

**Commercial Law Reform in Africa: a Means of Socio-economic Development, But
for Whom?**

Perspective of Women Entrepreneurs in Benin

Isabelle Deschamps

**Institute of Comparative Law, Faculty of Law
McGill University, Montreal
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ABSTRACT

This thesis explores the interactions between French and foreign influenced formal commercial law in the Republic of Benin and women's on-the-ground business practices. It uses a comparative, historical and inter-disciplinary and empirical methodology (Clinical legal pluralism). It contributes to the debate on the relationship between law and socio-economic development in African States where formal law is modeled on that of their former colonizing power.

The dissertation looks at the evolution of business law and of economic activity in the region from pre-colonial times to present where OHADA Uniform Acts ("Acts") largely inspired by French and foreign law constitute Beninese formal commercial law's primary source.

The thesis then examines elements of businesswomen's socio-cultural realities and economic practices in the region to assess the extent to which they are accounted for in formal law. The analysis reveals the considerable gap that continues to exist between the Western-inspired Acts and the realities and modes of Beninese women entrepreneurs.

While the OHADA regime may benefit French and other foreign companies that contribute to the region's economic vitality to varying extents, the difficult appropriation and access by a majority of citizens and enterprises in Benin to OHADA laws prevent Beninese (in particular female) small and medium enterprises from playing a greater role in the socio-economic development of their countries.

The dissertation suggests that the paradigms and methods currently used by OHADA and international organizations such as the World Bank in their law reform activities do not take appropriate account of economic, social and cultural realities of the regions where the new law is to be implemented. These include gender issues in business practices. It argues that commercial law reformers should recognise the central role of citizens in creating the law.

Finally, it outlines an analytical framework for applying these objectives so as to empower citizens in Benin as lawmakers. This framework will integrate some of existing law reform paradigms with additional ones focused on the identity of legal

actors in the region (banks, small, medium and large entrepreneurs, micro-credit institutions, financiers, etc.), the dynamics between them, the role of women in business and alternative legal reform methods based on bottom-up approaches to law.

RÉSUMÉ

Ce mémoire s'intéresse aux interactions entre le droit commercial d'inspiration française ou étrangère dans la République du Bénin avec les réalités pratiques que les femmes commerçantes y vivent sur le terrain. Une méthodologie comparative, historique et interdisciplinaire y est employée (pluralisme juridique clinique). Il se veut une contribution au débat sur la relation entre le droit et le développement socio-économique dans les États Africains où le droit formel prend modèle sur celui de leur ancienne métropole.

L'auteure débute en examinant l'évolution du droit des affaires et de l'activité économique dans la région à partir de l'époque précoloniale jusqu'à aujourd'hui, où les Actes Uniformes OHADA (les « Actes »), fondés largement sur le droit Français et étranger, constituent la source la plus importante du droit commercial Béninois.

Elle poursuit en explorant les réalités socioculturelles et les pratiques économiques des femmes commerçantes dans la région afin de vérifier dans quelle mesure elles sont prises en compte par le droit formel. Cette analyse révèle un écart considérable qui perdure entre les Actes d'inspiration occidentale et les réalités et pratiques des femmes commerçantes Béninoises.

Bien que le régime OHADA puisse bénéficier aux investisseurs Français et étrangers qui contribuent, à divers degrés, à l'activité économique dans la région, la difficulté pour une majorité de citoyens et d'entreprises Béninois à s'approprier ou accéder aux Actes empêchent les petites et moyennes entreprises Béninoises (particulièrement celles dirigées par des femmes) de jouer un plus grand rôle dans le développement socioéconomique de leur pays.

L'auteure postule que les paradigmes et méthodes employés par l'OHADA ainsi que par des organisations internationales telles la Banque Mondiale dans le cadre de leurs activités de réforme législative ne tiennent pas suffisamment compte des réalités économiques, sociales et culturelles des régions où leurs réformes sont mises en œuvre. Ces réalités comprennent les questions liées au genre dans le cadre des pratiques commerciales. L'auteure suggère que les réformateurs du droit commercial reconnaissent davantage le rôle central que les citoyens jouent dans la création du droit.

