OHADA on the Ground: Harmonizing Business Laws in Three Dimensions

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I. INTRODUCTION

The classic comparative discussion pits common law against civil law; there are many opportunities to effect this analysis in the post-

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colonial environment that so frequently results in a hybrid formal law. The traditional analysis does not consider, however, the impact of the formal laws on the most significant portion of a developing country's economy: its informal sector. This is not a trivial issue as it determines what laws are needed to facilitate business: to achieve the same outcomes, formal business law applied in the informal sector will necessarily be different from the formal law applicable to the formal sector.

The Organization for the Harmonization of Business Laws (OHADA),[1] is a supranational system of business laws that, as implemented in the Anglophone region of Cameroon, offers both comparisons (plus an issue of translation). This region's formal law is in the common law tradition, but OHADA is civil law based, and Cameroon is a developing country with an extensive informal sector. Thus, OHADA displays three levels of mixity. First, OHADA law is supranational; as we will see, it becomes part of the internal law of each member state but still retains supranational characteristics. That is the first dimension. Second, OHADA being at least partially French-inspired, exemplifies the traditional civil law interaction with common law comparison; that's the second dimension. Third, because of its locale, it simultaneously illustrates the integration of European and customary laws; that's the third dimension.

OHADA business laws in the formal sector—generically and then in contrast to the civilian norms and culture—constitute the first part of the discussion below. The second part considers the role of formal law—including OHADA—in creating an environment favorable to informal-sector businesses.

II. OHADA: MIXITY IN THE ANGLOPHONE CAMEROONIAN FORMAL SECTOR: SUPRANATIONAL VS. NATIONAL; CIVILIAN VS. COMMON LAW

A. OHADA: A Supranational, Neo-Liberal, Supply-Side Concept

OHADA was formed by the Treaty of Port Louis, signed in 1993.[2] At that time, West and Central Africa were suffering the consequences of

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1. The acronym comes from the French: *l'Organisation pour l'harmonisation en Afrique du droit des affaires*.

2. Traité relatif à l'Harmonisation en Afrique du Droit des Affaires, art. 1, 4 Journal Officiel [JO] OHADA 1 (Nov. 1, 1997) [hereinafter OHADA Treaty], *available at* http://www.ohada.com; an unofficial translation into English is available at www.ohada.com. *See generally* Claire Moore Dickerson, *Harmonizing Business Laws in Africa: OHADA Calls the Tune*, 44 COLUM. J. TRANSNAT'L L. 17, 19 (2005).

a financial crisis in primary goods and, therefore, were desperate for additional capital.[3] In the early 1990s, the Washington Consensus was dominant, and was understood by the major international financial institutions such as the World Bank to call for market fundamentalism. The influential organizations were focused on facilitating transactions in the market and, thus, on reducing transaction costs.[4]

An articulated reason for OHADA was to increase foreign direct investment.[5] One method of increasing foreign direct investment was to have well–written, clear, accessible business laws that were in style familiar to the donors and investors from the global North, and uniform across a large trading area. The OHADA legal regime truly is a breathtakingly ambitious project, and was adopted in Cameroon, for example, with very little discussion—truly top-down, supply-side (crammed down) legal system.[6]

On its own terms and with respect to issues under its control, OHADA has nevertheless been remarkably successful in the formal sector. Sixteen countries are currently members and cover significant territory:[7] Senegal is the western-most member, Mali the northern-most; except for the Comoros, the Central African Republic is farthest to the east, and Congo-Brazzaville the southern-most. The Democratic Republic of Congo is poised to become the seventeenth country, and to capture the eastern and southern boundaries from all but the Comoros.

OHADA's supranational legislator, the Council of Ministers,[8] has already promulgated eight, soon nine business statutes, called uniform acts. Immediately upon adoption, all these laws are automatically operational as the internal law of the member states, superseding any past, current or future laws covering the same topics.[9] These uniform acts already govern commercial business soup-to-nuts. For example,

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3. Dickerson, *supra* note 2, at 27-30.

4. *See generally* John Williamson, *A Short History of the Washington Consensus*, 15 L. & BUS. REV. AM. 7 (2009).

5. OHADA Treaty, *supra* note 2, pmbl.; Dickerson, *supra* note 2, at 20.

6. *See* Martha Simo Tumnde, née Njikam, *OHADA as Experienced in Cameroon: Addressing Areas of Particular Concern to Common Law Jurists*, *in* UNIFIED BUSINESS LAWS FOR AFRICA 69-78 (Claire Moore Dickerson ed., 2009) (discussing problems with OHADA's top-down implementation structure).

