

What role for citizens in West and Central Africa commercial law reform?

*Inquiry into the modes of women entrepreneurs in Benin **

Isabelle Deschamps** ©

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** Lawyer, Barreau du Québec (2005); Non-practicing Solicitor, Law Society of England and Wales (2008); LL.B., Université de Montréal (2002); M.A., International Relations, Universidad Complutense de Madrid (2004); LL.M. Candidate, Faculty of Law, McGill University (2010-11). I thank Professor Roderick A. Macdonald for his unwavering support and insightful supervision and Professor David Howes for his constructive comments on earlier work in connection with this paper.

I. Introduction

This paper explores how real-life economic behavior in West and Central Africa compares with African regional and international organizations' basic conceptions about law and trade. It seeks to contribute to expose how economic conduct is organized and shaped in communities where commercial activity is dominated by practices that do not necessarily conform to or come within the ambit of statutory law and officially recognized structures of business. Ultimately, this essay aims to present a perspective on the nature of business and business law that could induce policies and strategies for human and economic development that are more adapted to their region of application.

To do so, I use a case study: I examine economic practices in the Republic of Benin and look at how they interact with the State's Western (often French) derived formal commercial law and structure. I focus on women entrepreneurs as paradigms of investigation. I will be travelling to Benin in the summer 2011 to continue empirical research on issues raised herein. This paper thus also poses the bedrocks of my upcoming field inquiry.

Part A exposes my methodological framework of analysis, which is founded on a comparative, historical, inter-disciplinary and empirical approach. This framework, which I have labelled "Clinical Legal Pluralism", draws from "clinical economics", legal pluralism theories, and strategies developed for identifying on-the-ground commercial behaviour in Third World countries'. It focuses on the *context* in which economic activity takes place, on the *identity* of juridico-economic agents and on the *dynamics* and practices between these agents.

In line with this framework, part B considers aspects of the historical context of (female) economic activity and normativity in Benin from pre-colonial times to present. Part C examines some of the socio-cultural realities of Beninese businesswomen. It considers maternity, spousal unions, literacy, religion and ethnicity and asks how these elements, as well as history, model women's business conduct in Benin.

A comprehensive answer to this question requires the mapping of women entrepreneurs' sectors of economic activities, type of businesses and products and sources of financing. Part D is a preliminary attempt at this mapping exercise based on a preliminary environmental scan I undertook in Benin in 2010 and on other secondary

empirical data. It points to selected examples of dichotomies between formal regional business rules applicable in the country and on-the-ground trade practices as partial evidence of the limitations of dominant regional and international institutions' law and development logic and instruments¹.

In my concluding remarks, I discuss the significance of gaps between formal business laws in Benin and the realities and practices of its (female) entrepreneurs. It appears that while official structures may benefit foreign enterprises (including financial institutions) doing business in Benin, they tend to remain beyond the reach of the vast majority of the country's small and medium (women) entrepreneurs. Imbalance between the benefits foreign businesses derive from their activities in Benin and those of individual, small and medium Beninese businesses is thus perpetuated.

I outline proposals inspired by socio-scientific and critical legal pluralism theories for remedying to the above challenges. The objective is to allow Beninese citizens running small and medium enterprises to play a greater role in the socio-economic development of their country through, amongst other things, carefully drafted, nationally adapted and flexible legislation. In the particular case of women entrepreneurs, commercial law reform should involve more than efficiency concerns and be attentive to gender issues in business practices.

¹ Examples of such tools include legislative guides, model laws, uniform laws, World Bank "Doing Business" reports, etc.

II. What role for citizens in West and Central Africa commercial law reform? Inquiry into the modes of women entrepreneurs in Benin

A. Methodological Approach: Clinical Legal Pluralism

The methodological approach I adopt to study the issues raised herein is motivated by the objective of carrying out a comprehensive, culture-sensitive and humanitarian² research of the topic. I have designated it Clinical Legal Pluralism. It is derived from development economist Jeffrey Sachs' Clinical Economics method³, from law professors Boaventura de Sousa Santos and Roderick Macdonald's theories on social-scientific and critical legal pluralism and law reform, and from economist and Institute for Law and Democracy director Hernando de Soto's strategy for identifying and accounting for "extra-legal" business arrangements in Third World countries.

1. Clinical Economics

In *The End of Poverty: Economic Possibilities for Our Time*⁴, professor Sachs writes the following:

"(...) there are myriad possibilities for the persistence of poverty even in the midst of economic growth. Only a close diagnostic of particular circumstances will allow an accurate understanding. Policy makers an analysts should be sensitive, however, to geographical, political, and cultural conditions that may each play a role." (at 73)

Sachs assimilates the work of a development economist to that of a clinician and suggests a "clinical economics" method founded on five lessons from medical practice. These lessons are equally relevant to other development actors, including jurists, civil society and other. For the purposes of this paper and associated research, I focus on the following four teachings. i) First, the human body (here a country) is a complex

² I use the word in its original meaning, e.g. "concerned with or seeking to promote human welfare" rather than to mean "human" as is now often attributed to it in the media and international arena in the context of disasters or crises requiring urgent relief. (New Oxford American Dictionary, Version 2.1.3 (80.4), Apple Copyright © 2005–2009 Apple Inc.)

³ Sachs, Jeffrey, *The End of Poverty: Economic Solutions for our Times* (New York: Penguin Press, 2005).

⁴ *Id.*

structure in which many elements are interrelated and influence each other. ii) Second, complexity requires a multifaceted, organized and timely response to symptoms (problems, crises). iii) Third, one must not only identify the illness of a patient (country), he or she must appreciate the social context in order to prescribe adequate treatment. iv) And fourth, assiduous comparison of objectives and results (rather than mere verification of adoption of a suggested measure) is necessary to correct erroneous initial diagnosis⁵.

One can find examples of how this particularly translates into law in R.A. Macdonald's works on legal reform activity as well as in his and de Sousa Santos' legal pluralism theories.

2. (Critical) Legal Pluralist Approaches to Law and Reform

In an article entitled "Article 9 Norm Entrepreneurship"⁶, Prof. Macdonald provides guidelines for legal modernisation work (here in secured transactions law):

"(...) never take for granted the economic, political, social and institutional factors that make it possible to even contemplate security on property regimes as a means or enhancing access to credit. (...) never underestimate the fragility of the legal regimes, especially as they relate to the necessary citizen confidence and willingness to accept judicially declared outcomes that underpin them.

(...). To be successful reform cannot just be a transplant operated by political diktat." (at pages 241-242)

Macdonald insists on the importance that legal reform prioritize substance over form (e.g. looking at both intent and effect of new laws), timeliness (perfect is the enemy of the good), party autonomy (including by limiting public order rules to core structures), rules that are clear and intelligible to both the legal community and to the target business community and/or citizens, and on-the-ground legal practices.

Similarly, his critical legal pluralist approach to law, which is centered on the idea that individuals are irreducible norm creators⁷, calls for legal reform (or other

⁵ *Id.*, ch 4. The fifth lesson is the need for professionalism and disinterest in working out proposals and strategies for development. This is of course of utmost importance but since it relates to questions of ethics more than methodology and is not specific to development, my methodological framework does not focus on it.

⁶ Macdonald, Roderick A, "Article 9 Norm Entrepreneurship" (2006) 43 Can Bus LJ 240.

economic “remedy”) to be founded on human agency. Legal reform should take cognizance of the fact that individuals control law as much as law controls them⁸. Critical legal pluralism “(...) requires no boundary criteria for sources of legal rules, for the geographic scope of determinate legal orders, for the definition of its subjects, or for normative trajectories between legal orders.”⁹ My framework takes this to equally apply to economic orders.

De Sousa Santos’ social scientific legal pluralist analysis of the interactions between the multiple normative orders in Mozambique (colonial, socialist, democratic, community and/or traditional, global) is also instructive for designing my methodology. Insightful parallels can be drawn from de Sousa Santos’ analysis, in part due to the similarities between Benin and Mozambique’s 20th century histories¹⁰.

I am however critical of his view of normative orders as more *delimited* and *scaled* (e.g. local, national (State), regional, global)¹¹ than Macdonald.

de Sousa Santos points to a number of rough, clear-cut “conventional dichotomies” for analyzing normative plurality: the formal/informal, the official/unofficial, the traditional/modern and the monocultural/multicultural¹². While I do not agree with the stark oppositions they convey, my methodological framework uses such oppositions as starting points of analysis.

