G. Blanc, "Peut-on encore parler d'un droit du développement?" *JDI*, 1991, p. 903.

8 A.-J. Kerhuel and A. Raynouard, *Measuring the Law: Legal Certainty as a Watermark* (In French) (July 28, 2010), 8 International Journal of Disclosure and Governance, no. 4 (2011), 360–379; Georgetown Law and Economics Research Paper No. 10–12, available at SSRN: <http://ssrn.com/abstract=1650153>, accessed 3 February 2015.

9 Association Henri Capitant des Amis de La Culture Juridique Française, *Les Droits de Tradition Civiliste en Question: Á Propos des Rapports* Doing Business *de la Banque Mondiale*, Société de Législation Comparée, 2006.

10 E. Glaeser and A. Shleifer, *Legal Origins*, 117 Quarterly Journal of Economics, no. 4 (2002), 1193; T. Beck, A. Demirguç-Kunt and R. Levine, *Law and Finance: Why Does Legal Origin Matter?*, 31 Journal of Comparative Economics (2003), 653; R. La Porta, F. Lopez-de-Silanes and A. Shleifer, *The Economic Consequences of Legal Origins*, 46 Journal of Economic Literature, no. 2 (2008), 285.

A. Shleifer.[11] But, even those works were not representative of the research done regarding L&D, such that the relationships between institutions, democracy, and development have hardly been considered by French scholars.[12]

Nevertheless, due to their colonial past and subsequent decolonization, European countries have been strongly encouraged to focus their attention on the development of their former colonies. They have done so, from the perspective of either law or development, but the concept of L&D has never been the subject of an in depth analysis outside international development law circles. The relative isolation of the law in European research and the resulting lack of interdisciplinary research, has not allowed lawyers to analyze, in depth, the connections between law and development. In that regard, the research conducted by André Tunc at UNESCO's request, published in 1966 under the title "Legal Issues in Economic Development", is unique.[13]

That research reflects the possible approaches toward the necessary legal changes linked to decolonization: the establishment of a "modern" law modeled on pre-existing colonial law or a respect for traditional systems. Interestingly, the two reports from professors of law coming from Africa were in favor of what the general rapporteur called the "reformist trend" while the report of the British professor of anthropology opted for a "conservative approach".[14] That conservative contributor, Professor Gluckman, stressed that there was no need to substantially modify the existing pre-colonial systems "as they still work for a majority of Africans without them having gained a much deeper understanding thereof than we have."[15]

Subsequent history shows that normative action prevailed over sociological thinking. Scholars took over the fields of both action and thought from a purely positivist tradition. Thus, further research regarding the tensions between retaining former colonial law and the temptation to "renationalize" the law essentially stayed dogmatic works on positive law. The situation was different, however, in

11 R. La Porta, F. Lopez-de-Silanes, A. Shleifer and R.W. Vishny, *Law and Finance*, 106 Journal of Political Economy (1998), 1113; R. La Porta, F. Lopez-de-Silanes, A. Shleifer and R. Vishny, *Legal Determinants of External Finance*, 52 Journal of Finance (1997), 1131; S. Johnson, R. La Porta, F. Lopez-de-Silanes and A. Shleifer, *Tunneling*, 90 American Economic Review (2000), 22; S. Djankov, R. La Porta, F. Lopez-de-Silanes and A. Shleifer, *The Regulation of Entry*, 117 Quarterly Journal of Economics (2002), 1.

12 Y. Feng, *Democracy, Governance, and Economic Performance. Theory and Evidence* (Cambridge, MA: MIT Press, 2003).

13 A. Tunc (ed.), *Aspects juridiques du développement économique* (Dalloz, 1966).

14 A. Tunc, *idem*, p. 3

15 *Id*. "tels qu'ils fonctionnent encore pour une majorité d'Africains, sans en avoir acquis une connaissance beaucoup plus approfondie que celle que nous possédons".

economic and political science literature, particularly in the journal *Tiers-Monde*.[16] The social sciences were somehow closer to the current study of L&D, except that the perspective on law was not only methodologically outside the particular discipline, but was also undertaken by non-legal scholars. Thus, the law was the poor relation in development thinking in European literature.

Since the 1990s the legal business landscape, as well as the legal discourse, for developing West African countries has been dominated by OHADA, the Organization for the Harmonization of Business Law in Africa. The European response to OHADA is symptomatic of its positive law approach. European legal scholars have only studied the "new" harmonized business law of Sub-Saharan Africa from that positivist angle while political scientists and economists give it little or no attention in connection with economic development.[17] There is no equivalent research regarding OHADA law to compare to the L&D work that has already been undertaken for English-speaking Africa.[18] North American L&D research on OHADA is, in fact, rather rare, but it does demonstrate a direction that European research can take with respect to French-speaking Africa.[19] After a

16 See P. Marchesin, *Démocratie et développement*, 45 Tiers-Monde, no. 179 (2004), 487; E. Assidon, *Les théories économiques du développement* (Paris: La Découverte, 2002); Conseil d'analyse économique, *La France et l'aide publique au développement*, La Documentation française, 2006; J.-F. Baré, *L'évaluation des politiques de développement* (Paris: L'Harmattan, 2001).

17 We only found three references to OHADA in *Tiers Monde*, all of which were irrelevant as they were unrelated to the heart of our analysis. See also the special edition of *Jeune Afrique économique* dedicated to OHADA (February 15, 1998).

18 See M.A. Baderin, *Law and Development in Africa: Towards a New Approach*, NIALS Journal of Law and Development (Malden Ed., 2011), 1; E. Nnadozie, "NEPAD, APRM and Institutional Change in Africa", in S. Adejumobi and O. Adebayo (eds.), *The African Union and New Strategies for Development in Africa* (New York: Cambria Press, 2009), p. 207; I. Ayua, *Law and Development in Africa*, 3 International Journal on World Peace, no. 1 (1986), 71; T.M. Ocran, *Law in Aid of Development* (Tema: Ghana Publishing Corporation, 1978).

19 See, in particular, I. Deschamps, *Contributions to Poverty Reduction in Africa: A Grounded Outlook*, 6 Law and Development Review, no. 2 (2013), 111; C. Moore Dickerson, *Harmonizing Business Laws in Africa: OHADA Calls the Tune*, 44 Columbia Journal of Transnational Law, no. 1 (2005), 17, 30; C. Moore Dickerson, *The Future of International Law and Development: Flying under the Radar*, 35 North Carolina Journal of International Law and Commercial Regulation, no. 3 (2010), 563; and, C. Moore Dickerson, *Informal-Sector Entrepreneurs and Formal Law: A Functional Understanding of Business Law*, 59 American Journal of Comparative Law (2011), 179. For English-language articles on OHADA, see also, M. Bolmin, G. Bouillet-Cordonnier and K. Medjad, *The Prospects for Integration in West and Central Africa in the Light of Current Law Reform in the CFA Franc Zone*, 13 ICSID Review, no. 2 (1998), 440–454; B. Martor *et al.* (eds.), *Business law in Africa: OHADA and the Harmonization Process* (London: Kogan Page Ltd, 2002); and C. Moore Dickerson (ed.), *Unified Business Laws for Africa: Common Law Perspectives on OHADA* (2nd ed., London, Edinburgh: UNIDA, 2012).

short presentation of OHADA law and its relationship to development (2), this paper will focus on the inadequacy of this legal transplant with local realities (3). The wholesale transplant of Western legal concepts to Sub-Saharan Africa did not permit an appropriate and usable adaptation of such concepts to everyone's daily life in the region, which leaves open a number of questions. What groups should the law recognize as a single actor? Under what conditions? According to what procedures? With what limits? These are only a few of the innumerable questions, and we have certainly not formed opinions on the appropriate responses to any of them. Nevertheless, to not even attempt to formulate a response to such questions seems, to us, less than serious. That is why it seems important to draw bridges between formal and informal rules in the business sector in order to take legal pluralism seriously and to mark the diversity of forms that law can take (4).

2 Legal landscape and legal discourse focused on OHADA

2.1 OHADA's purpose and objectives

OHADA[20] is a regional organization that seeks to unify business law in its Member States. By introducing rules and institutions with the power to promote economic development, the normative actions adopted by OHADA come close to an economic development program via law.[21] OHADA's uniqueness lies in its regional dimension as well as its desire to establish a common business law across several countries in West and Central Africa.[22]

At the Franco-African summit held in Libreville in October 1992, the President of Senegal formally proposed the creation of an international organization with the express purpose of promoting harmonized business law

20 The Organization for the Harmonization in Africa of Business Law. The acronym OHADA is taken from French-language version of the name: *l'**O**rganisation pour l'**H**armonisation en **A**frique du **D**roit des **A**ffaires*. A rich bibliography of the literature on OHADA, although incomplete, may be found www.ohada.com (last visited 4 February 2015)

21 C. Ruez, *Coopération pour le développement*, Fasc. JCL Droit international, no. 4 and 6 (1999): "Le but du développement économique est d'accélérer le progrès vers la croissance auto-entretenue de l'économie des pays développés et des pays en voie de développement et leur progrès social."