7. West African members are Benin, Burkina Faso, Côte d'Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo; Central African members are Central African Republic, Chad, Cameroon, Comoros, Congo, Equatorial Guinea, and Gabon. OHADA, Réseau OHADA (2008), http://www.ohada.org/etats-parties/membres/post.html.

8. OHADA Treaty, *supra* note 2, arts. 27-30; BORIS MARTOR ET AL., BUSINESS LAW IN AFRICA: OHADA AND THE HARMONIZATION PROCESS 5-6 (2d ed., GMB Publ'g Ltd. 2007) (2002).

9. OHADA Treaty, *supra* note 2, art. 10; MARTOR ET AL., *supra* note 8, at 18.

company law, the general commercial law, secured transactions and, approved but not yet effective, the law on cooperatives,[10] all will be relevant to business formation, including the raising of capital. These laws, plus accounting law and, very important in the region, the law on carriage of goods by road, are touch every aspect of a business's actual operations, from obtaining ongoing financing, to effecting a sale, to physical delivery of a good. The resolution of disputes relating to any commercial transaction or arising at the end of a business, and the orderly winding up that business, are addressed by OHADA's laws on bankruptcy, on arbitration, and on measures of recovery and execution of judgments.[11]

The drafters of these uniform texts not only considered which areas of the law would be particularly well-adapted to the local realities, as evidenced by the law on carriage of goods by road, but also sought to include provisions within each law that would similarly would be well-suited to facilitating business in that region. Thus, the company law includes the possibility of highly streamlined structures, including a corporation managed by a single person who exercises the functions, simultaneously, of both a chief executive officer and a board of directors.[12] Further, in the interests of maximizing transparency, the OHADA statutes create a register, intended to be computerized, for the purpose of centralizing and making accessible information concerning a wide range of topics, including businesses (*commerçants*)[13] and secured

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10. Acte Uniforme relatif aux Sociétés Coopératives ou Mutualistes; adoption by the Council of Ministers is anticipated in 2010 (UA on Cooperatives).

11. Chronologically, by date of adoption: Acte Uniforme relatif au Droit des Sociétés Commerciales et du Groupement d'Intérêt Économique, adopted Apr. 17, 1997, 2 JO OHADA 1 (Oct. 1, 1997) (UA on Company Law and EIG); Acte Uniforme relatif au Droit Commercial Général, adopted Apr. 17, 1997, 1 JO OHADA 1 (Oct. 1, 1997) (UA on General Commercial Law); Acte Uniforme portant Organisation des Sûretés, adopted Apr. 17, 1997, 3 JO OHADA 1 (Oct. 1, 1997) (UA on Secured Transactions); Acte Uniforme portant Organisation des Procédures Simplifiées de Recouvrement et des Voies d'Exécution, adopted Apr. 10, 1998, 6 JO OHADA 1 (July 1, 1998) (UA on Simplified Measures of Recovery and Execution of Judgments); Acte Uniforme portant Organisation des Procédures Collectives d'Apurement du Passif, adopted Apr. 10, 1998, 7 JO OHADA 1 (July 1, 1998) (UA on Bankruptcy); Acte Uniforme relatif au Droit de l'Arbitrage, adopted Mar. 11, 1999, 8 JO OHADA 1 (May 15, 1999) (UA on Arbitration); Acte Uniforme portant Organisation et Harmonisation des Compatibilités des Entreprises, adopted Feb. 22, 2000, 10 JO OHADA 1 (Nov. 20, 2000) (UA on Accounting); Acte Uniforme relatif aux Contrats de Transport de Marchandises par Route, adopted Mar. 22, 2003, 13 JO OHADA 3 (July 31, 2003) (UA on Carriage of Goods by Road). Translations are unofficial; both the texts in French and a translation into English are available at http://www.ohada.com.

12. UA on Company Law and EIG, art. 494 (granting the possibility of appointing an "administrateur général" with such powers so long as the corporation has no more than three shareholders).

13. *See* UA on General Commercial Law, arts. 1-18 (describing the *commerçant*).

debts.[14] The national governments implement and control the register, and unfortunately its effectiveness has been compromised by the slow process toward computerization.