By comparison, de Soto uses the term “extra-legal” arrangements rather than illegal or informal. This appears as an attempt to move away from dual oppositions highlighted above. This proposal along with De Soto’s strategy for identifying and acknowledging “extra-legal” arrangements also underlie my clinical legal pluralist framework.

⁷ Kleinhans, Martha-Marie & Roderick A Macdonald, "What is a Critical Legal Pluralism?" (1997) 12 CJLS 25 (HeinOnline), 38.

⁸ *Id.*, 40.

⁹ *Id.*, 38.

¹⁰ Both countries inherited civil colonial law systems, both were rule by socialist parties following independence, both were subjected to severe economic crises that induced the departure of socialist regimes and gave way to structural adjustment programs, both have followed a “democratic” capitalist developed path in recent decades. *Id.*, 40 and see part 2 for the historical context of business law in Benin.

¹¹ de Sousa Santos, B. “The Heterogeneous State and Legal Pluralism in Mozambique” (2006) 40 Law & Soc Rev 39, 45.

¹² *Id.*, 46.

3. Hernando De Soto's Law-in-action: Identifying Extra-legal conventions

De Soto's proposals are rooted in the belief that capitalism is the only proven way of ensuring development. He sustains that poor countries are failing to develop properly functioning capitalist systems and thus to grow because they lack an efficient and functional property systems¹³. These assertions, which are challenged by a number of authors including de Sousa Santos¹⁴ and David Kennedy¹⁵, are not the focus of my attention here.

I am interested in De Soto's argument that Third World governments and (positive) law have failed to make assets identifiable for trade and exchange over the past decades because they refuse to acknowledge the practices of the people doing business outside of the (positive) law. Legal institutions, says de Soto, can only survive if they respond to social needs:

"In developing countries, the extralegal sector now constitutes the majority of the population and pretending that extralegal arrangements do not exist or trying to eradicate them is bound to fail to induce growth and development. (...)" (at 150)

"(...) accordingly, one must identify the real social contracts on property, integrate them in the official law and craft a political strategy that makes reform possible" (at 151)

"(...) when the mandatory law does not square with ... extralegal conventions, the parties in those conventions will resent and reject the intrusion." (at 170-71)

Hence instead of imposing bureaucratic and burdensome property and business laws and regulations, de Soto suggests that extra-legal business practices be identified and integrated in the formal legal system. He provides a strategy for turning

¹³ de Soto, Hernando, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000), Figure 6.1 "Capitalization process: movement from dead capital to live capital".

¹⁴ de Sousa Santos, B. "The Heterogeneous State and Legal Pluralism in Mozambique" *supra* note 9.

¹⁵ Kennedy, David, "Some Caution about Property Rights as a Recipe for Economic Development" Draft of 17 October 2010 online: Institute for Global Law and Policy <http://www.iglp.law.harvard.edu/>

“dead capital” (fixed, unused, unprofitable assets) into live capital¹⁶ that includes discovery work in connection with extra-legal practices, mobilization of political actors and simplification and alleviation of the law and bureaucracy. My framework draws particularly from De Soto’s methods for identifying social conventions. It does not however fully embrace their underlying assertion that informal arrangements need to be formalized or incorporated into the official system to ensure development. I favor a methodology that aims to *reconcile the formal with the informal* rather than integrate the latter into the former.

4. Clinical Legal Pluralism: Context, Diagnosis and Remedies

Clinical Legal Pluralism is founded on four core lessons inspired from the above economists’ and jurists’ teachings. First, any development work (including through economic or legal reform) must be attentive to and not underestimate the historical, political, social, cultural, economic, institutional and geographical context of the host country. This implies being aware of the complexity of the host country’s society and of the underlying, interconnected causes of the symptoms (problems) to be remedied. The second lesson relates to the importance of adopting a multifaceted approach aimed at identifying real normative practices and conditions in the host country and not taking them for granted. A differential diagnosis needs to be reached so that the reform projects proceed from local modes.

The third lesson concerns the objective of finding remedies that prioritize human agency. In other words, proposing solutions that recognize the individual’s (as opposed to the State’s, regional and/or international organizations or large dominant enterprises and financiers) central role as commercial norm creator and economic agent. Fourth, legal and economic reform work that aims to promote socio-economic

¹⁶ De Soto, Hernando, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Figure 6.1 *Supra* note 12.

development and the quality of choice¹⁷ of citizens in the poorest (in terms of material goods and physical living conditions) regions of the world calls for perseverant monitoring and measuring of actual outcomes rather than the fulfillment of prescribed methods. All of the above call for strong empirical dimension to research and so-called “development” initiatives including with respect to understanding and identifying economic behaviour.

In the following paragraphs, I will apply my Clinical Legal Pluralism to analyze women’s entrepreneurial modes in Benin and contrast them with institutional assumptions about commerce and the law. I will start by looking at events and conditions that shaped trade and commercial normative conduct in Benin from the pre-colonial era to present.

B. Historical Elements of Economic Activity in Benin from Pre-colonial Times to Present: A Tale of Two Worlds

1. The Pre-Colonial Era: 1600’s to 1880’s

After the fall of one of greatest and largest empires of Africa, the Songhai Empire at the end of the sixteenth century, a number of small and centralised emerged in West Africa¹⁸. With time, royal economies became increasingly founded on slave trade¹⁹-in which France (amongst other European states) and the kings of current Benin sadly played a prominent role²⁰, and a related necessary warfare between kingdoms to capture slaves. Tribal rural economy was on the other hand founded on self-sufficient subsistence economy²¹. Community trade and economic activity were centered on the family, which constituted the core economic unit of society. Chores were shared relatively equally between women, men and children. For the purposes of this paper, I will focus on this

¹⁷ Sen, Amartya, *Development as Freedom* (New York: Alfred Knopf, 1999).

¹⁸ Igue, John O. *L’Afrique de l’Ouest entre espace, pouvoir et société: une géographie de l’incertitude* (Paris: Karthala Editions, 2006), at 502. One of such kingdoms, the Abomey kingdom from which originates current Benin Republic, is thought to have consolidated itself in or about 1620.

¹⁹ In 1765, nine thousand slaves are said to have been sent for exchange at the Ouidah port by the Abomey kingdom.

²⁰ In 1726 the King of Dahomey proposed that Europeans establish plantations in his kingdom and offered to supply the slaves:

<http://www.bbc.co.uk/worldservice/africa/features/storyofafrica/9generic2.shtml> (The Story of Africa - Slavery, Remarkable facts)

²¹ Coquery-Vidrovitch Catherine. “Karl Polanyi, Dahomey and the slave trade. An analysis of an Archaic Economy” (1969) 24:3 *Annales. Économies, Sociétés, Civilisations* 651.

second tribal form of economic arrangement because it appears more closely related to commercial practices in Benin today than the sui generis and non-economically viable royal slave trade²², which was not integrated in tribal modes and relations.

Money consisted in cowry shells²³ that could be deposited by families that administered the funds in manners to some extent similar to modern-day banks. Market days alternated from one village to another. The rotation was not on the basis of the French seven-day week but rather every 8th, 9th or 10th day to allow time for harvest, collection of crops and preparation and/or transport handicrafts²⁴. Albeit with shorter interval periods, this uneven rotating structure continues in contemporary rural Benin.

Products sold and exchanged at markets consisted mainly in agricultural goods, some manufactured products and limited imported products such as spices²⁵. Women from the Fon kingdom of Daxome (which ultimately became Dahomey and is today part of Benin) were particularly active in palm oil production and trade²⁶. Other than its primary commercial function, markets, as is the case today, also constituted cultural and social centers.

Trade was also practised regionally as caravans pulled by horses, camels, donkeys moved freely on north-south and east-west axes. Protection on the roads was provided by villagers of travelled areas who instituted tolls and also received money and

²² Coquery-Vidrovitch Catherine. "A. Akinjogbin, Dahomey and its neighbours, 1708-1818. W. J. Argyle, The Fon of Dahomey. A History and ethnography of the Old Kingdom." (1969) 24:3 *Annales. Économies, Sociétés, Civilisations* 653.

²³ Coquery-Vidrovitch Catherine. "Karl Polanyi, Dahomey and the slave trade. An analysis of an Archaic Economy" (1969) 24:3 *Annales. Économies, Sociétés, Civilisations* 651. Cowry shells were most widely used for regional commerce but one could also find gold (international commerce only) and "manille" (metal shackle). Barter existed but was mostly used for trade of precious and primary goods: Igue, John O. *L'Afrique de l'Ouest entre espace, pouvoir et société: une géographie de l'incertitude* (Paris: Karthala Editions, 2006), at 505.