22 See Moore-Dickerson (2005), *supra* note 19; *OHADA on the Ground: Harmonizing Business Laws in Three Dimensions*, 25 Tulane European & Civil Law Forum (2010), 103.

legislation across French-speaking Africa. In response, a committee of three legal scholars was appointed to identify those areas of business law that could be harmonized and to draft an international treaty intended to further that goal. The Treaty creating OHADA, an entity intended to develop a modern, common legal framework for business law within its Member States, was signed by fourteen West and Central African countries the following year; it entered into force in 1995. Three countries have since adhered to the Treaty.[23] OHADA, which comprises several implementing institutions (Permanent Secretariat, Assembly of Heads of State, Council of Ministers, Joint Court of Justice and Arbitration, School of Magistrates), adopts various uniform acts relating to particular areas of business law that, once adopted, replace the Member States' existing law in that particular area. As of 1 January 2015, nine uniform acts govern different aspects of business law across OHADA's seventeen Member States.[24]

By repealing and replacing, in their entirety, all of the Member States' national laws covering the same subject matter, OHADA's Uniform Acts, which can be found in print and online,[25] have an undeniable advantage over the Member State's prior legal texts, which were often scattered, difficult to access, and outdated.[26] Such unification of business law also limits conflicts of laws; if all Member States apply the same law, there can be little reason to argue over which Member State's law applies in a cross-border dispute.[27] Moreover, uniform interpretation by the Member States of this new, modern business law is assured by the creation of the Common Court of Justice and Arbitration (CCJA), a supranational court functioning as the court of last resort for all Member States with respect to OHADA's uniform laws.[28] OHADA's modernization of

23 As of this writing, the Contracting Parties to the OHADA Treaty are: the Republic of Benin, Burkina Faso, the Republic of Cameroon, the Central African Republic, the Union of Comoros, the Republic of Congo, the Republic of Côte d'Ivoire, the Republic of Gabon, the Republic of Guinea, the Republic of Guinea Bissau, the Republic of Equatorial Guinea, the Republic of Mali, the Republic of Niger, the Republic of Senegal, the Republic of Chad, and the Republic of Togo.

24 All the uniform acts are available at: <http://www.ohada.com/actes-uniformes.html>.

25 *Ibid*.

26 See R. Masamba, *Avantages comparatifs des Actes uniformes de l'OHADA*, Penant (2010), no. 869, 489; J. Issa-Sayegh, *La portée abrogatoire des Actes uniformes de l'OHADA sur le droit interne des Etats parties*, Revue burkinabé de droit (2001), no 39–40, no spécial, 51.

27 *Ibid*.

28 S. Ba, "La Cour Commune de Justice et d'Arbitrage (CCJA) de l'OHADA", *Journée d'étude sur L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA). De sa création à l'adhésion de la République Démocratique du Congo*. Université Catholique de LOUVAIN - Belgique et INEADEC (Institut euro-africain de droit économique), available at: <http://www.ohada.com/doctrine/ohadata/D-11-24.html>.

African business law and its superior accessibility and intelligibility, clearly add to "legal certainty", one of OHADA's "buzz words".[29]

2.2 OHADA law, development, and foreign investment

The Uniform Acts create a more favorable legal environment for foreign investment and international trade.[30] For the last several years, though, efforts have been made to shift the focus to developing the local economy, but they remain limited.[31] While economic development in the Member States is the obvious underlying reason for the modernization and unification of African business law, the exact nature of such development remains uncertain as does the manner in which such result can or will be achieved.

The first recital in the original 1993 OHADA Treaty reflected that the High Contracting Parties were:

> Determined to accomplish new progress on the road to African unity and to establish a feeling of trust in favour of the economies of the Contracting States in a view to create a *new centre of development* in Africa.[32]

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29 See S. Menétrey, "Sécurité et effectivité du droit dans l'espace OHADA", in *Droit, économie et valeurs. Liber amicorum Bernard Remiche*, Larcier, 2014.

30 See, particularly, K. M'Baye, "L'histoire et les objectifs de l'OHADA", *Petites affiches*, no. 205 (2004), p. 4; and Moore-Dickerson (2005), *supra* note 22, p. 17, 20 (The OHADA laws' articulated purpose is to facilitate investment in general, and foreign investment in particular"). For an approach less focused on foreign investment, see R. Beauchard, "OHADA nears the Twenty-Year Mark: An Assessment" in Hassane Cissé *et al.* (eds), *World Bank Legal Review: Legal Innovation and Empowerment for Development* (Washington, DC: World Bank, 2012), 323, p. 326 ("The drafters of OHADA had small merchants in mind when they defined OHADA's ambitious policy goals. But somewhere along the way, OHADA's lofty objectives came into conflict with the entrenched economic logic of autocracy and rent seeking at play in the member states, which typically support contract or property rights enforcement only for regime insiders.").

31 See Deschamps (2013), *supra* note 19 and I. Deschamps, "L'effectivité du droit OHADA: enquête auprès de femmes entrepreneurs au Bénin, au Cameroun et en Côte d'Ivoire", in D. Hiez and S. Menétrey (eds.), *L'effectivité du droit économique dans l'espace OHADA*, forthcoming, regarding the informal sector and the modification of the Uniform Act on general commercial law to introduce the concept of entrepreneurship in a way that allows movement from the informal sector to the formal sector.

32 Emphasis added. The original 1993 OHADA Treaty can be found at: <http://www.ohada.com/traite/10/traite-relatif-a-l-harmonisation-en-afrique-du-droit-des-affaires.html> (last visited 6 February 2015). Although there is no official English-language translation of the OHADA Treaty, see <http://www.ohadalegis.com/anglais/traiteharmonisationgb.htm> (last visited 6 February 2015).

The 2008 Treaty amending the 1993 OHADA Treaty can be found at: <http://www.ohada.com/traite/937/traite-portant-revision-du-traite-relatif-a-l-harmonisation-du-droit-des-affaires-en-afrique.html> (last visited 6 February 2015). Again, there is no official English-language translation of the

It is only in this recital that the word development is even used.

Moreover, the concept of "making Africa a development center" is strange because it does not address development of the African economy, itself.

Sure, in official speeches, local development and attracting international investment seem to go together, but in reality, the former often gives way to the latter. Economic and social "development" in OHADA's Member States takes a back seat to attracting international investment.

According to the rhetoric, everything happens as if law has an inevitable effect on investment and investment (not the law) is the ultimate prize due to its effect on development.[33] The only goal is to increase investment, which, in turn, is expected to generate economic development, but all without taking any notice of equality or social justice issues. That, without a doubt, is the reason why OHADA is constantly criticized as a law that benefits foreign investors, while remaining ineffective, even illusory, for local traders.[34]

2008 Treaty, the author, relying in part on the other translation of the 1993 recital cited above, roughly translates it as:

> Reaffirming their commitment to further progress on the road to African unity and their determination to strengthen legal and judicial certainty within the area of the Organization for the Harmonization of Business Law in Africa (OHADA), in the nature of ensuring a climate of confidence contributing to making Africa a center of development.

It should be noted that the official consolidated version of the 1993 OHADA Treaty, as amended by the 2008 Treaty, does not incorporate the first recital of the amending treaty quoted above, but only includes the first recital of the original 1993 Treaty. That official consolidated version can be found at: <http://www.ohada.org/traite-ohada-consolide-traites-1993-et-2008-combines.html> (last visited 6 February 2015).

33 See L. Johnson, "Philosophie économique et stratégie du développement prônée par l'OHADA", Séminaire sous-régional de sensibilisation sur le droit communautaire de l'UEMOA, 2003, Ohadata D-04-09; X. Darcos, in Association du notariat francophone, *Les mécanismes d'harmonisation du droit des affaires*, 2004, p. 28, available at: www.notariat-francophone.org/wp-content/.../anf_colloque_ohada.pdf (last visited 6 February 2015): « On ne dira jamais assez à quel point le droit en général, et en particulier celui des affaires au sens large, est un élément essentiel du développement économique et social. Un droit lisible et applicable est en effet indispensable pour répondre aux besoins de sécurité auxquels aspirent légitimement tous les investisseurs, qu'ils soient étrangers ou non ». The author roughly translates the quote as: We can never say enough about how law – particularly, business law in its largest sense – is an essential element of economic and social development. A readable applicable law is indeed essential to meet the needs of legal certainty to which all investors, whether foreign or not, legitimately aspire.

34 C. Moore Dickerson, *Informal-Sector Entrepreneurs and Formal Law: A Functional Understanding of Business Law*, *supra* note 19, p. 202.

From this perspective, OHADA's rhetoric puts "development" in a similar place to that of La Porta, Lopez-de-Silva, Shleifer and Vishny (collectively known as "LLSV") in *Doing Business*.[35] "These authors advanced the theory that an emerging economy's protection of investors – being a form of protection of property interests broadly defined – affects development."[36] More broadly, and somewhat paradoxically, OHADA plays the *Doing Business* game because it proposes law that is destined to facilitate an economic actor's business. Thus, OHADA champions the concept of "development-through-foreign-investment", despite the fact that the evidence suggests the impact of such investment on development is modest.[37]

In a way, OHADA law most closely approximates the concept of L&D as it stood in the 1960s, which considered transplanting legal systems or law a legitimate means of encouraging economic development.[38] By the mid-1970s, however, scholars in the U.S. had already denounced such legal imperialism, decrying the failure of such legal transplants undertaken in those early years of L&D.[39]

In contrast, in the mid-1990s, nearly all French-speaking legal scholars from both Africa and Europe welcomed warmly OHADA's Uniform Acts, which, with some minor exceptions, are a carbon copy of French business law.[40] Only

35 La Porta et al. (1998), *supra* note 11.

36 Moore Dickerson (2011), *supra* note 34, p. 202.

37 See A. Tiemann, "OHADA Membership and Business Reforms: a Driver for Growth?", 2013, available at: <http://colloque-dial.dauphine.fr/fileadmin/mediatheque/dial2013/documents/Papers/146_US_Tiemann.pdf> and also Perform Strategy & Co, *Etude Impact économique de l'OHADA*, October 2013, 75 pages and Doing Business 2009: OHADA available at: <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2008/09/12/000333037_20080912024758/Rendered/PDF/453400WP0Box331pt01010200801PUBLIC1.pdf> (last visited 17 February 2015).