Enfin, le mémoire trace les contours d'un cadre analytique qui applique ces objectifs de façon à réhabiliter les citoyens Béninois à titre de créateurs de droit. Ce cadre intègre quelques-uns des paradigmes existants sur la réforme du droit avec de nouveaux paradigmes centrés sur l'identité des acteurs juridiques dans la région (les banques, les petites, moyennes et grandes entreprises, les institutions de microcrédit, les investisseurs, etc.), les dynamiques entre eux, le rôle des femmes dans le milieu des affaires et les méthodes alternatives de réforme législative fondées sur une approche juridique du bas vers le haut.

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Introduction

In June 2011, during an interview with Augustine, a Beninese merchant, I asked her why she had stopped selling in the bustling Dantokpa market of Cotonou after ten years of steadily expanding her business.¹ She responded as follows:

“Vous savez que nous sommes au Bénin. (...) Nous sommes en Afrique. Il y a toujours de la jalousie, il y a les envoutements. J’ai été sérieusement envoutée et mon argent était parti en fumée. Tout, tout, tout était parti en fumée et je me suis retrouvée à néant et je suis obligée de rester à la maison. [You know that we are in Benin. (...) We are in Africa. There is always jealousy, there are enchantments. I was seriously enchanted and my money went up in smoke. Everything, everything, everything went up in smoke and I found myself with nothing and I was forced to stay at home.]”² (Author’s translation)

She explained that witchcraft had been performed on two occasions in front of her shop, with devastating effects on her sales and finances.³ Within a few months of the unfortunate events Augustine went out of business, closed her shop and returned home to start all over again on the bottom rung with modest sale of small household goods.⁴

Are voodoo spells to blame for Augustine’s downfall? Or is it rather the increasing ruthlessness of the market, which Augustine also acknowledged? Is witchcraft a form of unfair competition? And could it make its way into legislation on prohibited commercial practices? Merely asking these questions would surely have one dubbed a buffoon, to say the least, by Western-trained jurists and legal drafters. Searching for references to sorcery in Benin’s formal commercial laws and regulations would also be a vain enterprise.

Be that as it may, and while Augustine was the most outspoken of the sixteen businesswomen interviewed⁵ for this research project in the summer 2011

¹ Interview conducted with Augustine (pseudonym), Cotonou (Benin), June 2011. Augustine started selling her products in Dantokpa market in a small exhibition stall but due to strong demand, she soon had to rent two storage stalls for her products.

² *Ibid.*

³ According to Augustine, on the first occasion, food had been prepared and buried under the soil in front of her shop prior to her arrival (she could still feel the heat of the bricks used to cook the food). On the second occasion, a small powder-filled flask was apparently left in a hole in front of the shop. Augustine’s driver tried to bury the flask but it always came back to the surface. In the months following this, Augustine saw her profits drop abruptly.

⁴ Augustine, June 2011. See also Appendices D and E-1 to E-4, which synthesize interview results.

⁵ Appendices D and E-1 to E-4.

regarding her subjection to bad spells, stories similar to hers are common in Benin.⁶ So is the belief in the mischief voodoo curses can achieve on one's professional and personal life.

What this reveals is the disparity that exists between real-life socio-economic behavior of Beninese merchants and the law-of-the-books. More generally, it draws attention to the need for analysing how on-the-ground normative conduct compares with States' and regional and international organizations' conceptions about law, trade and development. This thesis explores features of this contrast.

It examines how economic practices are organized and shaped in communities where commercial activity is dominated by modes that do not necessarily conform to or come within the ambit of statutory law and officially recognized structures of business. It presents a perspective on the nature of business and business law aimed at inducing policies and strategies for human and economic development that are more adapted to their region of application. It also looks at the relationship between law and socio-economic development in States where formal law is derived from that of their former colonizing power.

To do so, it uses a case study: it analyses the interactions between French and foreign-modeled formal commercial law in the Republic of Benin and traditional and informal business practices in the country. It focuses on women entrepreneurs as paradigms of investigation.⁷ The inquiry undertaken requires grounding in detailed empirical field studies of the practices of women entrepreneurs. This thesis introduces issues in need of examination, discusses key findings and situates such an empirical inquiry in its theoretical and general socio-economic context.