An interesting example of the continuing influence of pre-colonial commerce in current behaviour is related by Igué in this book. He explains that Yoruba and Fon people in Benin and Nigeria today refer to 1000 FCFA as "apokan" or "chaki dopo", which mean cowry bag.

²⁴ Njoh, Ambe J. *Tradition, Culture and Development in Africa : Historical Lessons for Modern Development Planning*, supra note 28, ch 3.

²⁵ Igue, John O. *L'Afrique de l'Ouest entre espace, pouvoir et société: une géographie de l'incertitude* (Paris: Karthala Editions, 2006), at 502.

²⁶ Coquery-Vidrovitch, Catherine. "Des femmes colonisées aux femmes de l'indépendance, ou du misérabilisme au développement par les femmes : approche historique", Colloque International Genre, population et développement en Afrique, 2001, at 9. Rural small-scale palm oil production continues today in Benin.

goods in exchange²⁷. Remnants of this arrangement still exist today in West Africa where non-official tolls are very frequent notwithstanding the existence of States and their statutory exclusive competence over road transport²⁸

Merchants travelling in caravans were mostly men but were often accompanied by their wives and other women in the family, slaves and/or dependencies. Some cases of quasi-exclusive female caravan commerce in pre-colonial West Africa have also been related²⁹.

Three ethnic groups dominated pre-colonial commerce: the Mandé, the Haoussa, and the Yoruba. Mandé encompassed Dioula, Wangara and Dendi, the latter whom founded Kandi and Djougo in Benin where they organised markets and managed structures for visiting caravans. The Yoruba, who continue to be particularly active in Benin's markets today³⁰, principally traded cloth and kola.

Internationally, the region of what is now Benin was known for its indigo (cloth dye), shea butter, cloth, copper and kola³¹. Trade of these products and others with Europeans took place at the southern frontier of the Sahel and along the West African Atlantic coast³². Technology and handicraft expertise was developed and passed on through family run corporations³³.

2. The Colonial Era: 1890's to the 1950's

²⁷ Igue, John O. *L'Afrique de l'Ouest entre espace, pouvoir et société: une géographie de l'incertitude* (Paris: Karthala Editions, 2006), at 503 and 505.

²⁸ This is due in part to States' failure to provide proper roads. Villagers thus more or less effectively repair and maintain roads, asking small retributions from passers by. In other places, an informal toll is charged by citizens claiming control over a given area.

²⁹ One such account regarding Bete women sourcing and selling kola nuts in 19th century Ivory Coast is can be found in Toungara, Jeanne Maddox. *The Pre-colonial Economy of Northwestern Ivory Coast and its Transformation under French Colonialism 1827-1920* (Doctor of Philosophy in History, University of California Los Angeles, 1980), at 63 to 70.

³⁰ See Part D.

³¹ Igue, John O. *L'Afrique de l'Ouest entre espace, pouvoir et société: une géographie de l'incertitude* (Paris: Karthala Editions, 2006), at 502-05.

³² European export companies such as Maison Régis Marseille, Maison Renhard had trading posts on the coast operated by African merchants: Igue, John O. *L'Afrique de l'Ouest entre espace, pouvoir et société: une géographie de l'incertitude* (Paris: Karthala Editions, 2006), at 502-05.

³³ One of such families was the blacksmith Hountondki family in Abomey. They apparently continue the tradition today: <http://pedagogie84.pagesperso-orange.fr/orfevre.htm> (last visited on 5 June 2011).

In 1884 and 1885, European States regrouped at the Berlin Conference (Congo Conference), proclaimed the end of the transatlantic slave trade³⁴ and divided Africa between and amongst themselves as means to end commercial tensions between them. West Africa was separated into sixteen territories under the control (essentially for trading purposes) of four powers: France, Germany, England and Portugal.

In 1894, through political, strategic and/or coerced alliances, France annexed the kingdoms of Porto-Novo, Abomey and Allada to its colonial empire³⁵. This marked the beginning of what would turn out to be a long-lasting ambivalent relationship between the Beninese (and other Africans), the nation-State and its by-product formal law³⁶. It was also the beginning of the cohabitation between formal State regulated commerce and non-State regulated trade in Benin.

Indeed, with colonization came rigidity for commerce. The instauration of firmly delimited frontiers between colonial empires, of different currencies between colonies and of prices for a same product dependent on each metropolis' economic policy rather than local conditions (causing price disparities) constituted obstacles to regional commerce. This, in addition to the increased presence of large European trade companies resulted in the near disappearance of caravan merchant communities and commerce. The objective and effect of the French authorities and of their (company) law in Benin was to serve French interests, enable exploitation of natural resources and facilitate commercial

³⁴ Claiming they were to “save Africa from itself through civilization and Christianization: Adi, Hakim. “Africa and the Transatlantic Slave Trade”, last updated 17 February 2011, BBC History, online: www.bbc.co.uk. Although slavery and slave trade already existed within African kingdoms prior to the European’s arrival on the continent, the scale of the European induced slave trade is unparalleled in history: estimates indicate that between twelve and twenty-five million people were forced away from the continent from the 16th to the end of the 19th century.

³⁵ By decree, the kingdoms were renamed “Colonie du Dahomey et ses dépendances”: Gouvernement du Bénin – Information générale, online: <http://www.gouv.bj/spip.php?article644>.

³⁶ Indeed, while the European concept of nation-State only officially structured Benin upon its independence in 1960, the concept itself, along with formal law, were inherited through colonial rule and oppression. It is thus not surprising that still today such institutions continue to appear foreign and even suspicious for many African people.

Moreover, a form of centralized administration emerged with the consolidation of kingdoms from around the 17th century until colonization: Coquery-Vidrovitch Catherine. “A. Akinjogbin, Dahomey and its neighbours, 1708-1818. W. J. Argyle, The Fon of Dahomey. A History and ethnography of the Old Kingdom.” (1969) 24:3 *Annales. Économies, Sociétés, Civilisations* 653.

One could however hardly claim identity between this political and administrative structure, which had limited control on the daily lives of tribal communities, and that of the nation-State, whose regulatory ambition is much broader.

relations between French colonizers and/or traders, without consideration for Beninese merchants' particular interests³⁷.

Notwithstanding, local commerce continued, albeit more covertly and under new modes, in parallel with colonial north-south structured commerce to meet indigenous needs³⁸. Accordingly, the Dahomey colony comprised at least two commercial (normative) orders: the indigenous one composed of local, pre-colonial rules and practices and the French one codified in the French 1807 *Code de commerce*, the 1804 *Code civil*³⁹ and other statutes⁴⁰ including some drafted specifically for colonial application⁴¹. The French administration also instituted a patent system by which businesses were taxed varying amounts depending on the size, nature, location, sector and other characteristics of their businesses⁴². Despite post-independence modifications, this system remains to date.

The appearance of cash crops (ex. cotton, palm trees⁴³) at basis of the French colonial economic logic in the region⁴⁴ and in part to compensate for losses resulting

³⁷ d'Almeida Topor, Hélène. *Histoire économique du Dahomey (Bénin), 1890-1920*, t2 (Paris : L'Harmattan, 1995), 268. See also: Anghie, Antony, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), at 173. (2005).

See also Toungara, Jeanne Maddox. *The Pre-colonial Economy of Northwestern Ivory Coast and its Transformation under French Colonialism 1827-1920* (Doctor of Philosophy in History, University of California Los Angeles, 1980), at 163-68 for a description of France's colonial economic policy and of its impact on economic and social life in the West African region. The author notes that France's objective to serve its own interest implied taking measures to deter any competing indigenous commerce. Thus this explains in part the rigidity of the colonial trade rules and system imposed by the French.

³⁸ Igue, John O. *L'Afrique de l'Ouest entre espace, pouvoir et société: une géographie de l'incertitude* (Paris: Karthala Editions, 2006), at 507.

³⁹ Under s. 1125 of the 1804 Code Napoléon, married women were deemed incapable (when provided by law). Colonial administration reports (whose accurate character can be challenged) of local customs also indicate that Beninese women could not reach emancipation.

⁴⁰ These include the 24 July 1867 *Loi sur les sociétés anonymes*, the 7 March 1925 *Loi sur les sociétés à responsabilité limitée*: Mouloul, Alhousseini. "Comprendre l'Organisation pour l'harmonisation en Afrique du droit des affaires (O.H.A.D.A.)" 2nd ed (December 2008), online: OHADA <<http://www.ohada.com>>.

⁴¹ Politically, Beninese citizens' lives became centered on relationships with their chiefs and rulers on the one hand and with colonial officials on the other: The Story of Africa – Africa and Europe 1800 to 1914, Political Resistance, BBC World Service, online: www.bbc.co.uk.

