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## **Future of International Law and Development: Flying under the Radar**

Claire Moore Dickerson

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## Future of International Law and Development: Flying under the Radar

### Cover Page Footnote

International Law; Commercial Law; Law

# **The Future of International Law and Development: Flying Under the Radar†**

*Claire Moore Dickerson††*

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## **I. Introduction: The North and South Are Not Tethered to Geography**

As a business lawyer, the major problem I see in the field of law and development involves politics and corruption. To address these problems, my remarks will focus on how to fly under the radar.

I have an image of an old story by Jonathan Swift,<sup>1</sup> in which

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† This article was delivered as the keynote address at the North Carolina Journal of International Law and Commercial Regulation's 10th annual symposium on January 29, 2010 in Chapel Hill, North Carolina. See Thomas Kelley, *Beyond the Washington Consensus and New Institutionalism: What is the Future of Law and Development?*, 35 N.C. J. INT'L L. & COM. REG. 539 (2010) for a full description of the issues discussed at the conference.

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he described Ireland under English rule a North/South discussion occurring in the northwest of Europe, on a land that was reasonably fertile and potentially prosperous. In the story there was a government on an island that floated above everything and could do so because the island was powered by a lodestone. In happy times, the people below worked and the people above enjoyed themselves. In unhappy times, the lodestone was turned off, the island landed and flattened everything under it, and then it rose again and continued on its way.

I do not advocate the “flattening” of discontented societies, but such scenarios do exist. Acknowledging that some governments do cast shadows can be useful when considering how to promote a positive environment in the lands below and how to avoid, as much as possible, the suppression of social interest.

Relevant in this context is the regulation of society. One of the characteristics of societal regulation is that it must respond to change and, for this reason, regulation is often cyclical. In the business arena, we have seen regular cycles in the kind of regulation imposed in response to realities on the ground, based, for example, on changes in perspective on the appropriateness of free market dogma. Nevertheless, at least to appearances, there are also reasonably consistent efforts to stay ahead of rent-seekers. (Rent-seeking, in this regard, is the manipulation and or exploitation of an economic environment to capture economic rent as opposed to promoting free enterprise through economic transactions.) Rent-seekers have a way of adapting their behavior to a particular regulation, which requires constant recalibration of regulation; this is also a component of our story, and it is as true in the North as in the global South.

The goal is to avoid the negative impact of the interplay of politics and corruption. To reach this goal, some self-regulation may prove to be at least a partial solution.

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principles to business-related areas of law, with a particular focus on standards of performance. Her research and scholarship have allowed her to travel extensively within Africa and to present her research both within the United States and abroad.

<sup>1</sup> JONATHAN SWIFT, *GULLIVER'S TRAVELS* 204-11 (Plain Label Books 1954) (1726).

## II. Two Perspectives of Law and Development

The daunting issue when talking about the future of law and development is that it encompasses two basic perspectives. The first perspective is of those who live in a developed context—however one chooses to define the term. The second perspective is of the people who live in an environment that needs, or deserves, whichever word is preferable, “development.”

Scholars in the field of law and development have expressed concern because academic discourse typically fails to discuss what development means. I would begin to define the term by espousing Amartya Sen’s concept of human capability.<sup>2</sup> For purposes of discussion by a business lawyer, I also note that an aspect of the human capability argument is, indeed, economic growth, and I will come back to that.

### A. Top-Down Perspective

In order to think about the future, it is always useful to start from the beginning—to look at least very briefly at the past. I would like to reemphasize some of the characteristics of the law and development field since World War II. Part of what we have seen is the enormous power of a limited number of extremely large institutions, including, in particular, the international financial institutions. When exercising their power, large institutions logically want to use their leverage, which is not necessarily damaging. But the consequence is that they are always looking for a big solution. On the law side as well, the search for big solutions has been the basic theme of law and development discussions.