Chapter I formulates a methodological framework of analysis, which is founded on a comparative, historical, inter-disciplinary and empirical approach. This

⁶ Informal conversations with market women, primary school teachers, university students and medical doctors in Glo Yekon village, Grand Popo and Cotonou (Benin) between April and June 2009, May and June 2010 and 19 June to 5 July 2011. Since many of these conversations took place informally even before I commenced my LL.M. and had a chance to apply for an REB certificate, I do not specifically reference them or my interlocutors.

⁷ Some of the rationale presented in this thesis can logically be expected to apply to other countries as well as to men entrepreneurs albeit to varying degrees. However, this inquiry is left for subsequent research.

framework, labelled “Clinical Legal Pluralism”, draws from “clinical economics”, legal pluralism theories, and strategies developed for taking cognizance of on-the-ground normative dynamics in Third World countries’ largely informal economies. It focuses on the *context* in which economic activity and underlying legal relations take place, on the *identity* of juridico-economic agents and on the *dynamics* and practices between these agents. Empirical investigations are necessary to adequately assess and understand these elements. The scope of the investigations undertaken for this thesis is described at the end of chapter one.

In line with a clinical legal pluralist framework, Chapter II considers elements of economic activity and normativity in Benin from pre-colonial times to present. This historical review serves to trace the roots and appreciate the workings of current commercial rules and practices in Benin. In particular, it recalls that it is during the colonization era that statutory law first started regulating the country through the application of the French 1807 *Code de commerce* and others laws. The Chapter notes that a functional body of local trade rules (amongst other rules) however already governed the region and was for the most part ignored by the colonial administration. Today, nine Uniform Acts adopted by the Organisation for Harmonization of Business Law in Africa (“**OHADA**”) and largely inspired by French and other Western law constitute the primary source of formal commercial law in Benin.

Chapters III and IV measure the extent to which Beninese businesswomen’s socio-cultural realities and economic practices are accounted for in formal law. To do so, Chapter III considers maternity, spousal unions, literacy, religion, ethnicity and geography and asks how these elements, as well as history, model women’s business conduct in Benin. This analysis is infused with empirical data collected during a preliminary environmental scan informally undertaken in Benin in May and June 2010,⁸ from a series of interviews conducted in the country in June and July 2011 and from secondary field research.

Chapter IV develops the analysis instigated in Chapter III by mapping Beninese women entrepreneurs’ sectors of economic activity, types of businesses and

⁸ This was prior to commencing my graduate studies at McGill.

products, sources of products, modes of financing, accounting and book-keeping habits and business networks. It draws from the same set of empirical data as the one described above. Chapters III and IV shed light on dichotomies between formal regional (OHADA) business rules and on-the-ground trading modes. These constitute partial evidence of the limitations of dominant regional and international institutions' law and development logic and instruments.⁹

Throughout Chapter III and IV, the significance of the dichotomies alluded to as well as other discrepancies between French and foreign-modeled formal business laws (whether specific to Benin or part of the OHADA *acquis*) and the realities and practices of female entrepreneurs in the country.

While official legal structures are generally useful for larger commercial operations and for foreign enterprises (including financial institutions) doing business in Benin and their lawyers, they tend to remain beyond the reach of the vast majority of the country's women entrepreneurs managing small and medium enterprises. This thesis hypothesizes that significant differences between the benefits larger and foreign businesses derive from their activities in Benin and those of individual, small and medium Beninese businesses suggest that effective deployment of official laws may require experience and understanding beyond the capacity of local women entrepreneurs.

Chapter V outlines proposals inspired by social scientific and critical legal pluralism theories for remedying the foregoing challenges. The objective is to allow Beninese citizens (including women) running small and medium enterprises to play a more effective role in the socio-economic development of their country through carefully elaborated, nationally adapted and flexible legislation. This legislation need not necessarily abandon foreign-inspired legal concepts. Rather, what is required is sensitivity to local practices. This will permit the law to nurture local modes that enable businesswomen and to counter local practices that constitute barriers to female entrepreneurial activity. In particular, commercial law reform should involve more

⁹ Examples of such tools include legislative guides such as the *UNCITRAL Legislative Guide on Secured Transactions* (Vienna: UNCITRAL, 2010), model laws such as the *EBRD Model Law on Secured Transactions* (London: EBRD, 2004), uniform laws such as the OHADA Uniform Acts, World Bank "Doing Business" reports, etc.

than efficiency concerns and be attentive to gender issues in both international and local business practices.