38 E. Burg, *Law and Development: A Review of the Literature and a Critique of Scholars in Self-estrangement*, 25 American Journal of Comparative Law (1977), 492; J.A. Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (Madison: University of Wisconsin Press, 1980); D.M. Trubek and M. Galanter, *Scholars in Self Estrangement: Reflections on the Crisis in Law and Development Studies*, 4 Wisconsin Law Review (1974), 1062.

39 Trubek and Galanter (1974), *supra* note 38; K. Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 American Journal of Comparative Law (2002), 97, 101; D. Berkowitz, K. Pistor and J.-F. Richard, *Economic Development, Legality, and the Transplant Effect*, 47 European Economic Review (2003), 165; K.E. Davis and M.J. Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 American Journal of Comparative Law (2008), 916.

40 See for example: R. Masamba, "L'OHADA et le climat de l'investissement en Afrique", *Penant* (2006), no. 855, p. 137; Masamba, *supra* note 26; T. Gervais de Lafond, "Le Traité relatif à l'harmonisation du droit des affaires en Afrique", *Gazette du palais*, 1995, 20–21 septembre 1995, p. 2.

Etienne Le Roy[41] and a few researchers affiliated with the *Laboratoire d'anthropologie juridique* have voiced any objections thereto.[42] While recognizing the simplicity of what OHADA put in place, Etienne Le Roy stressed that it is foreign operators, probably French, who are the primary beneficiaries of the system.[43] The December 2013 Report to the Minister of Economy and Finance entitled "*Un partenariat pour l'avenir: 15 propositions pour une nouvelle dynamique économique entre l'Afrique et la France*" (roughly translated by the author as "A Partnership for the Future: 15 proposals for a new economic dynamic between Africa and France"),[44] is an interesting title in this regard. One of the stated proposals is to press for the consolidation and expansion of OHADA's harmonized business law[45]; however such support does not serve African development. Rather, France views OHADA as a powerful factor in attracting long-term investment, because it is a law that protects against political risk.[46] The report goes on to suggest that OHADA, presumably because it adopts French law, is an undervalued shared asset, 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.[47]

Which brings us back to one of the principal criticisms (one that is, above all, a self-criticism) of the L&D movement concerning the often-conflicting

41 E. Le Roy, *Le jeu des lois*, Paris, LGDJ, 1999, p. 237 *et seq*.

42 L. Ben Kemoun "Plaidoyer tempéré pour l'OHADA, onze ans après le traité de Port-Louis", *Cahier d'anthropologie du droit*, *Juridicités*, special edition, 2006, p. 118; C.O. Tohon, "Le traité de l'OHADA: l'anthropologue du droit et le monde des affaires en Afrique et en France", *Cahier d'anthropologie du droit*, *Juridicités*, special edition, 2006, p. 129; P. Dima Ehongo "L'intégration juridique du droit des affaires en Afrique: les pièges d'un droit uniforme et hégémonique dans le droit de l'OHADA", *Cahier d'anthropologie du droit*, *Juridicités*, special edition, 2006, p. 137.

43 Le Roy, *supra* note 41, p. 237, referring to E. Le Roy and C. Kuyu-Mwissa, "La politique française de coopération judiciaire", *Rapport 1997 de l'Observatoire permanent de la Coopération française*, Paris, Karthala, 1997, 37/65. See also E. Le Roy, "De la modernité de la justice en Afrique francophone", *Droit et société*, 2002, 51/52, p. 300.

44 *Un partenariat pour l'avenir: 15 propositions pour une nouvelle dynamique économique entre l'Afrique et la France, Rapport au Ministre de l'économie et des Finances*, La Documentation française, 2013, sp. 121.

45 *Id*. Specifically, one of the important suggestions in connection with supporting African economic integration, is "*Appuyer la consolidation et l'élargissement du droit des affaires harmonisé par l'OHADA*."

46 *Id*. Specifically, the text reads "*l'OHADA constitue un puissant facteur d'attractivité des investissements de long terme, car c'est un droit protecteur face aux risques politiques (un État ne peut pas modifier son droit de manière uniforme)*".

47 *Id*. Specifically, the text reads "*C'est aussi un capital commun que la France sous-valorise: la maîtrise de l'outil OHADA offre une position forte et ouverte de la France vis-à-vis des investisseurs anglo-saxons* [sic], *africains anglophones et émergents*".

interests of donors and experts.[48] In a broader perspective OHADA, just like "the first law and development movement could be faulted for paying too little attention to customary laws and other informal legal institutions".[49] The recurring criticism of the L&D movement for not giving due importance to local realities can also be applied to OHADA.

3 Ineffectiveness and inadequacy of OHADA law

3.1 Evidence of ineffectiveness of OHADA law

Drawing attention to the difficulty of applying law in developing countries is not new; the L&D literature frequently does so. The fact that it is so frequently mentioned is, in fact, one of the drivers behind this contribution. Imperfect application of law stimulates harsh criticism of L&D's overly-optimistic early research. Even if the assumption is that law influences development, that assumption still requires the law to produce some effect. Even before discussing the possible relevance of correlations between legal reform and development, it is first necessary for the law to be applied. Our hypothesis is, grossly, that Sub-Saharan business law, that is to say state law, is ineffective, and, that this ineffectiveness is, above all, due to its disconnection with legal practice. It is only if, and when, that first point is established, that new solutions to improve legal effectiveness can be formulated.

In terms of Sub-Saharan Africa, the first step is to make a radical acknowledgement: business law, particularly OHADA law, is ineffective.

The general ineffectiveness of law is a central issue in Africa law. Such ineffectiveness, particularly the ineffectiveness of business law, is the source of extremely critical,[50] sometimes virulent,[51] commentaries, many of which focus

48 Davis and Trebilcock (2008), *supra* note 39, making reference to A. Santos, "The World Bank's Uses of the 'Rule of Law' Promise in Economic Development", in D.M. Trubeck and A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: CUP, 2006), p. 297.

49 *Ibid*. See also V. Crabbe, *Drafting in Developing Countries: The Problems of Importing Expertise*, 4 African Journal of International and Comparative Law (1992), 630.

50 OHADA, *trois questions à Renaud Beauchard*, available at: <www.ihej.org/trois-questions-a-renaud-beauchard/>, accessed 24 February 2015; see also the references *supra* note 30.

51 R.T. Ngalani, *Mondialisation ou impérialisme à grande échelle* (Paris: L'Harmattan, 2010); *Afrique: redéploiement de l'impérialisme français et sidération humanitaire de la gauche*, available at: <http://www.contretemps.eu/interventions/afrique-redéploiement-impérialisme-français-sidération-humanitaire-gauche>, accessed 24 February 2015; *Le cinquantenaire des*

specifically on OHADA law. Taken as a whole, such criticisms sometimes appear to lack nuance. At the very least, it seems that the situation appears so obvious to some authors that they work from assertion rather than demonstration.

The most obvious manifestation of such ineffectiveness is the absence or lack of implementation of the OHADA's Uniform Acts. The first implementation problem arises from a lack of sufficient cooperation by the Member States themselves. By signing on to the OHADA Treaty, the Member States gave up that part of their sovereignty that allowed them to legislate in the area of business law and they agreed to accept and implement the Uniform Acts, which Uniform Acts are developed at a regional level and within a regional framework in which the individual Member States now play a very limited role. However, signing or adhering to the OHADA Treaty has proven to be a less-than-effective method of ensuring implementation of the rules and standards introduced into the Member States' law when a Uniform Act is adopted. On the one hand, important legal elements needed for proper implementation, such as coherent taxation, have traditionally been excluded from OHADA's purview and, therefore, require additional or supplemental legislative action by the individual Member States, which is rarely adopted. On the other hand, sanctions for failure to comply with the rules and standards established in the Uniform Acts remains the prerogative of individual Member States: while the Uniform Acts may create offenses, only the Member States can define and impose penalties for such offenses.

In addition to such limitations, the general nature of the Uniform Acts prevents their direct application. Frequently, it is essential for the Member States to adopt national measures that allow the structures and measures contemplated in the regional legislation to be created and to function properly in the domestic setting. The most recent Uniform Act is an excellent, simple example of the problem[52]: The Uniform Act on Cooperatives, adopted 15 December 2010, contemplates the existence of a national registry for cooperatives and states that a cooperative's legal personality is only acquired once it has been duly included in said registry. That Uniform Act, after a certain transition period, became fully applicable on 15 May 2013.[53] Nevertheless, to date we have only been able to

indépendances en question: l'Afrique est-elle indépendante? available at: <http://base.afrique-gouvernance.net/fr/corpus_bipint/fiche-bipint-1320.html>, accessed 24 February 2015.

52 For a more global analysis of the implementation of that Act, see D. Hiez, "Le long processus d'élaboration du droit africain à travers l'exemple de l'acte uniforme sur les sociétés coopératives", revue de la fondation Raponda Walker, Libreville, 2014

53 Although the Act came into force 15 May 2011, existing cooperatives were given a two-year period in which to adapt their documentation to conform to the Act, which period expired on 15

confirm that one – just one – of OHADA's Member States (the Republic of Gabon) has actually adopted the regulatory measures necessary to operate such a registry[54]: Gabon's regulations designated the administrative agency in charge of the registry, developed administrative circulars to guide such designated officials, and elaborated similar such provisions. In the absence of such regulations, however, there is no such registry in OHADA Member States. Moreover, in the absence of such a registry, any cooperative registrations, to the extent such registrations are not otherwise blocked by excessively scrupulous civil servants, cannot conform to the Uniform Act, which requires such registry .