If the Council of Ministers by definition creates uniformity of text throughout OHADA's territory, the Common Court of Justice and Arbitration (CCJA), OHADA's supranational court, is responsible for maintaining uniformity of interpretation and implementation.[15] Disputes concerning OHADA laws that are litigated through the formal judicial system will first pass through the national courts, and then to the CCJA instead of to the national supreme court.[16] A judgment rendered by the CCJA is, for purposes of execution, treated as a judgment of the national judicial regime, which at this point is obligated to execute it.[17]

Thus, the Council of Ministers provides sophisticated and well-drafted business laws that are identical throughout the OHADA territory and regulate the formation, operation and winding up of businesses. Not only is a single text of each law applicable in all member states, but interpretation of the text drives toward uniformity as well. The CCJA's goal is to guarantee uniformity as its decisions apply to all member states in the same manner as would a decision of the highest national court.[18] Enforcement, however, being back in the hands of the national judicial regimes, is less directly under the control of the OHADA institutions and their push to predictability and uniformity.

A mixed jurisdiction such as the Anglophone region of Cameroon introduces additional issues.

B. Mixed Jurisdiction: Issues of Translation and Interpretation

1. Translation of Language

For historical reasons, Anglophone Cameroon inherited the British legal system.[19] Regarding the OHADA uniform acts, arguably the most salient issue to confront the Anglophone jurists is language. To date, the OHADA Treaty and the uniform acts have all been drafted in French. Translations into English exist, but they are as yet only unofficial. Indeed, the Treaty as currently written specifies that French is the only working language for OHADA, but a treaty amendment signed in 2008

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14. *See generally* UA on Secured Transactions.
15. OHADA Treaty, *supra* note 2, tit. III.
16. *Id.* art. 13.
17. *Id.* art. 20; MARTOR ET AL., *supra* note 8, at 8-12.
18. OHADA Treaty, *supra* note 2, art. 20.
19. Jean Alain Penda Matipé, *The History of the Harmonization of Laws in Africa*, *in* UNIFIED BUSINESS LAWS FOR AFRICA, *supra* note 6, at 10-12.

and currently circulating for ratification adds as working languages the three other European languages that are official languages of one or more OHADA member states: English, Portuguese, and Spanish. Nevertheless, for the moment, translation remains a serious issue.

The Anglophone jurists in Cameroon have lived up to the common law lawyer's reputation for pragmatism: they continue to find solutions. Generally, they tend to use natural equivalents so long as there is an English term that is in the same definitional vicinity; thus, a *société de fait* becomes a *de facto* partnership.[20] Even if the two terms are not identical in meaning, they are in the same ball park, and the natural equivalent sounds truer to the English ear than would the linguistic equivalent, "company in fact" or, worse yet, "society in fact." The natural equivalent is a time-honored choice, having been the strategy deployed by Francophones in Canada and Switzerland, for example, where French is the minority language, just as English is the minority European language in Cameroon, perhaps as a way of gaining linguistic control over the text.[21] The expectation, of course, is that ultimately the natural equivalent will acquire the same meaning as the opposite-language term from which it was translated.

2. Translation as Interpretation of Legal Concepts

For some terms, however, there is no natural equivalent, because the subject matter is too different between the legal system using one language and the other legal system operating in a different language. In that circumstance, the famed comparatists Arthur von Mehren and Kurt Nadelmann championed an interesting solution. For drafting the Hague convention on the recognition and enforcement of foreign judgments, they took the following phrase: "manifestement incompatible avec l'ordre public de l'Etat requis," and, as the common law does not have even a close analogue to "ordre public," translated it,

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20. *Compare* Uniform Act Relating to Companies and Economic Interest Groups (English version), arts. 864-868, *with* Acte Uniforme Adopté le 17 Avril 1997, Relatif au Droit des Sociétés Commerciales et du Groupement d'Intérêt Économique (French version), arts. 864-868, translations *available at* http://www.ohada.com/textes.php?categorie=98 (last visited Nov. 15, 2009).

21. *See, e.g.*, SUSAN ŠARČEVIĆ, NEW APPROACH TO LEGAL TRANSLATION 36-40, 234-36 (Kluwer Law International 1997) (Professor Virgile Rossel, French-Swiss, in the first decade of the twentieth century, and Professor and Justice Louis-Philippe Pigeon, Quebecer, in the 1980s, rejected linguistic equivalence in translation, and instead championed an idiomatic, "functional" translation into the target language.). Perhaps Rossel and Pigeon advocated idiomatic translations into French, using French words and syntax, in part because French is a minority language both in Switzerland and in Canada? Another translation strategy is the use of neologisms. *See id.* at 259.