⁴² d'Almeida Topor, Hélène. *Histoire économique du Dahomey (Bénin), 1890-1920*, t2 (Paris : L'Harmattan, 1995), 275- Annexe IXI.

⁴³ *Id.*, 259, 263

⁴⁴ Toungara, Jeanne Maddox. *The Pre-colonial Economy of Northwestern Ivory Coast and its Transformation under French Colonialism 1827-1920* (Doctor of Philosophy in History, University of California Los Angeles, 1980), at 37 For an explanation of the factors that lead to the instauration of cash

from the decreasing slave trade⁴⁵ and as one of the colonial economic logic operated changes in economic family arrangements. Men started leaving villages to take up salaried work in the crops, in the public colonial administration and other paid sectors. This resulted in a shift of the activities of women and children in rural areas towards agricultural work⁴⁶. Some contend this is at the origin and/or contributed to the gender divide in labour that persists today in Africa especially in rural areas⁴⁷. Rural women's predominant if not sole outside economic activity consisted in small sale⁴⁸ and catering for rural road workers⁴⁹. Some suggest that recourse by peasants to small (informal) trade in addition to their agricultural work was prompted by the need for extra money to pay for the various colonial taxes, which were collected by village chiefs who at times abused their powers in this regard⁵⁰.

In urban areas, market women's (especially Ibo and Yoruba women) business started rising in numbers and scope⁵¹.

crops by France and of the impact of the system on rural life in Ivory Coast. Parallels can be drawn with the situation in Dahomey.

⁴⁵ "Benin." Encyclopædia Britannica. Encyclopædia Britannica Online. Encyclopædia Britannica, 2011. Web. 02 Apr. 2011. <<http://www.britannica.com/EBchecked/topic/60879/Benin>>.

Various forms of forced labour remained during colonial times: d'Almeida Topor, Hélène. *Histoire économique du Dahomey (Bénin), 1890-1920*, supra note 25, 266-67.

⁴⁶ Toungara, Jeanne Maddox. *The Pre-colonial Economy of Northwestern Ivory Coast and its Transformation under French Colonialism 1827-1920* (Doctor of Philosophy in History, University of California Los Angeles, 1980), at 176.

⁴⁷ Njoh, Ambe J. *Tradition, Culture and Development in Africa : Historical Lessons for Modern Development Planning* (Aldershot, UK : Ashgate, 2006), ch 3. Blackett, Adelle. "Beyond standard setting: a study of ILO technical cooperation on regional labor law reform in West and Central Africa" (2011) 32:2 Comp Labor Law Policy J 443. Tsikata, Dzodzi, "Toward a decent work regime for informal employment in Ghana: Some Preliminary Considerations" (2011) 32:2 Comp. Lab. L. & Pol'y J. 311.

⁴⁸ *Coutumier du Dahomey*, Circulaire 128 AP, 19 mars 1931. This document is a written account of local customs commissioned by the 19 March 1931 French Circulaire 128 AP. While some Beninese authors (Médénouvo, Firmin. *Coutumier du Dahomey* (Paris: Présence Béninoise, 2004) claim that it is representative of the country's local customs, one should adopt a cautious and critical outlook at its contents. In fact, it was compiled by an anonymous French commission for French colonial administration purposes. Moreover, no contextual explanation of the practices listed in the document is provided. This can prevent a whole-picture understanding. The Beninese constitutional court refused to grant it legal force or recognition by its ruling DCC 96-063 of 26 September 1996.

⁴⁹ Toungara, Jeanne Maddox. *The Pre-colonial Economy of Northwestern Ivory Coast and its Transformation under French Colonialism 1827-1920* (Doctor of Philosophy in History, University of California Los Angeles, 1980), at 245. Rural women also helped with road works themselves when no men were left in the village.

⁵⁰ Toungara, Jeanne Maddox. *The Pre-colonial Economy of Northwestern Ivory Coast and its Transformation under French Colonialism 1827-1920* (Doctor of Philosophy in History, University of California Los Angeles, 1980), at 163 to 177.

⁵¹ Coquery-Vidrovitch, Catherine. "Des femmes colonisées aux femmes de l'indépendance, ou du misérabilisme au développement par les femmes : approche historique", Colloque International Genre,

3. The Post-colonial Era: 1960 to Present

In August 1960, Dahomey was declared independent. Most French commercial formal laws remained in force with some being amended and/or superseded. The post-colonial era began with multiple initial coups followed by seventeen years of Marxist-Leninist regime under Mathieu Kérékou. Some colonial trade companies were nationalized in what can be seen as the national government's attempt to appropriate itself of the formal colony-instituted economy. Parallel commerce did however remain and increased as borders and currencies multiplied in the region⁵². (from 4 during colonial times to 11 today)

Economic crises and Western pressures (including in the form of structural adjustment programs) precipitated the end of the Kérékou era and privatizations ensued.

This allowed for a renewed and enhanced French presence in the electricity, water and telecommunications markets. Colonial trading companies diversified their activities and opened their share capital to nationals⁵³. Lebanese and Syrian communities developed selling cloth, food products and home appliances. As for "local" Beninese enterprises, they maintained a strong presence in retail sale as will be further explained in Parts C and D. Some of them also developed as large importers.

At the beginning of the 1990's, the CFA Franc, which was instituted as common currency in Benin and other French West African colonies in 1945⁵⁴, plummeted to 50% of its value. This crisis coupled with outdated business laws and a stated objective of promoting regional economic integration and development through modernisation and harmonisation of business laws⁵⁵ incited the creation in 1993 of the

population et développement en Afrique, 2001, at 9 and 13. Parallels can be made with Togo where powerful market women, sometimes called "Nana-Benz" became particularly active from 1930 onwards.

⁵² They rose to eleven from four during colonial times.

⁵³ Igue, John O. *L'Afrique de l'Ouest entre espace, pouvoir et société: une géographie de l'incertitude* (Paris: Karthala Editions, 2006), at 511.

⁵⁴ The F CFA is guaranteed by the French treasury and is a convertible currency. Other countries in the region such as Nigeria have opted for non-convertible currencies for multiples reasons including political and monetary sovereignty. Today, eleven currencies are in use in the region where during colonial times, four were used and during precolonial times, three were used but only two at the regional and international level. (Igué at 513)

⁵⁵ *Traité relatif à l'harmonisation du droit des affaires en Afrique*, 17 October 1993, JO OHADA 4 at 1 (online: www.ohada.com, 16 ratifications on 3 April 2001), preamble. See also: Blackett, Adelle. "Beyond standard setting: a study of ILO technical cooperation on regional labor law reform in West and

Organisation for Harmonization of Business Law in Africa (“OHADA”) between fourteen West and Central African States⁵⁶ including Benin.

OHADA was and remains largely funded by the French Government, which in so doing furthers its international cooperation policy of “solidarity” and “influence”⁵⁷. The World Bank has also substantially funded recent projects⁵⁸.

Since its creation, three more Central and West African States have joined the organisation⁵⁹. Notwithstanding its stated aim to *harmonise* business laws, OHADA has adopted nine Uniform Acts (“Actes Uniformes”), which *unify* commercial legislation of member States and apply directly within them⁶⁰. The Acts are largely inspired by French and other Western law and constitute the primary source of formal business law in Benin.

The above historical account of commercial activity in Benin shows that economic behavior in the country today is strongly rooted in pre-colonial times. It also highlights the transformation that local commercial modes underwent as a result of colonization: it was forced into an underground and parallel world. Post-independence, despite the State’s nationalizations of colonial companies, local indigenous commerce and its rules continued to develop separately from the formal economy. The latter

Central Africa” (2011) 32:2 Comp Labor Law Policy J 443, 445 (Suggesting that the extremely wide scope of the OHADA project reveals the sentiment of urgency of its crafters to attract foreign investment as a means of securing the region’s future).

⁵⁶ Benin, Burkina Faso, Cameroun, Comoros, Côte d’Ivoire, République Centrafricaine, Republic of Congo, Gabon, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. All of these countries have inherited colonial civil law systems.

⁵⁷ For example, in 1998, France disbursed FCFA 2,000,000,000 in support of the OHADA project and pledged another FCFA 2,000,000,000 (at the rate of FCFA 600 for US\$1.00): Mouloul, Alhousseini. “Comprendre l’Organisation pour l’harmonisation en Afrique du droit des affaires (O.H.A.D.A.)” 2nd ed (December 2008), online: OHADA <<http://www.ohada.com>>. “Rencontre entre le ministre chargé de la coopération, M. Henri de Rincourt, et le Secrétaire Permanent de l’OHADA, Me Dorothe Sossa (16 mars 2011)”, (16 March 2011) Ministère des Affaires Étrangère et Européennes (France), online: www.diplomatie.gouv.fr. (for a more recent reflection of France’s active diplomacy and other support in the OHADA project).