The lack of implementation of national registries for cooperatives is not unique; similar problems exist with respect to the OHADA-contemplated Trade and Personal Property Credit Registry.[55] Certainly, its greater seniority and economic importance has led to its broader implementation, but it is striking that the central registry contemplated by the Uniform Act is still inactive, that (with the exception of Gabon) online access thereto is still just wishful thinking, and that some local records are still unavailable. This reduced functionality of the trade and personal property credit registry handicaps the implementation of other Uniform Acts that also resort to it.

Beyond the difficulties resulting from such legal gaps in implementation, existing information indicates that utilization of mechanisms put in place by OHADA Uniform Acts is disappointingly low. A lack of statistical data makes it difficult to accurately assess the extent of that phenomenon – making additional empirical studies an important aspect of further research; nevertheless, the fragmented data we have is enlightening.[56] The information, gathered for the years 2004 through 2014, comes from the court registries of three trial courts in the two largest cities in the Republic of Cameroon: two of the registries are in Douala, its economic capital (the *Douala Bonanjo* and the *Douala Ndokoti*) while the third registry is in Yaoundé, its political capital (*Yaounde Ekounou*) (hereafter, the "Cameroon Study").[57] Let us take this opportunity to examine some of the most interesting numbers of the Cameroon Study for our purposes. According to the Cameroon Study, the number of new, individual trader

May 2013 (Arts. 390 *et seq.*). All cooperatives are now obligated to conform to the Act's requirements, including registration.

54 Décret n°01295/PR/MAEPDR, du 6 décembre 2011, portant désignation de l'Autorité chargée de la tenue du registre des sociétés coopératives en République gabonaise.

55 M. Afana Bindouga, *Le registre du commerce et du crédit mobilier*, in D. Hiez et S. Menétrey (eds.), *L'effectivité du droit économique dans l'espace OHADA*, forthcoming.

56 It may occur that different data would give other conclusions in other cities, but it is not possible that they would be radically contradictory.

57 See, for further details and the complete set of numbers, Afana Bindouga, *supra* note 55.

registrations typically hovers around 100 per year, but once the number reached 200 for a single year. Registrations for corporations and simple stock companies remained minimal during the relevant period, never exceeding five in any one year. On the other hand, limited liability company registrations were somewhat more significant, although there were considerable variations from year to year and from location to location: there are typically around 1,000 per year for *Douala Bonanjo* (and once, the number reached 1,500), while such registrations hover around 25 per year for each of *Douala Ndokoti* and *Yaounde Ekounou*.

It is not possible to draw serious or specific conclusions from such limited data, but it is possible to garner some general impressions. First, legal scholars and practitioners should focus on limited liability companies, as it seems that these entities are most interesting to the relevant economic actors. Moreover, notwithstanding the relatively low number of individual trader registrations, those same legal scholars and practitioners should also take those registrations into consideration. Of course, further empirical studies should be undertaken in other Sub-Saharan African cities, but there is no reason to believe that such data will not confirm a similar pattern, as the Republic of Cameroon, from the perspective of OHADA cooperation, is not one of OHADA's "bad students." At the same time, further research should be done to identify the profile of the people – whether individuals or legal entities – founding and investing in such limited liability companies, to ascertain the type of investment (be it national, regional, or international) and the economic sectors attracting such registrations, in order to give input to policy-makers.

The Cameroon Study also collected data for the same period on security interests, in the form of financing leases (e.g., equipment leases with an option to purchase) and personal property security interests (e.g., the use of personal property as security for the repayment of a loan), registered on the Trade and Personal Property Credit Registry. Overall, financing leases were insignificant, never exceeding five in any particular year. On the other hand, personal property security interests were more prevalent, ranging between twenty and nearly 200 per year. Such empirical data is interesting because it contrasts with the frequent suggestion that financing leases are gaining importance across Africa. Even more interesting, however, is the fact the number of security interest registrations is very small. That does not mean, however, that we can infer that such security devices are not used. In addition to national methods of taking security interests in personal property that are not included in the

58 *L'Acte uniforme révisé portant organisation des sûretés*, adopted 15 December 2010, is available at: <http://www.ohada.com/actes-uniformes/938/acte-uniforme-revise-portant-organisation-des-suretes.html> (last visited 11 February 2015).

Revised Uniform Act Organizing Securities,[58] there may be alternative forms of collateral used in practice, which remain outside of or even in contradiction to the law. It is not inconceivable that traders take security interests or take possession of collateral without registering their interest therein; such practices may, at first, seem absurd, but in a society where virtually no one registers such interests, any purported disadvantages of not registering one's security interest must be rethought.

Research regarding arbitration centers, which OHADA has championed through, among other things, the adoption of the Uniform Act on Arbitration,[59] shows that their textual significance is not reflected in reality.[60] The tiny number of cases handled each year does not even justify their continuing existence (there are some years in which the centers have considered no cases at all and, in the best years, they have only reviewed a few). The Arbitration Center of the Common Court of Justice and Arbitration, an official institution of OHADA itself, does not typically received a large number of cases, either.[61] Of course, the research does not account for ad hoc arbitrations, as such arbitrations are typically so shrouded in secrecy that their numbers remain obscure. Nevertheless, the lack of usage is yet another sign of poor implementation of, as well as inadequacy of, OHADA law.

3.2 Inadequacy of OHADA law

OHADA law is not just ineffective, it is also ill-suited for its target – that is to say, it is poorly adapted to the needs of the African society it is intended to serve – because it serves "societal needs" that are not yet, and may never be, actually needed. One can note that the legal solutions offered in positive law are frequently poorly adapted to reality. Such unsuitability is easily discovered. One such example arises from the division of law into a set of laws that is addressed to physical persons (individuals) and a separate set of laws that is addressed to legal persons (entities with legal personality). The former has a recognizable, although sometimes disputed, meaning that enjoys relative stability. The latter does not: both the identity of legal persons and the set of laws addressed to them have provoked lively and deep debate, even in the Western

59 The Uniform Act on Arbitration, adopted 11 March 1999, is available at: <http://www.ohada.com/actes-uniformes/658/uniform-act-on-arbitration.html> (last visited 11 February 2015).

60 S. Menétrey, "Centre de médiation et d'arbitrage: exemples choisis", in D. Hiez et S. Menétrey (eds.), coming soon.

61 *Id.*

culture that gave birth to them. Both aspects of law are reflected in African law, due in part, one can assume, to the fact that they are among the most common legal concepts found in the transplanted law. Nevertheless, it is uncertain that the two aspects of law reflect Sub-Saharan African realities.

Take, for example, OHADA's Uniform Act Relating to the Law of Cooperatives[62]; it assumes, unsurprisingly, that a cooperative's members are either individuals or legal persons. In practice, however, the members are typically farms, which means neither natural nor legal persons. The persons who attend the meetings of the cooperative do not act as individuals, *per se*, but act instead as a representative of an operating family. A family is not, and cannot be officially recognized as, a legal entity. From a technical perspective, the law is observed because an individual is registered as the member of the cooperative, who only unofficially represents the family. But at the same time, a change of representative within the family does not conform to applicable rules on resignation and application of new member, because everyone agrees to consider such a change as nothing more than a change in the family's representative in the cooperative. In short, and this goes far beyond the issue for cooperatives, African life, apart from the individual and society as a whole, revolves around the group, in this case the family.

The misdirection of OHADA law via transplanted Western law can also be inferred from the observations made with respect to contract performance in Sub-Saharan Africa.[63] Such observations indicate, among other things, that breaches of contract and failures to perform are far more frequent in Sub-Saharan Africa, often due to external events suffered by one or the other of the contracting parties, which either constitute a force majeure event or, to a lesser extent, an excuse for non-performance.[64] As a result, the contracting party who suffers the consequences of the other party's non-performance demonstrates an acceptance thereof that is virtually the opposite of the restrictive nature of the Western concept of unforeseen circumstances. We can discuss whether it is appropriate to base the law on such practices. Nevertheless, the

62 *L'Acte uniforme relatif au droit des sociétés coopératives*, adopted 15 December 2010, available in French at: <http://www.ohada.com/actes-uniformes/939/acte-uniforme-relatif-au-droit-des-societes-cooperatives.html> (last visited 11 February 2015).

63 See, particularly, M. Fafchamps, *Market Institutions in sub-Saharan Africa Theory and Evidence* (Cambridge, MA: MIT Press, 2003); J. Paquin, *Legal Reform and Business Contracts in Developing Economies Trust, Culture and Law in Dakar* (Burlington, VT: Ashgate, 2013), p. 83 *seq*.; E. Cohen, *Doing Business Under the Hot Sun: How Small Firms Do Business and Process Conflicts in Kenya*, 11 Chicago-Kent Journal of International and Comparative Law (2011), 1; and supra note 31.

64 See Paquin, *supra* note 63.

important point for our purposes is that the addressees, and supposed beneficiaries of contract law – that is, the contracting parties – recognize the "foreignness" or "otherness" of the written law, and they choose, instead, to substitute other, informal rules more suited to their culture and needs, which informal rules constitute, for them, an acceptable, identifiable alternative to official law.

Legal scholarship has focused, rather emphatically, on conflict resolution. This leads to two over-arching conclusions: first, and on the one hand, there is very little recourse to litigation and, second and on the other, the courts themselves are dysfunctional.[65] Naturally, a link between the former and the latter can be made: businesses choose not to bring their disputes before courts because of the uncertainties that such recourse implies.[66] In this regard, even OHADA law is also only an initial response to the overarching problem, since the Common Court of Justice and Arbitration's task is to ensure the judicial independence that is lacking in the national courts. Likewise, the fact that businesses apparently distrust national courts favors arbitration or other dispute resolution methods.