> . . . if . . . manifestly incompatible with *public policy* of the State addressed or if the decision resulted from proceedings incompatible with the requirements of due process of law or if, in the circumstances, either party had no adequate opportunity fairly to present his case . . . .[22]

In other words, the English text itself includes a thoroughly educational commentary that becomes part of the statute (in this case, a treaty), with the ultimate desired result that the common law trained Anglophone understands the same concept from the English that the French-speaking civilian understands from the French.

French-law concepts such as *commerçant* and *fonds de commerce*, both found in OHADA's commercial law,[23] definitely would benefit from this kind of statutory gloss.

The common law jurist would likewise benefit from this approach for the term "notaire." The uniform act on company law refers to the "notaire" fifteen times, giving that professional exclusive powers. This is another arena where no common law analogue exists, but here the natural equivalent is particularly misleading in a part of the business law that affects basic protections relating to operations of business enterprises, not concerning dispute resolution.

In early 2009, the then-Prime Minister of Cameroon, himself an Anglophone, had been reported to have supported a move to impose civilian-style notaries in the Anglophone, common law area.[24] Although he ultimately relented, apparently because of a threatened strike by members of the Anglophone bar, the rumor within that bar had earlier been that the Prime Minister's intention was not necessarily to import Francophone notaries. Instead, his reported intention had been to create a new class of Anglophone jurist whom he proposed to call a "solicitor," with the implicit expectation that the term was the equivalent of the French-civilian "notaire." The English term "solicitor" at least conveys a

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22. *Id.* at 252-53 (emphasis added) (translation of "ordre public" in the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Art. 5(1), concluded February 1, 1971, and entered into force in 1979). Nadelmann and Von Mehren, discussing draft language subsequently included in the final version, were aware that the last clause of the convention's article 5(1) may be redundant, especially in U.S. jurisprudence, given the second clause relating to due process. Kurt H. Nadelmann & Arthur T. Von Mehren, *Equivalencies in Treaties in the Conflicts Field*, 15 AM. J. COMP. LAW 195, 201 (1967).

23. Respectively, Acte Uniforme Adopte le 17 Avril Relatif au Droit Commercial General (Uniform Act Relating to General Commercial Law), 1 JO Ohada 1 (Oct. 1, 1997), arts. 1-12, 103-105, *available at* http://www.ohada.com/textes.php?newlang=french&categorie=11.

24. Adolf Mongo Dipoko, *No Appointment of Notaries—Lawyers Assured*, EDEN NEWSPAPER, May 26, 2009, http://www.edennewspaper.com/index.php?option=com_content&view=article&id=9874:374&catid=75:national&Itemid=162.

seriousness much closer to the French "notaire" than does the United States term "notary," which refers to an essentially clerical position. The British "notary" is different again, and for the most part is somewhat closer to the French than the United States conception.[25] In either case, the use of the word "notary" for "notaire" would lead to confusion—as would the term "solicitor"—underscoring the desirability of a statutory explanation.

Legal concepts can be much broader and more abstract than these examples, of course, and the legal influences in Cameroon's formal sector are not exclusively from the French side to the Anglophone region. Even before the advent of OHADA, as the well-respected Francophone law professor Paul-Gérard Pougoué confirmed, judges in the Francophone region, trained according to the civilian system, were happily citing to cases in their judicial decisions. Although these Francophone legal professionals were not citing as consistently as their Anglophone co-professionals, according to Pougoué this use of decisions, especially in connection with well-written statutes of OHADA, creates its own kind of predictability.[26] He is not wrong: another first-rate scholar from the Francophone side publicly derided a judge for a specific decision, and, apparently, the offending judge became the object of his peers' mockery.[27]

As this common law approach to judicial decisions applies to OHADA, it helps OHADA conform to local norms, and thus the approach is helping OHADA put down roots in the formal sector. The depth and breadth of these roots nevertheless are difficult to measure: to the extent that local businesses and later the judicial system interpret the Northern texts to conform to local business culture, no cases will appear. Consider, for example, the following true story that occurred in the common law region of Cameroon. An uncle had a business in the formal

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25. *See generally* The Notaries Society, http://www.thenotariessociety.org.uk/ (last visited Oct. 17, 2009).