Now, it is true that law and development scholars recognized, after a while, their efforts as being failures. They did so, sadly and with frustration, but they acknowledged it nonetheless. Kevin Davis and Michael Trebilcock published a nice summary of this a

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<sup>2</sup> See generally AMARTYA SEN, DEVELOPMENT AS FREEDOM (Random House 1999). A Nobel Prize recipient for Economics and Professor of Economics and Philosophy at Harvard University, Dr. Sen argues that the capabilities of a country’s citizens should be used to measure a government’s development—not just what a citizen has a *right* to do, but what a citizen actually *can* do. *Id.* See also Amartya Sen, Equality of What?, Lecture at Stanford University (May 22, 1979), available at <http://www.dse.unifi.it/sviluppo/doc/Subramanian1.pdf>.

couple of years ago.<sup>3</sup> But even here, the legal scholars' efforts deserve to be treated in a nuanced way. It is too easy simply to declare an effort to have been a failure. Under the analysis employed in this regard, failure denotes a net negative. Although a result may be more negative than positive, there are areas that were positive, and it is worth at least considering even the top-down approach.

### *B. Edging Toward Subsidiarity*

To return to politics and corruption: They have thus launched two basic trends.<sup>4</sup> If the trend of the somewhat farther past is embodied by the image of the Godzillas of development walking across the land, the first contemporary trend—and it is always harder to identify more recent trends—is a kind of subsidiarity or, if you prefer this articulation, it is the demand side of the law and development debate.<sup>5</sup> This theme asks the question: “How do we identify the needs of the most vulnerable in a particular context?” The difficult, complicated part is that it also adds: “What would they say if they were able to express themselves?” Imagining discourse in order to aggregate the purported needs and desires of a society's most vulnerable in a climate of political corruption is indeed a very dangerous operation, fraught with the risk of misinterpretation.

Thus, this second trend is closer to the earlier law and development debate, but more nuanced. The new trend is still a top-down macro approach that is consistent with the international donors' sheer size and desire to leverage. We do see the new institutional economists' influence here; we have definitely seen Hernando de Soto in this trend, and the emphasis on the importance of property—specifically, real property.<sup>6</sup> In a nutshell,

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<sup>3</sup> See generally Kevin Davis & Michael Trebilcock, *The Relationship between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895 (2008) (discussing ongoing debates over the fundamental issues regarding law and development).

<sup>4</sup> The perspectives of those who live in a developed context and those who do not.

<sup>5</sup> See generally Michael Trebilcock & Paul-Eric Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. PA. J. INT'L L. 397 (2008) (arguing for a more nuanced and context-driven approach to understanding the relationship between property and development).

<sup>6</sup> See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY*

the trend attempts to formalize major capitalist concepts, such as property, to save the world from politics and corruption, but the contemplated macro shifts in endowments is for the purpose of empowering the individual.<sup>7</sup>

### III. The Role of Law

How to effect the newer, top-down version of law and development? Since the first law and development movement, the legal origins theory<sup>8</sup> also has had considerable influence. This theory basically says—of course, appealing to us as lawyers—that law affects business; business is necessary to growth; growth is necessary to development; and that *the* relevant social institution is law. Well, that is gratifying.

This is law *and* development because law is the tool of development so long as it supports growth. In large measure, this view is a response by the knowledgeable people who concede that one of the very few areas of consensus is that there is a correlation between economic growth and poverty reduction, and that economic growth is a factor in the evolution of human capability. Although we do not know precisely about causality, there is a correlation.

#### A. *Business Laws and Economic Growth*

That correlation allows me to search for laws that may support economic growth and, thus, allows me to slide into business laws. Business laws are particularly relevant to growth not only because of their connection to economic activities, but also because, in practice, they include a self-regulation component. Recall that I suggested that you must continuously recalibrate regulation. What is interesting about self-regulation is its ability to respond to a

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CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (Basic Books 2000) (discussing the potential of capitalism in underdeveloped countries).