Nevertheless, other factors may also explain the extremely low recourse to courts for dispute resolution, starting with the obvious disconnect between the function of the latter, which comes from the Western model, and those of the various actors in traditional modes of dispute resolution.[67] Relevant field studies tend to confirm this position.[68] From that was born the idea that the alternative dispute resolution methods that had developed in Northern countries over the last twenty years could provide a ready answer for African countries, as such alternative methods seemed to fit better with their traditional culture. However, arbitration and mediation have not flourished as much as other dispute resolutions methods, such as traditional[69] or adapted[70] litigation. Based on the foregoing, it appears that the business world does not look upon the impact of law on development with a friendly eye, as companies eschew solutions that

65 M. Bekai Dembélé, *Le procès équitable en droit malien*, thèse 2013, Université Gaston Berger; R. Adido, *Essai sur l'application du droit en Afrique: le cas de l'OHADA Aspects sociologiques et juridiques au vu du passé et du présent*, thèse Perpignan, 2000, Atelier national de reproduction des thèses, p. 75 *et seq*.

66 J. Alibert, *Justice et développement économique Le point de vue des entreprises*, Afrique contemporaine, no. 156 (1990), 72.

67 J.-G. Bidima, *La palabre Une juridiction de la parole*, Michalon, 1997, ps. 27 s.

68 Paquin (2013), *supra* note 63, p. 115 et seq.

69 Paquin describes, for example, how relatives become involved in litigation to achieve compliance with the commitments or to find an acceptable solution (id., p. 86 *et seq*.).

70 With respect to the Office of Justice, see C.O. Tohon, *Le droit pratique des affaires: l'exemple du Bénin*, these Paris I Panthéon-Sorbonne, 2002, atelier national de reproduction des thèses, p. 253 *et seq*.

misdirected laws put in place because such solutions, in this case in particular, are ill-suited to their needs.

In fact, legal scholars must resist the temptation to overstate the law's importance in general business relationships. As noted by Julie Paquin : "the lack of knowledge of law, of interest in the legal aspects of a situation, or of the popularity of legal ways of settling disputes among business people is not a reality that is limited to the OHADA zone or to developing countries."[71]

3.3 OHADA law is particularly ill-suited to the informal sector

Law faces, by nature, difficulties of application to the informal sector, and the African context is a good example to go further in the elucidation of that issue. The fact remains that our lack of understanding of the informal sector is a source of numerous questions about how the economy actually functions in that zone.[72] The very nature of the informal economic sector makes it difficult to measure and quantify; consequently, any figures given can vary and are subject to dispute.[73] Such debates, however, are of only secondary importance for our purposes because all of the figures mentioned support the importance of the informal sector, which represents more than half of all employment and approaches the same proportion of GDP in the region. But, even though we can leave that measurement problem to the economists, legal scholars cannot ignore the definition of the informal sector[74] because one of the criteria used to

71 "Le manque de connaissance du droit, d'intérêt pour les aspects juridiques d'une situation, ou de popularité des modes judiciaires de règlement des conflits parmi les gens d'affaires n'est pas une réalité limitée à la zone OHADA ni aux pays en voie de développement", Paquin, *supra* note 63, which makes reference to S. Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 Modern Law Review (2003), 44.

72 According to C. Moore Dickerson:

> It is, first, important to recognize the reality that in the informal sector, as much as eighty to ninety percent of disputes are settled by informal mechanisms. While such a figure must be next-to-impossible to document, it is plausible that the vast majority of disputes do not start in the formal judicial system.

Moore Dickerson (2011), *supra* note 19, p. 221.

73 N. Benjamin and M.A. Mbaye, *The Informal Sector in Francophone Africa: Firm Size, Productivity, and Institutions* (Washington D.C.: World Bank Publications, 2012).

74 For a discussion of the various definitional approaches, see Y. Pesqueux, *De l'économie informelle*, in S. Perseil and Y. Pesqueux (eds.), *L'organisation de la transgression Formaliser l'informel?* (Paris: L'Harmattan, 2014), pp. 17–41.

distinguish the formal sector from the informal sector is its relationship to law.[75] Or, it might well show the error of that assumption, as it is only then that law can fulfill its function in that sector.

Several criteria have been established to identify the informal sector, many of which touch upon the law[76]: failure to pay taxes, failure to comply with registration formalities, failure to use employment agreements regulated by employment law, and, from a somewhat less legal perspective, use of financing arrangements outside the realm of the classic banking sector.[77] The primary weakness of such criteria stems from the difficulty of applying them to individual cases. As not all of the criteria are necessarily present for any given enterprise, it is difficult to decide whether that the particular business is part of the informal sector. In that sense, the criteria are ideally suited for painting a picture of the informal sector, but are far less suited to actual application.

A second weakness, both theoretical and practical, comes from the role assigned to the law. While law is characterized by its normativity, the failure to respect the law in the informal sector can no longer be perceived as an infringement but is the sign of informality. The theoretical weakness becomes a practical weakness when applied; we speak not of the law taken as a whole, but of a particular rule, say, for example, the payment of taxes. Paying taxes is not a distinguishing criterion for deciding if a business is in the formal or informal sector, because the obligation applies to all businesses. Sociologists may rely on the failure to pay taxes as an evidence of informality but, for a lawyer, this is meaningless, since the business is still liable to pay taxes regardless of such classification.

Finally, application of the established criteria may prove difficult. Take the failure to pay taxes, to continue with that example: that is a highly complex question. Does the failure to pay taxes apply as a criterion only to a global failure to pay taxes, a failure to pay certain specific taxes, or a failure to pay any single tax? In fact, certain businesses that do not pay classic commercial taxes pay other taxes, such as those related to the business's location, for example, when they do not pay an alternative, lump sum tax specifically imposed to ensure that informal enterprises contribute to the state fisc.[78] Failure to register a business is also a problematic criterion. In this situation, certain businesses must make themselves known to authorities for other reasons, such as selling

75 For a foundational reflection on this issue, see B. de Sousa Santos, Vers un nouveau sens commun juridique Droit, science et politique dans la transition paradigmatique, LGDJ, 2003.

76 S. Kwemo, *L'OHADA et le secteur informel: L'exemple du Cameroun*, Brussells: Larcier, 2012, n° 37 *et seq*.

77 See Tohon, *infra* note 70, p. 70 *et seq*; Dickerson (2011), *supra* note 19, p. 179 *et seq*.

78 Kwemo, *supra* note 76, , n° 1096 *et seq*.

items on public property, and thus obtain official recognition, even though they are not a registered business in the classic sense. Does a business' failure to respect a business registration rule automatically trump, for purposes of classifying the business as formal or informal, the individual recognition the business obtains under a different rule?

More broadly, and more fundamentally, the difficulty of making a distinction leads to a discussion of the need for classifications within the formal sector classification.[79] What should be done with formal sector businesses that fail to pay taxes, either because they receive governmental dispensation or they shirk their obligations through a series of actions of varying degrees of legality? The use of employment contracts as a criterion generates similar difficulties, as no one really downgrades a formal sector business to an informal sector business just because it does not respect labor laws or resorts to clandestine workers. Under such circumstances, it is difficult to escape a charge of exploiting the law to make a distinction whose foundation is highly questionable.

To avoid such a charge, one author suggested taking only those laws that specifically govern the exercise of the particular economic activity into consideration, as it is only those laws that can justify an activity's exclusion from the formal sector.[80] The suggestion is certainly interesting: The author effectively excludes irrelevant criteria, such as tax regulation, or, at least, prioritizes such criteria in a hierarchy inherent in the activity at issue (including registration). But, the solution is imperfect, since a strict application thereof would result in leaving criminal activity in the formal sector. The author excludes criminal activity,[81] even though its exclusion was self-evident. Besides, criminal law infractions are still not a very satisfactory criterion, insofar as criminal law covers many areas, such as safety rule violations and environmental damage, such that it would be difficult to say that such an infraction qualifies a business as a criminal enterprise. Anyway, the classification remains artificial.

Thus, it appears that the law is not the operative criterion for distinguishing the formal from the informal sector. Undoubtedly, the law is affected by the distinction, but the failure to abide by the law, or even a particular regulation, does not characterize the informal sector, which is a social construct. Unburdened by that function, law may recover its original purpose, which is adapting to the situations to which it is meant to apply. One father of modern legislation

79 Pesqueux, *supra* note 74.
80 Tohon, *supra* note 70, p. 83.
81 Tohon, *supra* note 70, p. 80.

expressed it vividly: "The law of the people is made over time, but strictly speaking, one does not make it."[82]

It is only to the extent that law is molded by the State in an attempt to actualize its own power that legal scholars seek to conform reality to that mold. And, when the State does not succeed, such conformity is doomed to failure. The informal sector offers an obvious example. It is there that all of the technical inadequacies and the overall unsuitability of the transplanted business law described above, particularly OHADA law, runs headlong into the realities of African society and culture, as evidenced by the problems associated with the formalism required thereby. The best example is certainly the registration process of for business entities – that is, registration on the Trade and Personal Property Credit Registry. We have already mentioned the low number of annual registrations. The complexity of the registration procedure, which we briefly describe below, is probably one of the major causes for those figures.