26. Interview with Paul-Gérard Pougoué, Professor and Vice Rector, Université de Yaoundé II, in Yaoundé, Cameroon (July 9, 2004) (confirming the importance to judicial predictability of the publication and distribution of legal decisions in the Francophone, civil law focused, portion of Cameroon, as well as in the Anglophone, common law focused side).

27. Disciplining behavior by shaming of a professional sort is a well-known goal of judicial decisions in the common law tradition, including specifically in the business environment. See, for example, Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997), the seminal piece on the topic in U.S., and specifically Delaware, corporate law. At least in some communities, white-collar criminals may be more susceptible to shaming. *See generally* Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 367-68, 388 (1999) (asserting that judges can regulate white-collar crime through shaming in lieu of fines or prison sentences, and calling for empirical study of publication of sentences).

sector; desiring to retire, he turned the business over to a nephew who had shown some business promise. After not much time in charge of his uncle's business, the nephew concluded that another opportunity would be even more lucrative, and the nephew therefore started his own new business—using assets from the uncle's business. The new venture became wildly successful.

Under common law, the nephew had unambiguously breached his fiduciary duty to the owner,[28] and the taking of the opportunity was also a violation of statutory obligations under OHADA.[29] When the uncle found out what his nephew had done, far from being offended by his nephew's behavior, the uncle was affirmatively happy and proud: the nephew has grown the extended family's assets. To emphasize, the uncle was not merely tolerant; he was actively pleased.

How to explain this? Perhaps the local interpretation of the Northern text redefines what is meant by business. Perhaps it includes more than what is contained within the four walls of the classic, formal business entity created under applicable business laws, namely the OHADA uniform act on company law. Perhaps, instead, the relevant entity is the extended family and its business operations. On this revised analysis, the nephew was no longer acting beyond the scope of his authority, and since he is acting for the newly conceptualized entity, he no longer is benefitting himself instead of the entity since the latter includes both his uncle's business and his own, plus much more. In OHADA terms, he no longer is acting other than in the relevant business's interest.

This, of course, is a different type of translation and goes well beyond language. The narrative suggests that, here, an entire concept is being translated from the culture into the formal texts. That is how

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28. Liability exists even assuming a simple agency relationship. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY §§ 2.01 (Actual Authority), 8.01 (General Fiduciary Principle) (2006). The law of business enterprises, for example Delaware corporate law or limited liability company (LLC) law, creates the same type of obligation for a director or an LLC's manager, through case-law gloss on statute. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 102(b)(7), 141, 144, (2001) (relating a corporate director's power and responsibility); iconic Delaware cases on the fiduciary duty of care and loyalty, respectively, include *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), and, arguably, a takeover case such as *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954-55 (Del. 1985). For LLCs, see, for example, DEL. CODE ANN. tit. 18, § 1101(c) (referring to fiduciary duties among others), and *VGS, Inc. v. Castiel*, No. 17,995, 2000 Del. Ch. LEXIS 122 (Del. Ch. Aug. 31, 2000), *reprinted in* 27 DEL. J. CORP. L. 454 (2002), *aff'd*, 781 A.2d 696 (Del. 2001) (table), No. 564, 2000 (Del. May 23, 2001) (apparently concerning duty of loyalty under the current understanding of the Delaware obligation of good faith).

29. Assuming, for example, the use of a *Société à responsabilité limitée* (similar to a limited liability company in the United States), the actor has permission to act only in the company's interest. UA on Company Law and EIG, art. 328(1).

OHADA puts down roots, how it conforms the Northern form and sophistication of its texts to local norms. It also serves as an introduction to the third dimension: having considered the supranational versus the national, and the clash of common law and civilian systems, we turn now to the intersection of European laws—whichever the system—with local norms.

III. OHADA AND THE INFORMAL SECTOR; DEVELOPMENT

The uncle-nephew example is mostly in the formal sector, and there likely are multiple examples of this sort of development among businesses that straddle the formal and informal sectors. Deep in the informal sector, however, local norms definitely are salient. The question for OHADA is: what is its impact on, and relevance to, this vitally important business forum?

Any discussion of the informal sector will be quite different from our earlier contemplation of the formal sector. Function remains the theme, but OHADA, the formal law, inevitably loses its centrality to the analysis. The neo-liberal assumptions underlying OHADA have to be challenged.