<sup>7</sup> *Id.*

<sup>8</sup> The legal origins theory is an economic theory developed under Andrei Schleifer, Rafael La Porta, Florencio Lopez-de-Silanes, and Robert Vishny in the late 1990s. See Rafael La Porta et al., *The Quality of Government*, 15 J. L. ECON. & ORG. 222 (1999). See also, e.g., Edward Glaeser & Andrei Shleifer, *Legal Origins*, Q. J. ECON. 1193, 1193-1229 (2002) (explaining the “legal origins” theory and predicting that the theory may explain the differences between the social and economic outcomes of common and civil law traditions).

changing environment while flying under the radar—a valuable trait when seeking to avoid politics and corruption.

What does business law do in its effort to have a positive impact on economic growth and, ultimately, on development? To use the standard language, it reduces transaction costs. First, it clarifies property rights, although there are dangers and issues that remain. Second, it describes and constrains the tendency of people to benefit themselves. Finally, it may help level the playing field in certain circumstances between the vulnerable and the powerful.

In suggesting that business law may be useful, let me provide an example, one that is clearly on the supply side. It is a uniform system of business laws that is in operation in West and Central Africa—not all countries have joined—but, currently, a total of sixteen countries are involved, with a seventeenth poised to join them.<sup>9</sup> It is part of a larger effort at economic integration within West and Central Africa, which includes regional economic communities such as the Economic Community of Western African States (ECOWAS)<sup>10</sup> and le Communauté Économique des États d'Afrique Centrale (CEMAC)<sup>11</sup> as well as others, and, ultimately, the African Union.

This regime of uniform business laws is called the Organization for Harmonization in Africa of Business Laws<sup>12</sup> but is better known by its French acronym, OHADA.<sup>13</sup> For the West and Central African countries that have adopted this regime, the common language is that business laws are value neutral. Remember, we are looking at these laws for instrumental reasons and we are asking whether they can support economic growth, that is, whether they can be pro-development by flying under the

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<sup>9</sup> The seventeenth member of this association, the Organization for Harmonization in Africa of Business Laws, is the Democratic Republic of Congo. See OHADA Website, [www.ohada.com/index.php?newlang=english](http://www.ohada.com/index.php?newlang=english) (last visited Mar. 26, 2010).

<sup>10</sup> See ECOWAS Website, [www.comm.ecowas.int](http://www.comm.ecowas.int) (follow “About ECOWAS” hyperlink) (last visited Mar. 26, 2010). ECOWAS is a group of fifteen African nations, which was founded in 1975 to promote economic integration. *Id.*

<sup>11</sup> See World Bank Website, CEMAC, <http://go.worldbank.org/8QXADSZNE0> (last visited Mar. 26, 2010).

<sup>12</sup> For more information, see OHADA Website, <http://www.ohada.com> (last visited Mar. 26, 2010).

<sup>13</sup> *L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA).



politics/corruption radar. We know business laws are not neutral. We know that they are profoundly ideological and that they communicate values. Because the laws are pro-business, they conform to the assumptions of established business and political leaders and, thus, are non-threatening to them. Thus, there is utility in that assumption of neutrality, as it can be easier to fly under the radar in a vehicle that the powerful perceive as neutral.

The “constitution” of OHADA is a treaty that was adopted in 1993.<sup>14</sup> It was adopted by the national executives and by parliaments that were largely under the control of their respective countries’ executive body. The cynical explanation is that the executives were mollifying the international financial institutions that, in turn, were asking them to adopt a whole array of treaties. These included human rights treaties as well as this type of economic treaty.

At the same time, it is fair to say that the OHADA treaty was adopted in direct response to a big picture issue—an external reality—as opposed to a purely political or ideological trigger. The early 1990s was a period of significant economic dislocation in the region due to turmoil in world markets for primary goods, and government executives sought new capital. The articulated purpose for OHADA, indeed, was to encourage foreign direct investment by providing a legal system that would be familiar and therefore reassuring to potential foreign investors.

But, importantly for this discussion, to the extent that uniform international legal frameworks encourage potential foreign investors, they can also have a positive regulatory impact on purely domestic investment. My focus here is exactly in that tranche, and, more narrowly, in the tranche of the emerging middle class.