According to OHADA's *Acte uniforme portant sur le droit commercial général* (AUDCG), any individual who puts into circulation any goods or who provides any services with a profit motive is a "trader".[83] An individual who qualifies as a trader must, within the first month of his commercial activity, apply to the appropriate State authority to be registered on the Trade and Personal Property Credit Registry.[84] In addition to the application form required by

82 "Les codes des peuples se font avec le temps; mais, à proprement parler, on ne les fait pas." J.-E.-M. Portalis, *Discours préliminaire sur le projet de code civil*, (1801), Confluences, 2004, p. 24.

83 See, e.g., Arts. 2 and 3, Acte uniforme portant sur le droit commercial général, revised 15 December 2010, *Journal Officiel de l'Organisation pour l'harmonisation en Afrique du droit des affaires*, Volume 15, No. 23 (hereafter "AUDCG").

84 Art. 44 AUDCG. The application form, as contemplated by Art. 39 AUDCG, is supposed to include the following information about the applicant:

(1) *les noms, prénoms et domicile personnel de l'assujetti;*
(2) *ses date et lieu de naissance;*
(3) *sa nationalité;*
(4) *le cas échéant, le nom sous lequel elle exerce son activité, ainsi que l'enseigne utilisée;*
(5) *la ou les activités exercées;*
(6) *le cas échéant, la date et le lieu de mariage, le régime matrimonial adopté, les clauses opposables aux tiers restrictives de la libre disposition des biens des époux ou l'absence de telles clauses, les demandes en séparation de biens;*
(7) *les noms, prénoms, date et lieu de naissance, domicile et nationalité des personnes ayant le pouvoir général d'engager par leur signature la responsabilité de l'assujetti;*
(8) *l'adresse du principal établissement et, le cas échéant celle de chacune des succursales et de chacun des établissements exploités sur le territoire de l'État partie;*
(9) *le cas échéant, la nature et l'adresse des derniers établissements qu'il a exploités précédemment avec l'indication de leur numéro d'immatriculation au Registre du Commerce et du Crédit Mobilier;*

Article 44 AUDCG, which is to be completed and deposited by the applicant, Article 45 AUDCG requires the applicant to deposit the following supporting documents:

(1) *un extrait de son acte de naissance ou de tout document administratif justifiant de son identité*;
(2) *un extrait de son acte de mariage en tant que de besoin*;
(3) *une déclaration sur l'honneur signée du demandeur et attestant qu'il n'est frappé d'aucune des interdictions prévues par l'article 10 [AUDCG]. Cette déclaration sur l'honneur est complétée dans un délai de soixante-quinze (75) jours à compter de l'immatriculation par un extrait de casier judiciaire ou à défaut par le document qui en tient lieu*;
(4) *un certificat de résidence*;
(5) *une copie du titre de propriété ou du bail ou du titre d'occupation du principal établissement et le cas échéant de celui des autres établissements et succursales*;
(6) *en cas d'acquisition d'un fonds ou de location-gérance, une copie de l'acte d'acquisition ou de l'acte de location-gérance*;
(7) *le cas échéant, une autorisation préalable d'exercer le commerce*;
(8) *le cas échéant, les pièces prévues par des textes particuliers*.[85]

The foregoing list of required documents might seem, to Western eyes, a natural and appropriate means of verifying the information provided on the

(10) *la date du commencement, par l'assujetti, de son activité et le cas échéant de celle des autres succursales et établissements; [et]*
(11) *toute autre indication prévue par des textes particuliers.*

85 Art. 45 AUDCG. The author roughly translates the list as:
(1) the applicant's birth certificate or other government-issued document establishing his identity;
(2) if applicable, the applicant's marriage certificate;
(3) a statement, made under penalty of perjury, asserting that the applicant is not subject to any of the limitations set forth in Art. 10 AUDCG, which statement must be accompanied by a government-issued copy of the applicant's criminal record or similar government document, dated no more than 75 days prior to the date of the application;
(4) the applicant's certificate of residence;
(5) a copy of the applicant's title to the real property or his lease with respect to his principal place of business and, if applicable, any other places of business or branches he may operate;
(6) for the acquisition of a fund or management lease, a copy of the purchase deed or lease management agreement;
(7) if applicable, prior authorization to conduct business; and
(8) if applicable, any other documents required by law.

application form. But, to an African reading the list, it is, at best, a joke, or at worst, a con. The sheer cost of obtaining such documents, which is one of the concerns often expressed regarding this list, is prohibitive and may clearly dissuade those who would otherwise want to comply with the law. Moreover, it may be that the exorbitant cost is not even the greatest problem, as there is no guarantee that the required documents are even available. The idea of getting a copy of one's birth certificate and criminal record is enough to make an African laugh; need anyone be reminded that Sub-Saharan Africa has suffered bloody conflicts over attempts to reliably identify voters? Nevertheless, a quest for the impossible can boost an entrepreneur's energy and even imagination. And, once the impossible has, in fact, been achieved, the resourceful applicant must then find some civil servant willing to affix an official stamp to those extraordinarily hard-to-obtain documents, certifying that everything stated therein actually reflects reality. Is the result of this forged public documents or just desperate, and perhaps failed, attempts to comply with the demands of a crazy, foreign system? Our ironic description is, perhaps, not without some exaggeration, but we are certain that our perception of the problem is more serious than the law itself. Moreover, the problem exists, to varying degrees, for virtually all aspects of the Trade and Personal Property Credit Registry and that is no laughing matter.

Where does this disconnect come from? Why do Africans, faced with the AUDCG's requirements, simply shake their heads at the absurdity of the demands? At its most basic, the problem lies with society's relation to writing – that is, the written word. Law, as we perceive it in the West, is consubstantial with the written word and we can hardly conceive of a credible alternative. Thus, all valuable information should be available in writing and should be subject to confirmation through other written words. What is so striking, in this particular situation, is that the requirements of the law are not simply an annoyance that prompts noncompliance. Rather, the requirements of the law are simply impossible to perform, such that noncompliance is the only possible response.

It is not necessary to strengthen *le phénomène de l'information* by being more rigorous than necessary in respecting legal formalities. From this perspective, the importance of a particular action or the size of the business can and should be taken into account when determining the level of formalism required. Western society does not hesitate to make such distinctions. The fellow who puts a coin in the coffee dispenser is entering into a sales contract for that cup of coffee, but he remains blissfully unaware of the implications thereof and that is perfectly acceptable. Why should it be any different for the sale of a mango at a market in Bamako or the purchase of a used brake in

Cotonou? The same question can be asked with respect to businesses themselves, although a complete dispensation from formality would certainly raise a few eyebrows.

4 Drawing lines between formal and informal rules in the business sector

4.1 The failure of ongoing methods

Our suggestion that the OHADA rules for traders are absurd is not new; proposals intended to fill the (enormous) gap between the law and reality have been made for years. OHADA itself finally tried to rectify the disconnect in 2010: the original version of the law, which had been adopted in 1997 and had entered into force on 1 January 1998, was amended and restated in its entirety on 15 December 2010 and came into force on 15 May 2011.[86]

To address the problems we identified above, the 2010 AUDCG created a new category of commercial actor – the *entreprenant*.[87] The *entreprenant*, an alternative to a trader (*commerçant*), is subject to less restrictive requirements and is not obligated to register on the Trade and Personal Property Credit Registry.[88] Rather, an *entreprenant* is only required to complete a simple enrollment form.[89]

The jury is still out on the overall effectiveness of OHADA's 2010 reforms, when one looks at the number of *entreprenants* enrolled since the reform came into force in May 2011. The Cameroon Study, mentioned above, shows one – just one – *entreprenant* enrolled in Yaoundé in 2013.[90] A review of the enrollment records in Bamako did not disclose a single enrollment.[91] Of course, delays in introducing the new category of commercial actor onto the Trade and Personal Property Credit Registry, as well as a lack of training for the relevant civil servants and the lack of public awareness of the reform all bear some

86 Art. 30 AUDCG.
87 Art. 40 AUDCG.
88 Art. 30(7) AUDCG.
89 Arts. 63–65 AUDCG.
90 Bindouga, *supra* note 55.
91 This was discovered by a Malian Researcher (Mamadou Dembélé) who planned to study the practical enforcement of *entreprenant* in Mali, but has given up because there was no application at all.

responsibility for those disappointing results, but those are not the only reasons for the new category's lack of success. A qualitative survey of informal sector actors in Yaoundé, mainly in the construction industry, concluded that these actors simply lack the desire to take advantage of this new opportunity.[92] On the other hand, a trainer[93] who worked with about a hundred women in September 2014 indicated that those women were, in fact, interested in the new *entreprenant* status.[94] However, as the trainer explained to the conference participants, the women's interest may have been inextricably linked to the financial aid that she told them was available to commercial actors who enrolled as *entreprenant*, so it is difficult to determine whether the status of *entreprenant*, alone, was sufficient to arouse their interest.

Ultimately, it appears that the status of *entreprenant*, itself, is not particularly attractive to commercial actors, particularly informal sector commercial actors. The construction industry survey mentioned above confirms that impression. The main reason for such lack of interest appears to be the lack of advantages associated with taking on the status of *entreprenant*. A parallel can be drawn to the *auto-entrepreneur* status available to commercial actors under French law, on which the OHADA concept of *entreprenant* is explicitly based.[95] In France, the status of *auto-entrepreneur* is a relative success, based on the number of enrollments.[96] The reason for such success, however, is more likely due to the fact that, apart from the legal formalities that apply, an enrolled *auto-entrepreneur* is entitled to health coverage and retirement benefits. Parallels have been drawn between the French and Brazilian systems in this regard,[97] but not only is the context different, but the motivations are different, too. Moreover, the Brazilian situation cannot be compared to the Sub-Saharan African situation, as the informal sector actors in the OHADA zone cannot claim the same benefits as their Brazilian counterparts.