⁵⁸ Other funders include the European Union (who notably promised FCFA 1,000,000,000 (at the rate of FCFA 600 for US\$1.00) for specific project assistance in 1998), the United Nations Program for Development (technical assistance), and to a lesser extent Japan and Belgium.

⁵⁹ Guinea Bissau, Guinea Conakry and the Democratic Republic of Congo.

⁶⁰ While it is provided that the coming into force of the Uniform Acts automatically abrogates all incompatible sections in existing national statutes, the principle has been challenged on various occasions and led to many difficulties. In Benin, the 1807 Code de commerce still competes and/or is applied in concomitance with Uniform Acts.

Work relating to the possible adoption of labour law, intellectual property and contract law Uniform Acts is on-going.

continued to be regulated by colonial business statutes. Today, French and other Western laws continue to frame positive business law (principally OHADA law) in Benin.

I will now explore sociocultural factors that, alongside history, influence women's economic behavior in contemporary Benin. The point is not to assess how effectively (French) multinationals are operating in the official commercial sector and are using formal law but rather to analyze profiles of local women entrepreneurs and map their economic arrangements. In so doing, I will also seek to determine whether OHADA formal law has any bearing on how these women conduct their affairs and whether it continues to serve predominantly French and other foreign interests.

C. Doing business in Benin: Profiles of Women Entrepreneurs and Maps of their Economic Practices

In the paragraphs below I paint a general socio-cultural picture of Beninese women entrepreneurs on the basis of theoretical and empirical data I have collected to date. This will help assess how social and cultural realities shape their business practices. I consider maternity, spousal unions, religion, ethnicity and literacy and point to selected examples of dichotomies between formal OHADA law and these realities. Other relevant factors are geography, climate and infrastructure.

1. Socio-cultural Realities of Women Entrepreneurs in Benin

a) “Mamans” Women Entrepreneurs

Benin has a population of approximately nine million inhabitants, half of whom are women whose average age is 17,9 years old and whose life expectancy is 61,14 years⁶¹. The average number of births per woman is 5,31, making Benin fourteenth worldwide in terms of fertility rates⁶². These statistics, as well as the common use of the term “maman” (mother) when addressing women in informal settings, hint at the cultural and temporal significance of motherhood in Beninese (business) women's lives. Strolling in villages on market days or in the great Dantokpa market in Cotonou allows one to

⁶¹ CIA World Fact Book, online: <https://www.cia.gov/library/publications/the-world-factbook/geos/bn.html> This is close to three years over men's life expectancy.

⁶² Id.

quickly notice the number of children running around their mother's small retail stand or tied behind their working mother's back.

Thus maternity and commerce closely cohabit in Benin and it can be expected that they mutually affect one another. In the course of my field mission, I will enquire into the extent of this influence and ask whether and what informal arrangements are taken in this regard. Some arrangements include sending one's child to foster parents ("vidomingon" practice)⁶³ and calling upon elder women in the family to care for newborns while their mothers sell their products⁶⁴.

b) Spousal Unions

Closely linked to maternity and motherhood is the question of the extent to which one form of spousal union or another influences women's commercial modes. Another line of investigation concerns the extent to which the spirit and workings of OHADA rules take it for granted that spousal unions in Benin and other member States are monogamous (as is the case in France and elsewhere in the world), and that families are structured according to the Western nuclear family model.

Despite its prohibition in the recently adopted family code⁶⁵, polygyny is a common in Benin. Percentage rates vary between 15 and 41% depending on the region⁶⁶. However, the interplay between the family code provisions on residence and prohibition

⁶³ This is a frequent arrangement that families especially in rural areas take in response to the difficulties arising from the close cohabitation between the need to do commerce and motherhood. This dates generations back and is founded on a solidarity value in traditional African society that calls for all members of a community to come to one another's assistance in case of need. Thus poor, often peasant, parents who lacked the means to provide a good education to their child or children would send them to the care of richer urban businesswomen. In exchange for taking care and educating the children, the latter were expected to carry housework. This practice however sometimes takes perverse forms in Benin today and could be assimilated more to child labour and/or slavery than the traditional vidomegon. See also: Tilouine, Joan. "Bénin: Les vidomegon, nouveaux esclaves urbains" Afrik.com (11 December 2007), online: www.Afrik.com.

⁶⁴ In one of the cases I witnessed, the newborn was left at his or her grandmother's care while his/her mother went to the market to sell her products. The baby was too young to be brought to the market and the family could not afford for the mother to stay home. Thus the grandmother had to "artificially" breastfeed (she was not producing milk) the baby to keep it calm: Observation by the author in Ladj (Cotonou) in June 2010.

⁶⁵ Loi N° 2002 – 07 Portant Code des personnes et de la famille, 24 August 2004, section 123. Polygyny is more widely practiced in the North of the country given a predominantly Muslim population.

⁶⁶ Organisation for Economic Cooperation and Development - Social Institution and Gender Index, "Gender and Social Organisations in Benin" OECD, online: <http://genderindex.org/country/benin>.

of polygyny, and OHADA secured transactions rules aimed at excluding residential property from seizure⁶⁷ results in the paradoxical situation where the residence of a “legally” married woman in a polygamous marriage will be protected from seizure while the residences (if different) of “illegally” married women in the same family will not be protected. We have here an example of legal reform that failed to acknowledge the existence of a social practice, polygyny.

c) Religious beliefs

Religion occupies a significant space in Beninese citizens’ lives. One set of statistics provides the following picture of religious affiliations: Christian: 42.8% (Catholic 27.1%, Celestial Christianity: 5%, Methodists 3.2%, other Protestants 2.2%, other: 5.3%), Muslim: 24.4%, Voodoo: 17.3%; others 15.5%)⁶⁸. It is often the case that Beninese will have more than one set of religious beliefs; for example, Catholic and Voodoo. Part of my upcoming empirical research will look at the extent and manner into which religion influences women’s commercial modes today in the country. At this point, the prescriptions of Islam in the areas of insurance, finance and other aspects of economic activity constitute a clear example of the nexus between religion and commerce. Another such example is the existence of many religious associations (Muslim dahiras, choir groups, etc.)⁶⁹ in Benin and elsewhere in West Africa in which members can network and eventually find credit or assistance in case of financial difficulty.

d) Ethnic identity

In Benin, women’s traditional commercial modes are highly determined by their ethnic identity. There are eight main ethnic groups in the country: Fon, who constitute over one third of the population⁷⁰, Adja (15.2%), Yoruba, who migrated from

⁶⁷ *Acte uniforme du 15 décembre 2010 portant organisation des sûretés*, 15 February 2011. 22 JO OHADA at 1 (online: www.ohada.com), sections 198 and 199; *Loi N° 2002 – 07 Portant Code des personnes et de la famille*, 24 August 2004, sections 14, 15, 74, 123, 131.

⁶⁸ CIA World Fact Book, online: <https://www.cia.gov/library/publications/the-world-factbook/geos/bn.html>

⁶⁹ By analogy: Ndione, Emmanuël Seyni. *L'économie urbaine en Afrique: Le don et le recours* (Karthala: Paris, 1994), at 29. Author’s observations in Glo Yekon village, Benin in April-June 2009.

⁷⁰ They are concentrated in the South.

Nigeria⁷¹ (12.3%), Bariba (9.2%), nomadic Peulh (7%), Ottamari (6.1%), Yoa-Lokps (4%) and Dendi (2.5%).

Yoruba have a strong tradition of female marketplace commerce, which they imported into the many West African regions in which they migrated. The proximity between Nigeria and Benin has contributed to the prominent role Yoruba women now play in Beninese (predominantly non-State regulated) businesses and markets. In his book on the Yoruba people in West Africa, Beninese geographer John Igué writes the following about the transmission of commercial practices within families and the community:

“Unlike manual or intellectual work, African trade, as it is practised in the sub-region, follows a system of networking in which each trading community has been for very long and so has a monopoly over a particular area or a specific product line. (...) Such long term specialisation cannot be acquired overnight.

(...) it is not possible to fit into these networks over night.(...)