I. Methodological Approach and Literature Review

With a view of carrying out a comprehensive, culture-sensitive and humanitarian¹⁰ empirical study of the legal issues confronting women entrepreneurs in Benin, this research project follows a methodological framework that can be designated as Clinical Legal Pluralism. The following paragraphs expose the main components of this methodology and in so doing present the core literature reviewed in preparation for this thesis.

Clinical Legal Pluralism is derived from development economist Jeffrey Sachs' Clinical Economics method¹¹ (A), from theories on law reform, some of which inspired by social-scientific and critical legal pluralism (B), and from reasonings and strategies for accounting for "extra-legal"¹² (female) business arrangements in Third World countries (C). It is grounded on empirical research (D).

A. Clinical Economics

In *The End of Poverty: Economic Possibilities for Our Time*,¹³ 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 and analysts should be sensitive, however, to geographical, political, and cultural conditions that may each play a role."¹⁴ (Emphasis added)

Sachs assimilates the work of a development economist to that of a clinician and develops a "clinical economics" method founded on five lessons from

¹⁰ The word is used in its original meaning, e.g. "concerned with or seeking to promote human welfare" rather than in the meaning now often attributed to it in the media and international arena, e.g. "humanitarian" 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.)

¹¹ Jeffrey Sachs, *The End of Poverty: Economic Solutions for our Times* (New York: Penguin Press, 2005).

¹² Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

¹³ *Ibid.*

¹⁴ Sachs, *supra* note 11 at 73.

medical practice. Four of these are equally relevant to development lawyers and jurists. First, the human body (here a country) is a complex system in which many elements are interrelated and influence each other.¹⁵ Second, complexity requires a multifaceted, organized and timely response to symptoms (here problems and crises). Third, one must not only identify the illness of a patient (here a country), he or she must appreciate the social context in order to prescribe adequate treatment. Fourth, assiduous comparison of objectives and results (rather than simply verifying that a suggested measure was adopted without looking at the effect of the measure) is necessary to correct erroneous initial diagnosis.¹⁶

Michael Trebilcock,¹⁷ Ronald Daniels,¹⁸ Roderick A Macdonald,¹⁹ Boaventura de Sousa Santos,²⁰ Jacques Vanderlinden²¹ and Brenda Cossman²² are among those whose work translates these teachings into law and law reform.

B. (Critical) Pluralist Approaches to Law and Reform

1. Context attentive Law Reform

Making legal echo to Sachs' findings, law and economics experts Michael Trebilcock and Ronald Daniels indicate in their book *Rule of Law Reform and*

¹⁵ For example, saving leading to capital accumulation, trade, technology, the presence or absence of a market for innovation, resource booms or natural resource decline, adverse productivity shocks such as a natural disasters, population growth and demography, geography and climate, fiscal regimes, governance, cultural and religious elements, and geopolitics can all come into play and account for economic development or decline, as well as for legal reform success or failure. Accordingly, the form and nature that each of these criteria take in a given country need to be considered so that an adequate diagnostic and (legal, economic) solution can be found: Sachs, *supra* note 11. See sections B and C for a discussion on the application of this lesson in the context of legal reform work.

¹⁶ Sachs, *supra* note 11 at ch 4.

¹⁷ For example, Michael J Trebilcock & Ronald J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham: EE, 2008).

¹⁸ *Ibid.*

¹⁹ For example, Roderick A Macdonald, "Article 9 Norm Entrepreneurship" (2006) 43 Can Bus LJ 240 [Macdonald, "Entrepreneurship"].

²⁰ For example, Boaventura de Sousa Santos, "The Heterogeneous State and Legal Pluralism in Mozambique" (2006) 40 Law & Soc Rev 39.

²¹ For example, Jacques Vanderlinden, "What Kind of Law Making in a Global World? The Case of Africa" (2007) 67:4 La L Rev 1043 (HeinOnline).

²² For example, Brenda Cossman, "Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project" (1997) Utah Law Review 525 (HeinOnline).