92 P.-E. Kenfack, "La contribution des normes au passage des agents économiques du secteur informel vers le secteur formel: enquête sur l'effectivité du statut de l'entreprenant au Cameroun", in D. Hiez et S. Menétrey (ed.), *L'effectivité du droit économique dans l'espace OHADA*, forthcoming.

93 Joseph Kamga is a trainer of OHADA law. He conducted several training sessions on the new *entreprenant* status.

94 J. Kanga, as part of the oral exchange of information during the conference "L'effectivité du droit économique dans l'espace OHADA", held in Luxembourg on 20 November 2014.

95 Loi n°2008-776 du 4 août 2008 de modernisation de l'économie, arts. 1 seq.

96 <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/134000225/0000.pdf> (last visited 24 February 2015).

97 O. Giraud and C. Lerrer Rosenfield, *Se mesurer à la norme: travailleurs, institutions et analystes face à l'emploi, les normes de l'emploi au défi de l'auto-entrepreneuriat et des micro-entreprises individuelles: Une comparaison France-Brésil*, Tiers-monde, n° 218 (2014), pp. 35–52.

A commercial actor will only choose to move from the informal sector to the formal sector (and thereby submit himself to its formalizing requirements) if he receives some worthwhile advantage, consideration, or *contrepartie*, such as security for his assets, social security benefits, access to credit, or access to neutral and impartial justice. Adhesion to the rule of law rests, of course, on its binding nature, but also on the legitimacy of the system that imposes it. In that regard, distributive justice is one source of the binding nature of law. A legal system's legitimacy lies not only in its distributive justice, but also in its redistribution of rights.[98]

Without such worthwhile advantages for the commercial actor, it remains doubtful that current projects will actually promote a transition from the informal to the formal sector. Of course, one can also rightly blame illiteracy and rudimentary institutions (and the corruption that accompanies them), in short, the reality of life in Sub-Saharan Africa. But, as that reality is unlikely to significantly change in the next several decades, magic formulas that seek to "improve" the legal and non-legal framework will have little, if any, effect. The failure of such policies, despite their good intentions and their new and welcome attention, which manifests in the continued prominence of the informal sector, invites researchers and legal scholars to rethink the question, approaching it from a new and different direction.

Seen from Europe, what has characterized recent L&D research and what makes such research attractive, is its interdisciplinarity. While the inspiration for this trend may be found in the questions posed and the reasoning used in Law and Economics (L&E) research, a serious competitor for such inspiration may well be Law and Culture (L&C) research. Both L&E and L&C rely on a common perspective: both types of research assess the impact of law on development. Sometimes, the question is posed in terms of the economic factors that influence individual and collective behavior; other times, the research tries to assess the importance of culture, of which law is an element, on the same development. In other words, the researchers' attention focuses on the role that the law plays, while staying out of the law itself – the law is an object of study, rather than the subject to be studied.

Our proposal, more modest in some ways, is to study what *could be* the law in developing countries. But, even that ambition must be shaped and clarified. Our object is the law of Sub-Saharan Africa, which zone was chosen for its own sake, not as an example of developing countries in general. Our choice is not the result of any reaction to such categorization, or even a denial of that

98 For more along this theme, see Ph. Coppens, *Fonction du droit dans une économie globalisée*, 3 Revue internationale de droit économique (2012), 269.

qualification. Rather, it arises from the primary meaning of "law": a body of rules that apply to the community that shaped it. With that in mind, our research does not concern the various methods that could be developed to promote the role of law in development, much less questions regarding the validity of the assumption that law can even play that role. Our specific purpose is to reflect on what *could be* a law that is well-suited and adapted to Sub-Saharan Africa societies. Such research is not disconnected from the question of development, to the extent that we assume that these societies aspire to develop economically and the law cannot be indifferent to that aspiration, which makes it all the more obvious that we are interested in economic law.

The central element of our proposal consists of rules that could be used as a framework for economic activity in the relevant Sub-Saharan African countries. For that, we assume that the development of an applicable law, at least one more effective than what currently exists, requires information and understanding of the existing situation, which includes a recognition of the informal *juridicités*. Of course, it would be insufficient to simply substitute a set of informal rules adorned with all its virtues for the admittedly inefficient and ineffective State laws that currently exist. Instead, once both sets of rules have been properly identified and fully scrutinized, areas of coordination can be found.[99]

4.2 Identifying and understanding *juridicités*

Proposing to study *juridicités* to better understand them presupposes that one knows what they are. The notion of *juridicités* comes from the work of legal sociologists and anthropologists and refers to the existence of legal phenomena outside of State law. Methods of dealing with real property issues and family relationships in Sub-Saharan African existed long before colonization and transplantation of Western law and some of those methods – so-called customary law – have led to innovative solutions in African countries. Our lawyer instincts tell us that there must be other such innovative solutions for managing economic activities. Of course, Africa is best known for farming and its complex family structures; one does not automatically think of commercial activity or business structures when imagining African society. Thus, there is not an

99 A.M. Vargas Falla, "Legal and Social Norms for Development: Why Legal Reform of Informal Economy Failed to Influence Vulnerable Groups in Developing Countries?" in M. Baier (ed.), *Social and Legal Norms: Towards a Socio-Legal Understanding of Normativity* (Farnham, Surrey: Ashgate, 2013).

existing set of informal rules or principles, such that one can easily justify the need to develop a modern business law.[100] But, Africa has never consisted of just small, self-reliant, self-regulating communities; it has participated in significant cross-cultural and even international trade, as demonstrated by commerce that flourished through desert caravans and, more sadly, the slave trade. Thus, the conduct of contemporary economic activities are rooted in custom[101] or *habitus*[102] to use the terminology of Pierre Bourdieu; the ineffectiveness of State law might well be explained by its incompatibility with this legal substrate.

Only sociologists and anthropologists provide evidence to suggest that law exists outside the law. Some, like some others before them, have emphasized the existence of norms distinct from State law,[103] without the need to fall back on morality. In Western society – that is, the Global North – there are such legal phenomena, and certain social scientists are committed to exposing them.[104] Management experts have also participated in this movement by studying all of the various operations within a company that escape formal direction and official organization.[105]

For their part, anthropologists have studied the particular manifestations of social organization, for our case in Sub-Saharan Africa.[106] Their main contributions are well known and we will not repeat them here. Our interest is simply to highlight the difficulty of subsuming such phenomena in our existing categories for thinking about the law.[107] Thus, it is even possible to ask whether custom is not likely to crystallize and, thus, pervert traditional law. Any field study undertaken by a legal scholar in an attempt to discover informal *juridicités* is only possible by crystallizing customs, habits, practices, etc., which risks creating customs, thereby changing the very nature of the sources of the forms of

100 Adido, *supra* note 65, p. 23 *et seq*.

101 E. Le Roy, "Formes et raisons de la place marginale du contrat dans les « accords » juridiquement validés en Afrique noire au tournant du XXe siècle", in S. Chassagnard and D. Hiez (eds.), *Approche critique de la contractualisation*, LGDJ, 2007, pp. 49–68.

102 Le Roy, *supra* note 41, p. 198 *et seq*.

103 S.P. Donlan, *Things Being Various Normativity, Legality, State Legality*, in M. Adams and D. Heirbaut (eds.), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Oxford: Hart Publishing, 2014), pp. 161–176.

104 For a foundational reference, see G. Gurvitch, *Éléments de sociologie juridique* (Paris: Aubier Montaigne, 1940).

105 F. Geoffroy, "Quels sont les managements possibles de l'informel?", in S. Perseil and Y. Pesqueux (eds.), *L'organisation de la transgression Formaliser l'informel?* (Paris: L'Harmattan, 2014), pp. 77–85.

106 For a brief summary and problematization, see Le Roy, *supra* note 41; N. Roulant, *Anthropologie juridique*, (Paris: PUF, 1988), p. 265 *et seq*.

107 For such a discussion, see G.R. Woodman and A. Obilade, *African Law and Legal Theory* (Dartmouth: Dartmouth Publishing, 1995).

juridicités observed. That is, of course, possible; however, as Africa is not a museum and it is not isolationist, we do not fear such change in its legal sources, since their particularities are not overlooked. What stands out from the study of African *juridicités* is the importance of its oral tradition, as well as the divergence of its legal imagination. So, rather than trying to categorize the findings, we prefer to retain the term *juridicité*,[108] or speak of legal pluralism,[109] to mark the diversity of the forms that law can take.

The forms the law takes cannot be disassociated from their foundations and, to give them their proper place in African commercial practices, it is necessary to study them. But, that is easier said than done, as much of the necessary research falls into other academic disciplines, as those are defined in the West. Some literature does, in fact, exist and recently, as we have noted, there has been increased interest in studying African business practices, particularly in the informal sector. But, the existing research, for the most part, comes from disciplined, and therefore limited, academic disciplines. Either the studies have been undertaken by economists or designed for economic analysis, and are more interested in individual motivations in order to validate the universality of *homo economicus*.[110] Or, the research is a legal study, clearly grounded in the positivist trend, which attempts to remain abstract[111] and often only skims over the basics.[112]

In sharp contrast, descriptive studies of business relationships, examined from a legal point of view (even broadly speaking), are virtually nonexistent. Some types of activity have, nevertheless, garnered some research attention (e.g., *tontines*), but few of those legal scholars or those who have otherwise indulged in such study, have been able to go beyond a superficial descriptions of the studied business practice, failing to get into the details necessary to permit a true understanding of how such practices actually work. It is, therefore,

108 I. Finkel, *L'imaginaire africain Représentations et stratégies juridiques de migrants d'Afrique noire* (Paris: L'Harmattan, 2000).