### *B. Business Laws and Modified Subsidiarity Revisited*

How is OHADA relatively self-regulatory and how would it facilitate flying under this political radar? Basically, what it does is it bypasses a lot of national institutions. These sixteen countries cover a lot of ground. To the north is Mali, in the west is Senegal,

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<sup>14</sup> Traite relatif a l'Harmonisation en Afrique du Droit des Affaires, 4 Journal Officiel del OHADA [J.O. OHADA], Nov. 1, 1997, p. 1, available at <http://www.ohada.com/traite.php?categorie=10>.

and in the east, if you do not count the Comoros, are the Central African Republic and the Republic of Congo. If the Democratic Republic of Congo joins OHADA, it will take over as the boundaries to the east and the south. We are talking about 147 million people.<sup>15</sup> We are talking about a gross domestic product (GDP) of about US \$265 billion.<sup>16</sup> Compared to the European Union, that is about one third of the population<sup>17</sup> and one eighteenth of the per capita GDP,<sup>18</sup> so there is room for growth. While that figure would seem to suggest that the economy in the OHADA territory needs to grow by a factor of about twenty-five to equal per capita GDP in the European Union, the actual factor is probably somewhat less due to the amount of African GDP in the informal sector, since that is not fully reflected in the official GDP figures.

### *1. The Supranational Strategy*

OHADA represents a massive effort to create a cross-border, uniform system of business laws. In order to bypass national institutions, it has created supranational institutions. The individual national parliaments have no authority to adopt these business laws. There is a supranational parliament, constituted of ministers of finance and justice; the laws it adopts become, automatically and immediately, the internal laws of each of OHADA's member nations.

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<sup>15</sup> CIA, The World Fact Book, African Region, [https://www.cia.gov/library/publications/the-world-factbook/region/region\\_afr.html](https://www.cia.gov/library/publications/the-world-factbook/region/region_afr.html) (last visited Mar. 26, 2010). The number does not take into account the population of the Democratic Republic of Congo.

<sup>16</sup> Int'l Monetary Fund, World Economic Outlook Database, October 2009, <http://www.imf.org/external/pubs/ft/weo/2009/02/weodata/index.aspx> (follow "By Countries" hyperlink; then follow "Africa" hyperlink; select OHADA member states and GDP) (last visited Mar. 26, 2010).

<sup>17</sup> CIA, The World Fact Book, European Union, <https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html> (last visited Mar. 26, 2010). As of 2009, the European Union had an estimated population of 492,000,000.

<sup>18</sup> Int'l Monetary Fund, World Economic Outlook Database, October 2009, <http://www.imf.org/external/pubs/ft/weo/2009/02/weodata/index.aspx> (follow "By Country Groups" hyperlink then select "European Union") (last visited Mar. 26, 2010). The IMF lists the GDP of the European Union for the 2009 fiscal year as US \$14.851 trillion. *Id.*

Having already spoken about the issues of corruption and the need for constant recalibration of regulations, the next problem regards interpretation of the laws. There is a supranational court with exclusive jurisdiction to hear any matters regarding OHADA on appeal from the penultimate level of the various national court systems. Part of the OHADA effort is, thus, in many ways, pure old-style, top-down law and development. A cynical analysis would show that, in addition to benefitting foreign investors, the structure initially benefits the local elites, who probably do not require as much help as the emerging middle class, whose support appears to be more by-product than intended result.

There are skeptics about OHADA's efficacy, and, interestingly, some of them are exactly the people who brought us the Washington Consensus and who supported the law and development perspective for a long time. They include, notably, proponents of law and finance, and the legal origins theories. That is to say, in this area of the world, where Transparency International and its Corruption Perceptions Index indicate that there are serious issues,<sup>19</sup> the World Bank has been publishing regularly, and annually since 2004, a Doing Business report. I will mention two of those reports briefly—the very first one and the most recent one.