*Development: Charting the Fragile Path of Progress*²³ that there are three main types of challenges to rule of law reform: i) resource constraints; ii) cultural, social and historical values and iii) political economy (corruption, hegemonic political leaderships, etc.). They make the following suggestions for overcoming these challenges:

1) make legal reform respond to what relevant groups in receiving countries perceive as their needs and institute a close work relationship between foreign experts and key institutions from receiving countries;²⁴

2) sustain advice providers' commitments;

3) have foreigners develop local knowledge (of the language, traditions, culture, laws, conditions) so that their contribution be more effective;

4) give advice on the basis of general, universal principles rather than based on the donor country's experience so that the receiving country can easily adapt to its realities—according to clinical legal pluralism, this guideline needs to be balanced with the need to account for country specificities;

5) have developing countries compare their situation with that of similar developing countries that successfully implemented their reform, and transpose lessons learned—again, clinical legal pluralism insists on the importance of assessing the possibility (for example, by reference to the costs involved), practicability and desirability of the transplant.²⁵

²³ Trebilcock & Daniels, *supra* note 17.

²⁴ See also: Emmanuel Kwabena Quansah, "Educating Lawyers for Transnational Challenges: Perspectives of a Developing Country – Botswana" (2005) 55:4 J Legal Educ 528 (HeinOnline) for a Botswanan example of how this comes into play. The author explains that modern-day legal education programs in the country place emphasis on computer literacy and on the need to adapt law courses to local reality (as opposed to having a copy/paste of their ex-colonial empire's legal education system). He also highlights the fact that a number of Botswanan laws have now been amended in order to be more deferent to customs. Interestingly, the author also asks for additional funding for legal education programs in his country. This can be interpreted as the expression of a local need, which Trebilcock and Daniels refer to in their rule of law reform guiding principles.

²⁵ Trebilcock and Daniels have also analysed measures taken and/or envisaged by the international community to induce rule of law reform in developing countries including: i) providing funds and expertise to reform-oriented governments and NGO's without any form of pressure or conditionality; ii) conditionalities through trade policies, regional political organizations and aid and debt relief, and iii) sanctions. They found that the latter two are least effective in inducing rule of law reform: Trebilcock & Daniels, *supra* note 17.

Along the same lines of thought, in an article entitled “Article 9 Norm Entrepreneurship”,²⁶ Roderick 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.”²⁷ (Emphasis added)

Macdonald insists on the importance that legal reform prioritize substance over form (by 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.

The objective is to choose or create a legal reform technique (for example model law,²⁸ harmonization,²⁹ unification, transplantation, viral propagation, legislative guide, recommended standards³⁰ or other³¹) that will allow for effective

²⁶ Macdonald, “Entrepreneurship”, *supra* note 19.

²⁷ *Ibid*, 241-42.

²⁸ See Neil B Cohen, “Should UNCITRAL Prepare a Model Law on Secured Transactions?” (2010) 25 Unif L Rev 325; Roderick A Macdonald, “A Model Law on Secured Transactions. A Representation of Structure? An Object of Idealized Imitation? A Type, Template or Design?” (2010) 25 Unif L Rev 419 [Macdonald, « Model Law »]; Jean-François Riffard, « Le Livre IX du Cadre Commun de Référence Européenne et la future loi modèle de la CNUDCI sur les sûretés réelles mobilières : Quand l’un vient d’en bas et l’autre d’en haut, il y en aura un de trop... » (2010) 25 Unif L Rev 465; Jean-Hendrik Röver, “The EBRD’s Model Law on Secured Transactions and its Implications for an UNCITRAL Model Law on Secured Transactions” (2010) 25 Unif L Rev 47 (for arguments in favour and against the technique of model laws (in addition to or in comparison with legislative guides.)

²⁹ Martin Boodman, “The Myth of Harmonization of Laws” (1991) 39: 4 Am J Comp L 699 (for an analysis of the concepts of harmonization and of legal harmonization as well as the relevance and/or appropriateness of using such a legal reform technique in a given case).