*By becoming precious middlemen for companies which cover both host and native countries, migrants participate in this manner in the process of regional integration.*⁷²”

Founded on a clear positive, formality based approach, OHADA Uniform Acts do not account for the informal manner in which commerce is taught, transmitted and exercised between (women) entrepreneurs in the region. Nor does its formal regional organisation structure for integration envisage the unofficial on-the-ground form it takes through migration movements.

Yoruba constitute one of many ethnic groups in the region that have specific defining commercial practices⁷³. There is however limited recognition and/or deference

⁷¹ They most densely populate the capital region of Porto-Novo and the northern region: Igué, John O. *Les Yoruba en Afrique de l'Ouest francophone, 1910-1980* (Paris, Dakar: Présence africaine, 2003).

⁷² Igué, John O, *Les Yoruba en Afrique de l'ouest francophone, 1910-1980* (Paris, Dakar: Présence africaine, 2003).

⁷³ During my past visits in Benin, I was also in contact with the Peulh where men are traditionally known for their ability to take care of cattle while women collect milk for sale in the markets: Author's observation in Gorum Gorum, Burkina Faso, July 2009. Another small and today very poor community who lives in southern lakeside villages is the Toffin who have customarily been involved in fishing. Men go out fishing and women sell the products at the market: Author's observations in Aimlonfié (Cotonou), Benin, June 2010.

toward these indigenous original business models in the official business sector and in the OHADA Uniform Acts, apart from selected provisions in the latter such ones aimed at illiterate parties and ones aimed at small-scale informal entrepreneurs. I will turn these below.

e) *Literacy*

Data from 2002 estimate the level of female literacy (e.g. women aged fifteen and over able to read and write) to 23,3% in Benin⁷⁴. Moreover, 2005 estimates indicate that on average, girls attend school for six years while this number rises to ten in the case of boys. This situation has many implications on women's economic behaviour as well as women's access to formal OHADA law. I will highlight a few examples of the latter here.

First, this means that almost 80% of the Beninese women are faced with a structural obstacle to access OHADA Acts because they cannot read. And even if they could read, many of the women would not understand the rules because they are in a language foreign to their mother tongue. The case being, one can hardly be surprised by the extent of "extra-legal" orders and practices that women develop and by the Acts inability to structure the greater part of women's trade in Benin.

Second, in multiple instances, provisions of the Uniform Acts explicitly or implicitly require the capacity to read and write. For example, the recent *Acte uniforme relatif au droit des sociétés coopératives*⁷⁵ requires that multiple documents be filled and signed by members of cooperative societies. Another example comes from the newly introduced category of "entreprenant" businessperson in the revised *Acte uniforme du 15 décembre 2010 relatif au droit commercial général*⁷⁶. This is aimed at bringing current small informal entrepreneurs within the scope of application of the law by alleviating costs and registration requirements. However, the Act still requires that the "entreprenant" register in writing and keep ledgers and precise chronological data on all sales. The dichotomy is apparent: most small traders, including many women⁷⁷, are illiterate and

⁷⁴ CIA World Fact Book, online: <https://www.cia.gov/library/publications/the-world-factbook/geos/bn.html>

⁷⁵ 15 February 2011. 23 JO OHADA 1. (online: www.ohada.com)

⁷⁶ 15 February 2011. 23 JO OHADA 1 (online: www.ohada.com), ss.30 and after.

⁷⁷ A1992 survey of ten major cities in the country found that women street vendors occupy 75% of all economic units (total percentage for street vendors is 80%): Chen, Martha Alter, "Women in the

hold little if any ledgers or rely on a community “grand frère” (big brother) for accounting⁷⁸. In such circumstance, it is predictable that these small entrepreneurs will not seek application or the benefit of the law since it is not adapted to their local realities.

One could also point to sections 10, 18 and 72 of the same Act that provide for the possibility of replacing a required signature with a digital imprint. The problem here is that a signature requirement normally serves to confirm a party’s consent to terms that appear in writing on the document to be signed. In such circumstances, replacing an oral confirmation of understanding with an imprint appears to defeat the purpose of the signature requirement. Section 14 of the Uniform Act on secured transactions provides a more adapted method of ensuring consent of an illiterate surety (“caution”). It requires that two witnesses accompany him or her and accomplish formalities on his or her behalf. Notwithstanding, this Act as other OHADA laws appear to fail to appropriately account for the fact that the majority of businesswomen in Benin are illiterate and fail to be attentive to and/or acknowledge their practices.

Having carried out a contextual analysis of the history and of some socio-cultural realities of business as well as pointed to a number of dichotomies between OHADA laws and ground realities, I will now examine women’s modes of doing business and highlight the way in which history, social and cultural elements (including colonial remnants) influence such modes.

D. Doing business in Benin: Map of Women Entrepreneurs’ Economic Practices

This part is a first attempt at charting women entrepreneurs’ economic practices on the basis of criteria drawn from works of anthropologist Prof. Anita Spring, economist Hernando de Soto and others, of semi-formal interviews I conducted with jurists and women entrepreneurs in Benin in 2010 and of other data collected during my visit. I look at a) the landscape of female registered and extralegal commerce; b) the scale

informal sector: A Global Picture, The Global Movement” ILO Bureau of Statistics – prepared on the occasion of the 90th Session of the International Labour Conference (Geneva, 4-20 June 2002), online: <http://laborsta.ilo.org/default.html>.

⁷⁸ See Sources of Financing in subsection 2 below. Igué, John O, *Les Yoruba en Afrique de l’ouest francophone, 1910-1980*, *supra* note 48.

and sectors in which women carry out economic activities; and c) businesswomen's financing methods. This chart of businesswomen's practices in Benin will serve to sharpen my upcoming field research objectives and questions and develop a more comprehensive empirical investigation instrument.

a) The formal and informal sector

Defining formal and informal sectors is a goal that many before me have aspired towards⁷⁹ and I do not intend to compete with them here. The general distinction I will thus use for the purposes of this paper is between registered enterprises (individual or plural) that submit and comply with statutory law and non-registered enterprises (individual or plural) that are more or less oblivious to statutory law. As noted earlier, the conceptual duality between the formal and the informal dates only from the colonial period when the notion of the formal nation-State made its way to Benin (and many other parts of Africa). What is more, the duality appears to have been gendered from the start since through the divide between urban/cash crop/salaried men's work and rural/non-official women's work that was induced by the colonial economy⁸⁰. One could speak of the "colonial gendered formalisation" of the economy⁸¹.

Presently, some estimates indicate that approximately 80% of Benin's active population exercises economic activity in the informal sector⁸², which is largely dominated by retail sale and services⁸³. Retail activities are predominantly carried out by

⁷⁹ Spring, Anita. "African Women in the Entrepreneurial Landscape: Reconsidering the Formal and Informal Sectors" (2009) 10:1 Journal of African Business 11, 12 (Canadian Research Knowledge Network). (Noting the difficulty of distinguishing the formal from the informal sector).

⁸⁰ See Section B.2.

⁸¹ Others have referred to "gendered informalisation": Blackett, Adelle. "Beyond standard setting: a study of ILO technical cooperation on regional labor law reform in West and Central Africa" (2011) 32:2 Comp Labor Law Policy J 443. Tsikata, Dzodzi, "Toward a decent work regime for informal employment in Ghana: Some Preliminary Considerations" (2011) 32:2 Comp. Lab. L. & Pol'y J. 311. This term is in my view inadequate since it is formality and not informality that was transplanted to Africa by colonizing powers. Informality already existed and was the form in which relations took place.

⁸² Maldonado, Carlos, "Secteur informel: Fonctions macroéconomiques et politiques gouvernementales: Le cas du Bénin", Doc S-INF-1-18.

Studies tend to indicate that the "informal" sector has increased in Benin over the past couple of decades and some suggest this is a consequence of the reduction of privatizations and structural adjustments programs (Blackett, Tsikata). However, a contextual outlook reveals that the formal sector, which appeared through colonial administration of labour and commerce, was extended, particularly in Benin, through socialist State management and thus a private sector.

⁸³ Some estimate the value of the informal commerce between Benin and Nigeria to be of more than 12 billion FCFA (3 billion dollars) (Igue 519).

women. Data collected during the 1990's indicate that over 95% of women who work outside the agricultural sector are in the informal sector and they represent 62% of the overall non-agriculture informal sector in the country⁸⁴. Moreover, 99.1% of Beninese women in trade do this informally⁸⁵.

Informal retail responds to a widespread need within the Beninese (and other West African) population, of whose majority is illiterate and/or does not have sufficient means to consume in large urban formal sector department stores⁸⁶. Accordingly, merchants of long-standing commerce and trade traditions such as the Yoruba and other ethnic groups (Haoussa, Mandé, Wangara /Dendi) constitute the link between informal retail sale and the larger import/export formal companies⁸⁷.