In the very first of the Doing Business reports, the World Bank,<sup>20</sup> appropriate to its size, took a macro perspective. It concluded that, based on its analysis of all countries, including those that have done well and those that have done poorly, countries that have a civil law system as opposed to a common law system do not develop.<sup>21</sup> Consequently, the advanced hypothesis was that civil law systems are antidevelopment.<sup>22</sup>

You can imagine there was a bit of excitement in various parts of the world, including a certain hexagon in Europe. In addition to that country, others that have inherited any kind of civil law

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<sup>19</sup> Transparency International, Corruption Perceptions Index, [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009](http://www.transparency.org/policy_research/surveys_indices/cpi/2009) (last visited Mar. 26, 2010).

<sup>20</sup> WORLD BANK, DOING BUSINESS IN 2004: UNDERSTANDING REGULATION (2004), available at <http://www.doingbusiness.org/Documents/DB2004-full-report.pdf> (last visited Mar. 26, 2010).

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

system, plus a number of countries that have hybrid systems, echoed their excitement, which pretty much accounts for most of the world, excepting the United Kingdom and former U.K. colonies. At any rate, that civil law is antidevelopment was one argument the World Bank identified.

Five years later, in 2009, the analysis is much more evolved and much more nuanced, although the World Bank's approach is still macro and top-down.<sup>23</sup> Everything is about metrics—you have to prove everything—which is difficult to do in the social sciences. However, the World Bank tried and, in doing so, came up with ten factors to measure development,<sup>24</sup> against which they compared the progress of OHADA countries.

Now, here is a dark secret: Of those ten measures, four are entirely outside OHADA's jurisdiction. For example, OHADA says nothing about construction permits, nor does it address employment law—that subject is too political to be confided to a supranational authority. OHADA says nothing about taxes, either; they are arguably more political than employment law. Importation duties and the like are a type of tax, as well, and are not addressed either. So, that is the first part of the dark secret.

Secondly, OHADA does address the next four measures, but has only a very limited impact on these topics. In this category are: starting a business; protecting investments; enforcing contracts; and closing a company. Let me illustrate this by focusing on the first of these topics; namely, starting a business. OHADA does have something to say about that. It describes what documents to file. It explains, for those of you who have studied business enterprises, promoter liability. Basically, it discusses the mechanics of starting a business. What it does not discuss is where to file, how to file, how much to pay, or how long the process will take. And the transaction costs involved in starting a business entail just those categories, which remain under national control.

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<sup>23</sup> WORLD BANK, DOING BUSINESS 2009: COMPARING REGULATION IN 181 ECONOMIES (2009), [http://www.doingbusiness.org/Documents/FullReport/2009/DB\\_2009\\_English.pdf](http://www.doingbusiness.org/Documents/FullReport/2009/DB_2009_English.pdf).

<sup>24</sup> See *id.* at 1, Figure 1.1. The factors include: starting a business; dealing with construction permits; employing workers; registering property; getting credit; protecting investors; paying taxes; trading across borders; enforcing contracts; and closing a business. *Id.*

In Cameroon, the government (alleged by some under the prodding of the World Bank) came up with a new ministry of small- and medium-sized enterprises. The government representatives said something like, "What we are supposed to do is set up a one-stop shop, so then you can come in with your documents to this one window, hand in your documents and then, 'poof,' you will get your documents back after you pay whatever taxes and fees are due." Understand that this looks nice on paper but says nothing about the process' length or costs.

Finally, there are two items in the 2009 Doing Business report's list that OHADA has much to say about; namely, registering personalty and obtaining credit. OHADA addresses these two items through its commercial and secured transactions laws, including through the general commercial code's establishment of a registry for the purpose of creating transparency. By way of example, this registry was to be computerized, allowing prospective creditors access to an applicant's credit history.

Here is the experience in reality. OHADA describes the registry's intended structure and role, but the national governments establish, run, and organize the registry. In Cameroon, the registry is housed in the local courts of first instance—the trial courts. I went to one such court in Cameroon's commercial capital and in one of the commercial centers in Cameroon's Anglophone region to find what was available.