³⁰ See Yair Baranes, “You Can Live Good Doing It” (2010) 25 Unif L Rev 307 (for an empirically-based proposal for the adoption of “globally recommended standards” for creating and/or modernizing secured financing registries.) For proposals similar to “recommended standards” see: Eric Franco et al, “UNCITRAL’s Guide to Secured Transactions – a Contractual Guide” (2010) 25 Unif L Rev 367.

³¹ See Chapter V for a discussion on these legal reform technique options and how they could play out in the case under study.

application of these recommendations. These recommendations are a reflection of a (critical) legal pluralist approach to law. This approach constitutes the theoretical bedrocks of Clinical Legal Pluralism.

2. (Critical) Legal Pluralism

Critical legal pluralism is best understood in comparison with social scientific legal pluralism and within the context of other dominant Western legal theories namely centralism, monism and positivism.

Centralism can be said to conceive law as centrally located in State action, the formal, the institutional and the exactly defined.³² Similarly, monism views law and society as the only two variables that influence each other in a given geographical area – there can be no other law, no two or multiple legal systems. It views law on a linear plan.

Positivism has been described as the “traditional image of lawyer’s law” and as being “only about those forms, processes and institutions of normative ordering that find their origins and legitimacy in the political State or its emanations”. Positivists would be those who consider such an image as “a satisfactory intellectual framework for inquiry”.³³ Thus positivism sets out clear scopes of application of rules. As is the case for monism and centralism, positivism cultivates and promotes deference and reserve toward the law. It views the law from an external standpoint rather than approaching it from within.

Monism, centrism and positivism prevail in the OHADA regime. This thesis argues that pluralist legal theories and in particular critical legal pluralism could more adequately respond to local needs in West and Central Africa by providing original alternatives to the problem of the gap between official statutory structures and on-the-ground realities. Moreover, it could lead to better integration of indigenous approaches to law in the legal reform process. Ultimately, this would promote more efficient social and economic development in Benin

³² Martha-Marie Kleinhans & Roderick A Macdonald, "What is a Critical Legal Pluralism?" (1997) 12 CJLS 25, 29 (HeinOnline).

³³ *Ibid.*

Legal pluralism dates back to at least the Roman Empire and was rejuvenated in Montesquieu's writing during the 18th century European Enlightenment period.³⁴ Modern-day conceptions of the theory regained popularity during the 1960's in the midst of decolonisation, the Vietnam War, the hippy movements and the Cold War. Legal pluralism presented itself and evolved as a reaction to centralist, monist and positivist conceptions of law, possibly fuelled by a certain guilt and a desire to depart from traditional views of law associated with domination.

Legal pluralism was and still is about contesting a conception of law which is hierarchical, homogenous and systemically organized: ³⁵ “[Legal pluralism]...provides a framework for understanding the dynamics of the imposition of law and of resistance to law...attention to plural orders examines limits to the ideological power of state law.”³⁶

Legal pluralism opens the scope of law and understands it as composed of norms created by multiple institutions and orders such as the family, the tribe, religion, which coexist with the State: “it is possible to see in legal pluralism a concern with how manifold legal norms emerge, change, and negate or reinforce one another in social situations not derived from, tributary to or purportedly structured by State action.”³⁷

Legal pluralism's account of the multiculturalism of norms remains deferent to the State as an ultimate normative order. The legal pluralist attitude to law is thus somewhat like a teenage rebel: it both contests and needs authority, which here takes the form of the State.

Critical legal pluralism seeks to break free from this, e.g. from any remnants of a fixed hierarchical conception about the law. It is centered on the idea that individuals are irreducible norm creators³⁸ and calls for legal reform (Sachs' remedies) to be founded on human agency so that individuals control law as much as

³⁴ Kleinmans & Macdonald, *supra* note 32 at 29.

³⁵ *Ibid.*

³⁶ Sally Engle Merry, “Legal Pluralism” (1988) 22 *Law and Society Rev* 869, 890.

³⁷ Kleinmans & Macdonald, *supra* note 32 at 29.

³⁸ *Ibid* at 38.

law controls them.³⁹ It “(...) 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.”⁴⁰ Moreover, such an approach rejects the traditional dichotomy between formal and informal legal orders and proposes a four-fold sociologically based typology of legal regimes⁴¹ in which all forms of normativity are seen to contribute to the overall normative system governing interpersonal relationships. According to this typology, norms are produced more or less explicitly or implicitly, and they can be more or less codified or inferred.