Many of these formal companies are French and they dominate large segments of their target market in Benin as in the rest of the CFA Franc area⁸⁸. French businesses' average market share in Benin (all areas of trade included) for the period of 1998 to 2001 has been estimated at 20% to 30%⁸⁹. In 2002, some 731 French company branches were implemented in Sub-Saharan Africa in the areas of energy (Total, Edf, Norelec, Alstom), public works (Bouygues, Colas, Spie, Fougerolles, Dumez, Sogea), large-scale distribution (Cfao), transport (Air France), banking and related services (Accor, BnpParibas, Société Générale, Crédit Lyonnais), agro-industry (Cfdt, Saupiquet, brasseries du groupe Castel), telecommunications (France Télécom, Alcatel, Satom) and industry⁹⁰.

While OHADA's stated objective is economic integration of its member States for *regional* development, Uniform Acts are much better tailored for the activities and structures of these larger foreign companies than to those of the local numerous informal (women) traders. The one set of OHADA rules on "entreprenant" aimed at small informal individual vendors referred to above (Part C) does not adequately tackle and

⁸⁴ Chen, Martha Alter, "Women in the informal sector: A Global Picture, The Global Movement" ILO Bureau of Statistics – prepared on the occasion of the 90th Session of the International Labour Conference (Geneva, 4-20 June 2002), online: <http://laborsta.ilo.org/default.html>.

⁸⁵ *Id.*

⁸⁶ In such stores, prices are written and non-negotiable.

⁸⁷ Igué, John O, *Les Yoruba en Afrique de l'ouest francophone, 1910-1980*, *supra* note 48.

⁸⁸ Enquête filiales DREE - <http://www.izf.net/pages/accueil/4786/>

⁸⁹ *Id.*

⁹⁰ *Id.*

recognise the quantitative, qualitative, social and cultural importance of small and medium informal business in West Africa, and more particularly in Benin.

Subsection b) further reveals the gap between OHADA laws and commercial modes of women entrepreneurs in Benin through the analysis of the scale of enterprises held by women and the types products they sell. These contrast with the French business models and product lines described above.

b) Types of Businesses and Products

In an article discussing the characteristics of women entrepreneurs in the formal and informal sectors in Sub-Saharan Africa, anthropologist professor Anita Spring provides an insightful categorization of women’s business types, sizes and products⁹¹:

Informal Sector		Formal Sector			
Micro →→→→→Large Enterprises		Small →→→→Medium→→→→Large Firms/companies			NGAEs Firms/Companies
♦ Ag. produce	♦ Textiles	♦ Manufacturing of clothing	♦ Manufacturing of textiles, clothing, agroprocessing	♦ Manufacturing of textiles, clothing, agroprocessing industrial products	♦ High value exports
♦ Prepared foods	♦ Food products	♦ Furniture			♦ Tourism
♦ Crafts	♦ Transport	♦ Bakeries			♦ Computers
♦ Herbals	♦ Furniture				♦ Real estate
♦ Household goods	♦ Household goods	♦ Retail shops	♦ Retail shops		♦ Public relations
♦ Hair-dressing			♦ Transport firms	♦ Supermarkets	♦ Manufacturing
				♦ Transport firms	♦ Information technology
				♦ Retail shops chains	♦ Manufactured products
					♦ TV/radio

FIG. 2 Types of enterprises=firms by sector and size. Source: Spring, A. “African Women in the Entrepreneurial Landscape” (2009) 10:1 J Afr Bus 11, 18.

NGAEs refer to what the author calls “new generation African entrepreneurs” or “formal-sector globalists”⁹².

⁹¹ Spring, Anita. “African Women in the Entrepreneurial Landscape: Reconsidering the Formal and Informal Sectors” (2009) 10:1 Journal of African Business 11 (Canadian Research Knowledge Network).

A closer look at Yoruba commercial practices serves to illustrate Spring's compilation—which mostly derives from data and studies in Anglophone Sub-Saharan Africa—and map women's economic practices in the Beninese context. Yoruba economic activity is concentrated in the informal retail sale of local industry and/or imported goods as well as in urban informal trading jobs such as hairdressing. These small trade jobs are most often a means to access start-up capital for retail sale.

Informal retail sale is usually carried out: i) through peddling or street vending, ii) on small stalls, iii) in “boutiques”, family-run non-registered small to medium size shops selling food, plastic, clothes and other products, and/or iv) markets. One can see remnants of the pre-colonial caravan commerce in such trading arrangements.

Market selling constitutes the most common mode of commerce of Yoruba women, who often work in collaboration with their daughters, nieces and other female family members. Yoruba men also trade in markets but usually only as butchers and craftsmen.

Street trading, the cheapest and most rudimentary type of sale, takes two forms. In the first, young girls leave their village early each morning, loaded with products for sale and go solicit clients from village to village. This structure can be useful for the many people who live in isolated rural regions in Benin, especially since markets do not take place everyday in such areas. In the second, young girls go offer their products from door to door, or person to person in urban areas. Products sold respond to pragmatic day-to-day needs of buyers (rather than needs that are more or less artificially created in formal stores through seductive displays). I experienced the flexibility and social character of this selling structure during my past visits in Benin. Indeed, at whatever location in a city or village, at whatever time of the day, there is almost always someone nearby selling small products one may need (peanuts, soap, Kleenexes, cigarettes, etc.). All one needs to do is ask.

There are thus myriad little contracts carried out by women street vendors daily in Benin, whose structure and characteristics are not accounted for in OHADA laws. The 26 percent of urban informal labour force and 24 percent of the total urban

⁹² *Id.* at 13.

labour force women peddlers constitute in Benin calls for a more adapted recognition of their practices than that of current sections on the “entreprenant”.

Similar remarks can be made about the “tabliers” or small stalls sales that take place on the border of streets, markets and train and bus stations, following affluence.

c) Sources of Financing

Looking at women’s sources of start-up capital and modes of financing reveals yet another set of original indigenous female commercial practices in Benin. It is again possible to refer to Spring’s compilation on African women entrepreneurs’ sources of start-up capital for a general landscape of these sources ⁹³ :

	Informal Sector			Formal Sector		
	Micro→→→Large	Small→→Medium→→Large	NGAEs			
Own money	x	x	x	x	x	x
Family money	x	x	x	x	x	
Rotating Savings and Credit Associations	x					
Inherited businesses	(x)	x	x	x	x	
Donor loans	x		(x)			
Retirement funds		x	(x)	(x)		
Previous salaries			(x)	(x)	x	x
Diversified investments		(x)	x	x	x	
Bank credit		(x)	(x)	(x)	x	x
Bank overdrafts		(x)	x	x	x	

FIGURE 3 Sources of start-up capital by sector and size. Source: Spring, A. (2009) 10:1 J Afr Bus 11, 18. ((x) indicate that this is less commonly the case).

⁹³ See also: Chen, Lein-Lein & Raymond P. H. Fishe, “Informal Financial Arrangements and the Stability of Deposit Insurance in Less Developed Countries” (1993) 60:1 Southern Economic Journal 157, for informal savings and credits arrangements in developing countries and how they interact with formal sector actors.

I will limit myself here to the analysis of the “tontine”, which is one of, if not the most prevalent financing instrument used by Beninese (business)women and men alike.

There are two types of “tontines” in Benin. The first most common one⁹⁴ is a traditional informal credit and savings arrangement by which a limited number of members from a same community (village, neighbourhood) gather together and each pays a fixed amount to a pot on a regular basis (every week, month). The proceeds collected each time are devolved to one of the members, on a rotating basis. A committee administers the tontine, composed of at least a president and treasurer elected by the tontine members on a confidence basis⁹⁵. It has strong social characteristics and is a form of what some generically call ROSCAs (Rotating Savings and Credit Associations).

The second type of tontine is the “tontine journalière” (daily tontine)⁹⁶. This is predominantly a savings instrument. Similarly to a bank account, it is administered by one sole person who creates and holds registries of amounts deposited with him by individuals. There are no fixed amounts or periods for depositing and/or drawing money. Overdraft is not allowed. An administration fee is usually paid to the administrator but he sometimes waves this fee given the considerable advantage he gains through access to liquidity. The advantages of this structure are perceived as being threefold: i) it facilitates saving for participants and helps them manage their funds. This is especially true for the many women entrepreneurs who are illiterate; ii) it allows richer more educated merchants to place their money “under cover” and/or away from the eyes of banks; iii) it allows participants to deposit small sums that would otherwise not be worth depositing in a bank account.