109 E. Le Roy, "Pourquoi, en Afrique, le droit refuse-t-il le pluralisme juridique que le communautarisme induit?", coming soon; J. Van der linden, *Les droits africains entre positivisme et pluralisme*, Bulletin des séances de l'académie royale des sciences d'outre-mer, n° 46 (2000), 279–292.

110 See, *supra*, I. Introduction

111 See, *supra*, I. Introduction, with the exception of Tohon's work, which is colored by anthropology, and Adido's work, which is dotted with history.

112 A special place must be reserved for the work of E.B. Lawson, *La société commerciale un pôle de développement? Comprendre le droit commercial outil de développement capitaliste* (Paris: L'Harmattan, 2012), who nourished his thoughts through theoretical perspectives and rich critiques.

absolutely essential to undertake, encourage, and conduct detailed and specific field studies.

4.3 Coordinating formal and informal *juridicités*

Such an understanding of the informal is, however, only one step, an admittedly very important step, as such an understanding will not change the fact that two distinct legal spheres will remain, with different, some might even call them opposite, shapes and content. Thus, our goal is to participate in developing a composite law that is both relevant and effective to the society it serves and, as such, can make a significant contribution to development. This requires building bridges between the two types of *juridicité*, without one necessarily absorbing the other. A focus on informal *juridicités* must not ignore or neglect formal law.

In that regard, the fact that OHADA law is under-utilized and often ineffective should not be used as a justification for losing interest in it. The OHADA initiative is of major significance, not only with respect to its ambitions, but also with respect to what it has, in fact, accomplished: the adoption of supranational rules in areas central to the economic life of its seventeen Member States. This achievement, due its size alone, is remarkable and we do not suggest, much less think, of going back. Besides, even if it was possible to return to national laws, those laws would not provide any better remedy, as there is nothing to suggest that the national rules that were superseded by OHADA law were any more effective when they were still in force. Thus, as legal scholars, it is necessary to take a second look at OHADA law. In other words, to build bridges between informal and formal *juridicités* not only implies a better understanding of the first, but it also requires a new look at the second.

It behooves us not to look at OHADA from a purely dogmatic perspective, but rather to consider it as a set of abstract rules. Of course, it is possible to analyze OHADA law on that basis, to highlight the contradictions to be found therein, to scrutinize the problems of coordination between regional, sub-regional, and national law, and to compare it with foreign law (starting with French law in francophone Africa). That work, however, has largely been undertaken in legal scholarship and shows OHADA law to be highly inadequate. Indeed, it is not possible to ignore the widespread ineffectiveness that characterizes OHADA law without making the distance between the law and its addressees even larger.[113]

113 For a very good analysis of "statolary" and the disconnect it creates between the law and the addressees of such law in Africa, see F. Eboussi Boulaga, *Les conférences nationales en Afrique noire, une affaire à suivre* (Paris: Karthala, spéc., 2009), p 102 *et seq*.

Nevertheless, despite its ineffectiveness, OHADA law deserves to be taken seriously, while taking that ineffectiveness into account.

It is, therefore, necessary to incorporate that reality – that is, that disconnect between the law and the people to whom it is addressed – into any legal analysis of the factual situation, without which any such an analysis is nothing more than mental gymnastics. Such knowledge of reality is typically provided to lawyers and legal scholars through court decisions. But, in Sub-Saharan Africa, court decisions are very difficult to access. But, rather than trying to continue the technical work while simply acknowledging this lack of access, rigor requires that it be overcome. That is to say, additional efforts should be made to study court decisions and other access channels must be found to find the reality lived by those subject to law. It is only in this way that we can reveal the technical difficulties encountered when trying to apply any particular rule. It is only on that basis that one can even contemplate the possibility of a genuine coordination between formal and informal *juridicités*.

Many modes of such coordination are conceivable and we only give a few small examples that our thinking has allowed us to glimpse so far. Other research has already opened the way: legal anthropologists, for example, went beyond a simple description of the terrain they observed, but instead sought to generate working qualifications based on the reported phenomena.[114] This approach is valuable because it helps to measure, concretely, just how compatible actual practice is with the official legal concepts available or, to put it another way, how well those concepts are adapted to reality. In that regard, it is absolutely necessary for the two legal spheres to have exchanges of terminology, so that communication between them can actually happen.

In terms of State law, it would be useful to expand the areas studied to include various rules and regulations adopted by the government to regulate economic activity, not just those that are considered traditional business law subjects. The States' programs for helping establish new businesses, training programs, urbanization and infrastructure programs, as well as zoning regulations and operating permits, together with the agreements they sign with associations and groups, all constitute rules and regulations that can bring the State's power closer to the ground and make the law more concrete for its addressees. From this perspective, we would suggest using the term "economic law" rather than "business law", as it more likely to embrace this diversity of legal sources.

114 Such work was done, for example, in connection with real property customs of the Dogon in Mali (M. Monteleone, *Le culte de la terre au pays Dogon (Mali) Entre coutume foncière et décentralisation*, Paris: L'Harmattan, 2013), as well as research regarding activities the informal sector in Benin (Tohon, *supra* note 70).

Coordination, however, also means penetration. On the one hand, customary law is, by nature, open to such indirect penetration, but it can only be studied and not stimulated. State law, on the other hand, is the opposite: by its nature, it resists such influences but its authors can be stimulated to go in that direction. In that regard, we will propose to two concepts, both of which consistent of integrating into official standards a new dimension that comes from informal *juridicité*.

The first suggestion comes from the importance of proverbs in Africa. They are a constant reference for education, communication, and explanation of behaviors or situations.[115] These proverbs would be rather pithy if they were, in fact, the basis for adjudicating litigation.[116] It is difficult for State law to incorporate such proverbs, as they are the antithesis of a rule. However, it is conceivable to insert appropriate proverbs in the preamble to laws to the extent they illuminate the meaning for lawyers and non-lawyers alike, and could even be used by the judge, himself, when interpreting the law. The use of such proverbs by the law and the judge would demonstrate the proximity of the official law to other, perhaps more familiar, norms, and might even be a vehicle for developments in official law. Such practice would be easy to introduce into systems already influenced by the Common Law, to the extent that legislative acts are frequently preceded by explanatory preambles and incorporate sections providing useful definitions. Countries whose legal systems are inspired by continental European law might have more difficulty with such legislative practices, but there has been an increase in programmatic provisions in response to unclear norms. The status of proverbs would require further research in order to find an appropriate place for them in the hierarchy of sources of official law. One thing, however, remains abundantly clear: references to maxims occasionally used in Western law are not the right place to start.

Our second suggestion is much more uncertain and requires far more discussion. One of gaps between State law and traditional African *juridicité* lies in the absence of rules for the latter. For the latter, the solution to a current question is not sought in a rule that must be followed but rather is found in conformity with an example taken from a given model with an ancient history. Therefore, to facilitate the transition between the former and the latter, one might consider changing the grammatical tense used in legislation. While the present tense is regarded, in law, as an essential, imperative characteristic of

115 For an example of a European's discovery of Malian life and the central role maxims played therein, see M. Haslé, *Portrait d'un village malien au bord du goudron* (Paris: L'Harmattan, 2012).
116 M. Dembélé, "Les mécanismes de résolution des litiges au Mali", in D. Hiez and S. Menétrey (eds.), *L'effectivité du droit économique dans l'espace OHADA*, forthcoming.

any rule, law could retake its original form as narrative. In that regard, a rule would be more like the presentation of a model to be replicated.[117] The abstraction linked to the generality of the particular rule would still continue to be in opposition to the concrete nature of informal *juridicité*, but such a change could still result in a better understanding thereof.

To conclude, if we want to better understand the legal tools used in West Africa and to participate to the elaboration of a more effective law in this context, European and especially French scholars have to change their way of thinking as well as their methodological patterns. They have to focus on legal pluralism rather than on the law produced by the State. This is not entirely new among the work of legal sociologists and anthropologists that refers to the existence of legal phenomena outside the State. However legal scholars working on OHADA law have only focused their attention on a positive law approach. There is no link between the two approaches. We think it important to draw lines between them and to take legal pluralism seriously in order to reduce the gap between official rules and informal practices. This is a fertile field and legal scholars have to go beyond the words and out into reality in order to focus on very specific questions to suggest small but precise analysis. The proposal of changing the way of thinking is particularly necessary for French literature, but discussion may arise to assess to which extent it can be applied in different contexts. In that respect, many questions can be proposed which enlarge and enrich the one we have faced hereby, and contribute to extract prejudices that remain alive. The effectiveness of law should be compared in ancient French colonies and in the commonwealth, in order to determine if the opposition between continental law and common law has still an impact nowadays and, if so, which one it is. In the meantime, some comparative studies in developing countries and in western countries (even if the category is not appropriate) would precise the meaning and the features of informality in those two different contexts. Apparently, these questions differ from the core idea of this paper, that is, the law can only be seized through State law but also informal rules, and that the negligence of informal rules is an important reason for ineffectiveness. However, that idea is, for us, very close from other hypothetical answers to these broader questions. For example, if we accept a definition of law beyond state law, the common idea of an opposition between developing and western countries, regard to law, should be nuanced. Instead of radically opposite conceptions of law, it could occur that the opposition concerns more the way of thinking that the legal practice. But, these are only hypothesis, some ideas for future research, and cannot be otherwise considered.

117 For an analysis of a regulation as a model, see A. Jammaud, "La règle de droit comme modèle", Dalloz, 1990, chronique, p. 199.