First, all input to the registry is manual; no computerization in sight. That is okay. But the information is listed only chronologically, without an index. This information includes the formation details of business enterprises, the identification of property used as collateral to secure credit, and other substantive material. Thus, a creditor considering lending to a particular debtor must literally go back from the beginning and review every subsequent entry to locate the desired information. How useful is this? The registry is not searchable in any meaningful way. And, additionally, it is highly unlikely that a random potential creditor will have direct access to the registry as it will be under the court clerk's control for safekeeping. To access the information, the potential creditor must rely on the thoroughness and accuracy of a civil servant's review.

## 2. *Interference with the National Regimes*

Again, you can see that it is at these transition points, at these borders between OHADA and the national governments, there are serious issues.

Recall that we are trying to find a way to pass under the radar. One strategy that the OHADA treaty did not adopt is to have set up a hierarchical system of courts—from top to bottom. Rather, it established only a supranational appellate court. This situation is understandable from a financial perspective. It would be too expensive to establish a system of trial and intermediate courts, and OHADA has thus had to rely on the hope that there would be sufficient transparency generated by the highest-level review. However, the major problem with the lack of trial and intermediate courts is that most decisions are not appealed all the way to the top, which is the case in any purely national system as well. The result here, however, is that the vast majority of OHADA matters end in national courts, without any supranational review.

The problem remains as to what happens within the national environments. I will preface my next statement by remarking that it is always difficult to talk about development environments from the perspective of an outsider. I recognize that we in the United States have serious problems with corruption as well. But I will share some vignettes to illustrate the impediments that national leniency toward corrupt practices place on development.

I heard a former president of the Cameroonian Bar chastise his colleagues and say, “I look forward to the day when what you know will be more important than whom you know.” And I have heard a lawyer say, “I hate to practice before such-and-such a judge, because he’s always entertaining people in his chambers who are before him, who have cases before him.” It is reassuring that the lawyer is upset about that; however, I spoke to another lawyer who said, “Oh, I never give money to a judge. I have my clients do that.”

Finally, a very prominent case, one of the more important cases in the region, was decided in a way that did not make apparent sense. The rumor is, although I do not have proof, that the French government had put extreme pressure on the executive, who, in turn, put pressure on the judges to rule in the manner they did.

Wait a minute. Judges are independent, right? The Cameroonian Constitution confirms that the president appoints the judges, but he also, as part of his obligation, protects their independence.<sup>25</sup> Unfortunately, this is not necessarily the case in reality and a more apt illustration is embodied by the phrase *chantage alimentaire*,<sup>26</sup> which is basically “extortion by withholding sustenance.” The executive has administrative control of the courts. If a judge refuses to behave according to the executive’s desires, the judge as well as the judge’s family could end up in the Cameroonian equivalent of Siberia. The resultant unpredictability of outcome compromises the pro-development impact of even the best laws.

### *3. Self-Regulating Subsidiarity Within a Top-Down Framework*

Therefore, the failure of OHADA laws and the failure of implementation are fundamentally political problems, but does that mean that the laws are useless? That would be an unhappy characterization for those interested in law and development. The reality is that law does have a signaling potential, at least in a tranche of society, and I will consider that briefly.

In 2005, the Dean of the University of Buea’s Faculty of Social and Management Sciences and I set up a series of workshops on the newly-implemented OHADA laws, mostly in the Anglophone region but also in the commercial center, on the Francophone side. Instead of bringing in some hotshot law professors as was the norm on the Francophone side, we had local practitioners serve as panelists.

During the fifth workshop, which was offered in a commercial center deep in an agricultural area of the Anglophone region, the discussions were broadcast on local radio. The courts had closed, which was a significant honor, so that all lawyers and judges could attend this technical discussion of OHADA laws. As this workshop was being broadcast over the radio, businesspeople heard it, left their work, and showed up unbidden. That is an indication of the signaling power of law and also emphasizes the

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<sup>25</sup> See 1996 CONST. Art. 37 (Cameroon).

<sup>26</sup> “Chantage” is a French word meaning “bribery” and “alimentaire” means “food.” FRENCH-ENGLISH DICTIONARY (Eileen Haraty, ed., Mirriam-Webster 2000).

demand side, although I have been speaking primarily about the system as a supply side law.