Attempting to find OHADA rules that recognize and/or encourage the diffusion of “tontine” practice throughout the formal and informal business sectors could lead one to the 2011 *Acte Uniforme relative aux Sociétés Coopératives*. However, many of its articles are mandatory and prescribe completion of formalities that traditional tontine arrangements do not call for. As such, one can hardly conclude to official recognition and/or integration of the tontine.

⁹⁴ *esusu* in Yoruba language.

⁹⁵ Igué, John O. *Les Yoruba en Afrique de l'ouest francophone, 1910-1980*, *Supra* note 48, 90-91.

⁹⁶ *Ajo Ojojumon* in Yoruba language.

In the paragraphs above, I focused on some of the defining characteristics of female commerce in Benin by looking at sectors (formal, informal) in which business is carried out, scale and areas of trade, and sources of financing. Other elements of women's economic activities can also provide valuable information on "extra-legal" socio-commercial arrangements in Benin and on the dichotomies that persist between businesswomen traditional and/or cultural commercial modes and OHADA Acts. They include organizational structure for product sourcing⁹⁷, their networks and associations⁹⁸ and their dispute resolution practices. In the course of my field research I will also look at how they influence women's economic behaviour.

III. Conclusion

My clinical legal pluralist methodology is founded on the importance of taking a contextual outlook⁹⁹ to allow adequate diagnosis of problems that need to be remedied and of their underlying causes, on the legal pluralist recognition that citizens (in Africa and elsewhere) are irreducible norm generators who interact within and between multilayered normative orders, and on de Soto's strategy for identification of socio-economic "extra-legal" arrangements. In this last regard, looking at people's background and social and cultural characteristics is at the core of understanding the nature of the norms that they create.

⁹⁷ Within the Yoruba community, this takes a hierarchical structure with the family chief negotiating purchase contract with wholesalers and redistributing products to his wives and trainees for retail sale: Igué, John O. *Les Yoruba en Afrique de l'ouest francophone, 1910-1980*, *supra* note 48. It is also interesting to note that Yoruba have put in place an extralegal or illegal currency exchange system to cope with the difficulties linked with different currencies being used in the various countries of the region. The author calls it "parallel banking".

⁹⁸ Chamber of Commerce, International Chamber of Commerce, Association inter-professionnelle de coton, Tokpa Association of Merchants.

⁹⁹ The need to be aware of the particular background, characteristics and challenges faced by the host countries' citizens is particularly important in a development context since badly tailored reform efforts can more easily, directly and negatively affect lives. The harmful effects of untailed "enforcement" in African States (and elsewhere in the world) of the now often condemned structural adjustments programs of the IMF (see Sachs, Jeffrey, *The End of Poverty: Economic Possibilities for our Time*) constitute one of but a number of examples of the consequences of failing to account for a country's history, social and cultural conditions (amongst other things) in the course of development focused worked. Examples concerning failures of legal reform include some of the recommendations of the Office de revision du Code civil in Québec that were dismissed mostly due to political and social elements existing in the 70s and 80s Quebec society: (Macdonald.)

The contextual analysis carried out in Parts B to D gives a glimpse of how historical, social, cultural and economic elements shape women's economic behaviour in contemporary Benin as well as highlights some of the gaps that exist between OHADA laws and local realities and practices in the country¹⁰⁰. The question remains of how to better account and reflect women's economic behavior in policy and development strategies in Benin. Also, how can the disparities between law-in-action and law-in-the-books be resolved so that the current distance between the laws and the citizens and local businesses can be reduced?

I will here only briefly comment these questions from a legal standpoint¹⁰¹. Three types of potential remedies can be suggested for reconciling the gaps between women's on-the-ground commercial practices and formal OHADA Acts. The first category consists in general principles aimed at contributing to a business law reform that is more culture-attentive and deferent to human agency in law-making. The second relates to more technical solutions and methods for law reform and the third category concerns tailor-made critical legal pluralist responses to specific dichotomies.

As for the first type of remedies, they call for attention to be paid at the purposes and goals of commercial law in Africa and Benin in a manner that goes beyond the Western dominated manner in which legislative reform is currently understood and carried out under the auspices of OHADA¹⁰². The idea is to look at the main actors, Beninese (women) entrepreneurs and financiers, and identify their dominant narratives so

¹⁰⁰ In addition to incongruities already highlighted, other examples concern i) the perhaps unrealistic or overly ambitious provisions of the OHADA uniform law on secured transactions that provide for electronic registries and web access given that OHADA countries are subject to frequent power shortages, limited resources and very low levels of IT education; ii) the inadequacy of various French legal transplants (such as the French "agent de sûreté" in the Uniform Act on secured transactions), which are completely foreign to Beninese modes; iii) the writing of most if not all Uniform Acts by foreign (and foreign trained) jurists and experts with the effect of lack uniformity of form and to some extent of coherence of substance between the Acts. For example, the uniform law on the transport of goods is written by Canadian experts while the uniform acts on general commercial and secured transactions are written by French and French trained jurist.

¹⁰¹ A more extensive discussion of the points below can be found in: Deschamps, Isabelle. "Commercial Law Reform in Africa: a Means of Socio-economic Development, But for Whom? Perspective of Women Entrepreneurs in Benin" draft essay in course of preparation presented at the African International Economic Law Network Regional Conference (May 2011, Johannesburg, South Africa): On file with the author.

¹⁰² Commercial law paradigms of OHADA can be assimilated to those of other international organizations such as the World Bank, the European Bank for Reconstruction and Development and the United Nations Commission on International Trade Law.

that they can be reflected in the new law. Caution needs to be taken so that the position of the dominant banks, companies and entrepreneurs is not viewed as the only truly Beninese and/or African position. Law reform needs to account for smaller, local businesses often led by women that also have their own commercial practices that need to be accounted for, and be attentive to gender issues.

Looking at techniques of law reform, the goal is to identify the ones that can best serve the human agency objective outline in my methodological framework. It is to determine which of model laws, harmonization, unification, transplantation, viral propagation, legislative guides and other could best serve a commercial law reform in Benin that would balance the need to promote development of the multiple economic actors in the area (including women entrepreneurs) and that of being attentive to culture and tradition concerns.

Regarding tailor-made responses, I will consider the recent rewriting of the Uniform Act on Secured Transactions (“AUS”) and to exemplify what remedies can be imagined. Like all other Uniform Acts in their respective areas, the AUS unifies formal secured transactions law in the OHADA region and applies directly and without modification into all OHADA member States.

A critical legal pluralist analysis of the history and socio-cultural context suggests that the technique of unification, particularly in such a multicultural, multilayered and diverse setting as the Beninese one can be, inadequately responds to the need to account for the diverse normative orders and inter-normativities of the region. Second, one could have considered rewriting the new Act with greater if not predominant reference to African institutions. This could have been done by having law reformers actually go and meet the people and businesses potentially affected by the new law in order to understand their practices, see their reality and hear their concerns.

Moreover, the team of drafters could have included a larger number of African jurists trained in Africa, more diverse backgrounds and a more balanced proportion of men and women than was effectively the case. The group of drafters could also have invited and/or consulted diverse African citizens and actors evolving in sectors likely to be affected or to affect secured transactions law: men and women entrepreneurs, commercial chamber representatives, bank employees, laymen and laywomen, etc.

A second example of tailor-made remedy concerns the problem of the formal/informal dichotomy. Widespread use of such distinction can be seen as a manifestation of the opposition between the State and non-State and induce people to view society as such. Indeed, the formal/informal opposition further traces boundaries between the State and its subjects. A change of words and of discourse in the law as well as by government representatives, academics, businesspeople and other members of the community that would reflect a more pluralist approach may contribute to end the divide between the State and non-State, the formal and the informal.

I thus suggest abandoning the formal/informal duality since i) it is not accurate (and accordingly the relevance of the dichotomy itself can be questioned); ii) it promotes segregation between groups of society; iii) it perpetuates the positivistic approach to law as the monopoly of the State and the positivist belief that one can fix deep problems with a piece of legislation rather than recognising citizens as the heart of normativity and their role as agents of law.

The case being, my field research this summer will seek to determine whether and how OHADA Uniform Acts influence and/or should be conceived to better address the nexus between economic behaviour and socio-cultural realities nexus so that a better balance can be achieved between the benefits of attracting foreign corporations through Western inspired law and economic logic and the pressing need enhance the business conditions, and eventually the quality of choice of local (women) entrepreneurs.