A number of authors have made proposals for legal pluralist inspired reform and law-making in the African context. They include Jacques Vanderlinden,⁴² Patrick Glenn (adopting a comparative analysis of chthonic traditions in the world⁴³), Gordon Woodman (focusing on the cohabitation between religion, culture and official law),⁴⁴ Etienne LeRoi,⁴⁵ Camille Kuyu,⁴⁶ Sally Falk Moore⁴⁷ and Boaventura de Sousa Santos amongst others.⁴⁸

³⁹ *Ibid* at 40.

⁴⁰ *Ibid* at 38.

⁴¹ Roderick A Macdonald, “Pour la reconnaissance d’une normativité implicite “inférentielle””, (1986) 18:1 *Sociologie et sociétés* 47, 53; RA Macdonald, “Les vieilles gardes” in JG Belley, ed, *Le droit soluble* (Paris: LGDJ, 1996) 233.

⁴² Jacques Vanderlinden, “What Kind of Law Making in a Global World? The Case of Africa” (2007) 67:4 *La L Rev* 1043 (HeinOnline).

⁴³ Patrick H Glenn, *Legal Traditions of the World*, 4th ed (Oxford: Oxford University Press, 2010).

⁴⁴ Gordon R Woodman et al, eds, *Local Land Law and Globalization: A comparative study of peri-urban areas in Benin, Ghana and Tanzania* (Münster: LIT Verlag, 2004); “The Challenge of African Customary Laws to English Legal Culture” in Ralph Grillo et al, eds, *Legal Practice and Cultural Diversity* (Farnham, England; Burlington, VT: Ashgate, 2009), 135; “Ghana: How does state law accommodate religious, cultural, linguistic and ethnic diversity?” in Marie-Claire Foblets, Jean-François Gaudreault-Desbiens and Alison Dundes Renteln, eds, *Cultural Diversity and the Law: State Responses from Around the World* (Brussels: Bruylant, Éditions Yvon Blais, 2010), 255; “On the Sources of Law in Africa – and Elsewhere” in Jörn Bernreuther et al, eds, *Festschrift für Ulrich Spellenberg zum 70. Geburtstag*, (München: sellier.european law publishers, 2010), 661.

⁴⁵ Etienne Le Roy, *Les Africains et l'Institution de la Justice. Entre mimétismes et métissages* (Paris: Dalloz, 2004).

⁴⁶ Camille Kuyu, *A la recherche du droit africain du XXI^e siècle* (Paris: Connaissances et Savoirs, 2005).

⁴⁷ Sally Falk Moore, "Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running 'Their Own' Native Courts," 1992 26:1 *Law & Soc'y Review* 11.

⁴⁸ For example, Norbert Rouland, *Aux confins du droit, Anthropologie juridique de la modernité* (Paris: Odile Jacob, 1991).

Although he views normative orders as more *delimited* and *scaled* (e.g. local, national (State), regional, global)⁴⁹ than Macdonald, De Sousa Santos' social scientific legal pluralist analysis of the interactions between the multiple normative orders (colonial, socialist, democratic, community and/or traditional, global) in Mozambique is instructive for the design of the clinical legal pluralist methodology. This is especially true since parallels can be drawn with Benin, whose 20th century history resembles that of Mozambique.⁵⁰

De Sousa Santos points to a number of rough, clear-cut “conventional dichotomies” as reference points for analyzing normative plurality: the formal/informal, the official/unofficial, the traditional/modern and the monocultural/multicultural.⁵¹ Without adhering to the stark oppositions they convey, the analytical framework of this thesis recognises their relevance and practicality as a starting point for exploring normative plurality in Benin.

Past this point, the approach proposed by Brenda Cossman in her article “Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project”⁵² for comparing law in a manner that avoids both ethnocentrism and hyper cultural relativism more adequately reflects some of the aspirations of this research project. Cossman promotes a method founded on the idea of cultural hybridity and is critical of advocates of cultural authenticity and of dual views of the world: them/us, tradition/modernity, here/there.