A. Neo-Liberalism and the Informal Sector

1. Informal Sector, Defined

The International Labour Organization offers an influential definition from 1993 that focuses on workers who sell goods or products for their own account (or who employ such own-account workers).[30] A definition more focused on economics refers to workers whose output is not included in Gross Domestic Product.[31] Because this piece focuses on law, a definition that includes own-account workers and that relates to income not officially counted understands the informal sector to be the locale where formal law does not penetrate, or does so only unpredictably, and generally weakly.

By any reasonable understanding street vendors, hawkers, and market women will typically satisfy the ILO, GDP, and law definitions simultaneously, and these workers thus are part of the informal sector.

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30. Int'l Labour Org. (ILO), 15th Int'l Conference of Labour Statisticians (Jan. 1993), *Resolution Concerning Statistics of Employment in the Informal Sector*, paras. 6-10, *available at* http://www-ilo-mirror.cornell.edu/public/english/bureau/stat/res/infsec.htm.

31. FRIEDRICH SCHNEIDER, SIZE AND MEASUREMENT OF THE INFORMAL ECONOMY IN 110 COUNTRIES AROUND THE WORLD 3 (2002), *available at* http://rru.worldbank.org/Documents/PapersLinks/informal_economy.pdf.

For purposes of this piece, then, the focus is on people who do business in the informal sector, that is, on nano-entrepreneurs, on own-account workers.

What, then, is the informal sector's relevance? The simple answer is that, although the size of the informal market is notoriously difficult to measure, it is huge. In 1999-2000, that is, even before our current financial crisis, a report prepared for the World Bank estimated that the informal sector in Sub-Saharan Africa represented between 40% and 60% of the local economy,[32] and employed between 51% and 93% of nonagricultural workers.[33]

2. Neo-Liberalism and the Informal Sector

By its own statements at the time of OHADA's formation, the World Bank was trying to encourage economic development as it espoused the neo-liberal perspective. A few years later, economists at the World Bank convinced the institution that French-inspired law is heavy with regulation and thus friction, and consequently is incompatible with development.[34] These legal-originalists were still operating on the neo-liberal perspective, were still focused on reducing friction in the markets, so that a thousand flowers might bloom. The unemployed and underemployed masses in developing countries were basically passive recipients of market-created largesse.

In fairness to the World Bank, its thinking has evolved since then,[35] but it is important to acknowledge explicitly that there are conceptions of pro-development activities other than the neo-liberal vision. For example, Amartya Sen proposes "human capability" as a definition—one which is much more than purely economic factors.[36] To be totally reductionist, Sen is communicating the following two points: first, economic growth is necessary but not sufficient to development. Having the choice to live the life we plan for ourselves is critical, whether or not

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32. *Id.* at 5 (very low figures).

33. ILO, Women and Men in the Informal Economy: A Statistical Picture 19 (2002), *available at* http://www.wiego.org/publications/women%20and%20men%20in%20the%20informal%20 economy.pdf.

34. THE WORLD BANK, DOING BUSINESS IN 2004: UNDERSTANDING REGULATION, at xvi (2004), *available at* http://www.doingbusiness.org/Documents/DB2004-full-report.pdf.

35. *See, e.g.*, THE WORLD BANK, DOING BUSINESS 2009 (2008), *available at* http://www.doingbusiness.org/Documents/FullReport/2009/DB_2009_English.pdf (reflecting that by its own measures, countries that had inherited a French legal system have made significant development progress).

36. *See generally* David A. Clark, *The Capability Approach*, *in* THE ELGAR COMPANION TO DEVELOPMENT STUDIES 38 (David Alexander Clark, ed., Gloucester: Edward Elgar Publ'g, 2006), *available at* http://www.netlibrary.com/Reader/.

we exercise that choice. Being "adequately nourished and . . . free from avoidable disease" are hallmarks, along with "being able to take part in the life of the community and having self-respect."[37]

Sen's second point is that the capability of each individual depends on that person and on that person's complex of circumstances. Because choice and participation are important[38] this conception espouses a bottom-up approach, as those affected must be part of the solution.