Let me now shift gears to a different style of subsidiarity in my remaining moments, still top-down, still increasingly nuanced, and still reliant in part on self-regulation. I have been talking about the formal sector until now, but I also want to mention the informal sector. These OHADA laws are directly applicable to the formal sector, and I am targeting that narrow tranche of emerging middle class. Consider this: Depending on how you count and how you define the informal sector, and without going into too much detail, the statistics in Sub-Saharan Africa reflect that between forty and sixty percent of the urban economy is the informal sector.<sup>27</sup> The fact we are talking about figures between forty and sixty percent, an enormous range, indicates how hard this sector is to measure and identify.

People talk about it often in the context of agricultural workers, but in the context of non-agricultural workers, some of the figures range between fifty-one and ninety-three percent of workers in the informal sector depending on the country—again, an enormous range.<sup>28</sup> In the same study, the overall figure for the non-agricultural informal economy in Sub-Saharan Africa figure is estimated at seventy-two percent.<sup>29</sup> Any true law reform must consider this fact.

The informal sector includes more than just the market women, and the street vendors selling ground nuts on the side of the road. It also includes people who have, for example, a catering business that is included in the formal sector but they also operate a back room, ladies' clothes and accessories business away from the eyes of the tax collector. Emphatically, informal sector work and illegal work are not synonymous.

Everything that I have said so far regards the formal sector. But the realities—the business realities—to the extent that business is a tool for economic growth and human capability, are

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<sup>27</sup> Jantjie Xaba et al., *The Informal Sector in Subsaharan Africa* 4 (Int'l Labor Org. [ILO], Working Paper, 2002), available at [http://www.ilo.org/dyn/infoecon/iebrowse.page?p\\_ieresource\\_id=42&p\\_lang=en](http://www.ilo.org/dyn/infoecon/iebrowse.page?p_ieresource_id=42&p_lang=en) (last visited Mar. 26, 2010).

<sup>28</sup> Int'l Labour Org. [ILO], *Women and Men in the Informal Economy: A Statistical Picture* 19 (2002), <http://www.wiego.org/publications/womenandmenintheinformaleconomy.pdf>.

<sup>29</sup> *Id.*



that legal and quasi-legal structures do currently exist in the informal sector. Thus, the ultimate question is: What can we do with formal law to support these informal structures?

As an example of an informal structure, the Bamileke in Cameroon have a particularly sophisticated credit fund system from which people can borrow. It includes an interest component as well. As a further example, in Niger there is a kind of secured transaction, the “tolmé,” which has built-in incentives to discourage the creditor from calling the loan early, something that we could have used in this country. There are also systems of quasi-trade payables for market women to obtain the inventory to sell that very day. I am not saying that these systems are perfect or that they represent a complete solution. Rather, I am saying that there is something real that deserves to be supported, and, again, deserves to be supported in the under-the-radar, nonpolitical way, to the extent possible.

One possible solution is to use formal, top-down structures for exactly this kind of empowerment. Formal, top-down law can, for example, authorize and facilitate the formation and use of cooperatives. There already exist multiple examples of the use of cooperatives for everything from childcare, to insurance, to improved sanitary conditions, and to individual capital formation.

#### **IV. Conclusion**

I am not qualified to forecast the future of law and development. Maybe the pessimistic view is that it is all about politics and resultant corruption, and I certainly experience days when that is what I believe. It is all politics and we are basically trying to take down Mount Everest with a teaspoon. On my optimistic days, maybe pragmatic days, I may tell you that you can try to overcome the politics and resultant effects, so long as you focus on human capability, rather than specifically on structures. That is the proper focus. Thus, regulation will always be to some measure top-down, especially in the development context; however, a focus on subsidiarity, on using law to create the framework that facilitates business in every sector, has to be part of the future.

The big picture law in the development context: Keep the supply side going, but be careful. The smaller picture: Pay attention to the demand side. To combine both the big and little

pictures: Look to see what kind of facilitating role law can play for both the supply and demand sides.