What type of business-law system would take into consideration the nano-entrepreneurs' own perceptions of their needs? Remember what we said about OHADA's functions as a business law: Starting a business, including formation of a business enterprise and raising capital; operating a business, including securing loans and effecting commercial leases, and selling and delivering goods; and winding up a business, including returning assets to productive use and resolving disputes.[39]

B. Realities in the Informal Sector

1. Law in the Informal Sector: The Demand Side

The functions that OHADA laws perform in the formal sector thus help frame the analysis of formal business laws transplanted from the global North, and their ability to address the problems of business people deep in the informal sector.

Assume that a nano-entrepreneur needs to raise capital; what will she want to obtain from the legal system? This is a focus on the affected person's and what she will demand from and of law. As a practical matter, in the informal sector, the nano-entrepreneur will go to her family, and then to friends, just as does any start-up entrepreneur anywhere in the world. She will also go to her supplier and, for example, "borrow" produce for the day and repay the debt out of proceeds at the end of each day.[40]

If her liquidity needs remain unmet, and assuming no microfinance alternatives like the early Grameen Bank,[41] the nano-entrepreneur will go

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37. AMARTYA SEN, DEVELOPMENT AS FREEDOM 71, 75, 144 (1999) (citations omitted).

38. AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT 30-31 (1982).

39. *See supra* Part II.A and text accompanying note 8 (describing the OHADA uniform acts and their functions).

40. Conversation with Bar. Akin, Abuja, Nigeria (Mar. 29, 2008), and Paris (CDG airport) (Mar. 30, 2008).

41. *See, e.g.*, David Hulme, *The Story of the Grameen Bank: From Subsidised Microcredit to Market-Based Microfinance* (Brooks World Poverty Institute Working Paper No. 60, Nov. 1, 2008), *available at* http://ssrn.com/abstract=1300930 (pointing out that since 2001 the Grameen Bank has been less focused on lending to the very poor and no longer uses the famed peer groups); *see also* David Hulme & Karen Moore, *Why Has Microfinance Been a Policy*

back to her native village to participate in an often sophisticated pool (tontine).[42]

For nano-entrepreneurs, the property protections contained in the sophisticated system that OHADA offers simply are not relevant. The nano-entrepreneurs will not file with at official OHADA register,[43] no matter how useful it would be to their attempts to raise capital, because they do not have practical access to it. No matter how much protection they would obtain from forming a limited liability business organization, they will not do so as the complexity, and the cost of formation and operation put it out of reach.

Further, for businesspeople in the formal sector of a developed economy, there are endowments that pass unnoticed because they are so firmly embedded in the legal infrastructure. For example: most business people in the global North do not worry about finding a stable dispute-resolution system, or about the availability of a sanitary and safe place to store inventory and do business.

Thus, however effective OHADA's business laws can be in the formal sector, they are not designed to create analogous outcomes in the informal sector, at least directly. For this reason, in the informal sector OHADA loses its centrality to the discussion of law, but this does not mean that OHADA is irrelevant there.

2. What Can OHADA's Formal Legal System Offer Business in the Informal Sector

a. Role for Nonbusiness Law

There may still be a role in the informal sector for formal law, although for the most part not for classic business law. What law must accomplish in the informal sector is to create a framework within which the existing local business norms can play out. That role could be to facilitate coordination among the relevant players in the informal sector, inevitably most often on a relatively micro level: there, demand for law may be identifiable even in the informal sector hard to define.

Success in Bangladesh (and Beyond)? (draft of Mar. 10, 2006), *available at* http://www.sed.manchester.ac.uk/idpm/staff/documents/DH_KM_130306_Microfinance_Bangladesh_PolicP_000.pdf (describing the development of the Grameen Bank, including the recognition that the peer pressure often was not effected).

42. *See generally* John R. Heilbrunn, Markets, Profits and Power: The Politics of Business in Benin and Togo 11 (1997), *available at* http://cean.sciencespobordeaux.fr/page%20perso/td53.pdf; Claire Moore Dickerson, *The Cameroonian Experience Under OHADA: Business Organizations in a Developing Economy*, 112:2 BUS. & SOC. REV. 191, 205-06 (2007) (discussing the tontine).

43. For a discussion of the OHADA register, see *supra* Part II.A.

Ultimately this is a different form of providing a legal framework for businesses from that with which we are familiar in the global North, but it is an application of a formal legal system to the informal sector, in tandem with the informal system still in operation there. As an illustration, consider the usefulness to a nano-entrepreneur if collectives, formal or not, were created within the market, or perhaps geographically more broadly, but limited by industry. These have been harnessed in Sub-Saharan Africa to help provide the predictability and security that business law supplies to businesses in the global North, for example for artisans seeking at least rudimentary healthcare.[44]

In terms of raising capital, broadly defined, collectives have been used to take advantage of a type of property otherwise not exploitable by nano-entrepreneurs, for example, by operationalizing intellectual property. A Ghanaian cooperative has over 40,000 cocoa farmers organized through village societies; the cooperative also processes the chocolate, so the farmers no longer are selling only primary goods. The chocolate indeed has its own intellectual property, in this case, its own trademark.[45]

Formal and informal cooperatives have been instrumental in more than business formation. They have also been used to support business operations by, for instance, generating inexpensive insurance, which in turn can be used as a partial substitute for the limited-liability structures—these being too expensive and complicated for a nano-entrepreneur.[46] Collectives have shown that they can promote the supportive business environment we in the North take for granted. They have organized child care, purchased physical security to keep the peace, responded to authorities such as tax collectors, and have wrested improved sanitary conditions for sellers in the market.

In addition to encouraging collectives of various types, law can provide a kind of wholesale approach to commercial leases. For example, a standardized commercial lease that would become known to all nano-entrepreneurs could reduce both the cost of entering into a lease for a market stall and the cost of resolving any subsequent dispute. The standardized lease could be a nonabusive contract of adhesion, for

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44. Carlos Maldonado, Cheikh Badiane & Anne-Lise Miélot, Méthodes et instruments d'appui au secteur informel en Afrique francophone 123 (SEED Working Paper No. 24, 2004), *available at* http://webdev.ilo.org/empent/Whatwedo/Publications/lang--en/contLang--fr/docName--WCMS_117713/index.htm (describing Mali's MUTAM).

45. *See* UN DEVELOPMENT PROGRAMME, COMM'N ON LEGAL EMPOWERMENT OF THE POOR, VOLUME I: REPORT OF THE COMMISSION ON LEGAL EMPOWERMENT OF THE POOR (UNDP) 252 (2008) [hereinafter UNDP Report].

46. Maldonado, *supra* note 42, at 123.

example, and call for basic sanitation, electricity, security and so forth in the markets; this has been a focus in South Africa, for example.[47]

b. Role for the OHADA Business Law

While laws not necessarily focused on business may well take the laboring oar in the informal sector, business laws such as OHADA's may have a contribution to offer there, as well. By virtue of their own attributes, namely their clarity, sophistication and accessibility, and because of the additional certainty of interpretation and application provided by OHADA's institutions, at minimum OHADA can put into high relief some impediments to business. For example, although the World Bank's Doing Business criteria feature items not actually under OHADA's control,[48] the simplicity and clarity of OHADA procedures highlights the burdensome nature of national procedures for entity formation. It emphasizes the unfortunate and costly failure of the national authorities to computerize the OHADA register, as well as the difficulty of obtaining execution of judgments through the national regime.[49]

With respect to the creation of collectives, OHADA has a very specific form to offer: the Economic Interest Group, which would have been a perfect form for the Ghanaian chocolate venture.[50] In addition, if a draft uniform act currently under consideration progresses through the Council of Ministers as many observers expect, OHADA will have a statute on cooperatives before the end of 2009.

IV. CONCLUSION

The issues concerning development are so large and so important that they must be addressed both top-down and bottom-up. The discussions held in connection with the conference at the University of Stellenbosch have considered each, and we have seen that OHADA in Anglophone Cameroon, a supply-side mixed jurisdiction operating in the formal sector, has focused the legal professionals in a positive way on the

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47. UNDP REPORT, *supra* note 45, at 97, 99.

48. *See* The World Bank, *supra* note 35, at 32-33 (describing, *inter alia*, countries that had effected reforms across 10 criteria). Of those ten criteria, some, such as the time to start a business, the time to obtain construction contracts, the transparency of tax-payment, are not at all within OHADA's jurisdiction. Others, such as protecting investors, are mixed responsibilities of OHADA and the national governments.

49. *See supra* Part II.A (referring to the OHADA register and execution of judgments).

50. UA on Company Law and EIG, arts. 869-885 (referring to the "Groupement d'intérêt économique," i.e., the economic interest group).

neo-liberal conception of facilitating commercial activity. Meantime, nonbusiness formal laws, plus a touch of OHADA, create a different type of mixed jurisdiction that can construct a framework responsive to the demands of nano-entrepreneurs operating in the informal sector.