Similarly, De Soto's proposed use of the term “extra-legal” arrangements rather than “illegal” or “informal” reflects an intent to move away from the dualities referred to above. This proposal along with his strategy for identifying and giving recognition to such “extra-legal” arrangements also underlie the clinical legal pluralist framework.

⁴⁹ De Sousa Santos, *supra* note 20 at 45.

⁵⁰ Both countries inherited civil colonial law systems, both were ruled 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 development path in recent decades. *Ibid* at 40. See Chapter II for the historical context of business law in Benin.

⁵¹ *Ibid* at 46.

⁵² Cossman, *supra* note 22 at 536 (for an example of how, according to her, one can “turn the gaze back upon itself”).

C. Law-in-action: Taking cognizance of 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 land estate system.⁵³ Moreover, he argues 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. (...)

(...) 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."⁵⁴ (Emphasis added)

"(...) when the mandatory law does not square with ... extralegal conventions, the parties in those conventions will resent and reject the intrusion."⁵⁵ (Emphasis added)

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 "dead capital" (fixed, unused, unprofitable assets) into live capital⁵⁶ that includes discovery work in connection with extra-legal practices, mobilization of political actors and simplification and alleviation of the law and bureaucracy.

De Soto's assertions are challenged by a number of authors, of whom David Kennedy who calls for care and prudence regarding what he qualifies as

⁵³ De Soto, *supra* note 12, Figure 6.1.

⁵⁴ *Ibid* at 150-51.

⁵⁵ *Ibid* at 170-71.

⁵⁶ De Soto, *supra* note 12, Figure 6.1.

ideological claims that “clear and strong property rights” are the simple and straightforward solution to development.⁵⁷ He highlights that:

*“it is simply meaningless to say that property rights in general are or ought to be “strong” or “clear” without specifying just who ought to have a strong entitlement against whom or for just whom the application of the state’s enforcement power ought to be clear and predictable in what circumstances.”*⁵⁸

Similarly to Sachs and Macdonald, Kennedy insists on the importance of accounting for the complexity of the systems in which property regimes and laws insert themselves, and argues in favour of comprehensive law reform approaches and development strategies that account for and integrate economic, social and political constraints and realities.⁵⁹ Regarding methodology, he claims that:

*“To undertake a broad empirical study correlating property rights with economic growth [as did De Soto and others], one must find a way to assess the overall “strength and clarity” of property rights in a society. Doing so forces one to overlook the conflicting and relative nature of property entitlements. At the same time, the indicia relied upon to make such assessments routinely underestimate the extent to which the clarity or strength of entitlements is a relative affair which depends upon one’s perspective and interest, as well as on the relationship between property entitlements and other elements in the legal fabric and the informal world of custom and business practice which transform the meaning of entitlements for different actors. As a result, empirical work typically relies upon perception, correlating the perception, particularly among outsiders or foreign investors, that property rights in a society are strong and clear with the society’s level of development.”*⁶⁰

Clinical legal pluralism takes stock of this criticism as well as of Kennedy’s objection against De Soto’s and many other development experts and law reformers’ assumption that there is a direct causality between formalization and clear,

⁵⁷ David Kennedy, “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/>. Other critics include: Alain Gilbert, “On the mystery of capital and the myths of Hernando De Soto: What difference does legal title make?” (2002) 24:1 International Development Planning Review 1; Erika Field, “Property rights and investment in urban slums” (2005) 3: 2/3 Journal of the European Economic Association 279 (while the overall conclusion of Field’s research project shows that “stronger” property rights led to more household investment by the members of her study group due to lower risk of eviction, the author also notes that these investments were not made through credit and that stronger property rights did not lead to greater access to credit).

⁵⁸ Kennedy, *supra* note 57 at 26.

⁵⁹ Kennedy, *supra* note 57.

⁶⁰ *Ibid* at 4-5.

strong rights.⁶¹ The formal/informal dichotomy is discussed further in Chapter V. For the purposes of this section though, it is necessary to indicate that this research project is critical of De Soto's assertion that informal arrangements need to be formalized or incorporated into the official system to ensure development. The limits and dangers of applying such an assertion in Sub-Saharan Africa as if it were a golden rule are manifest when one accounts for the fact that some informal arrangements, in particular some of the customs developed as a result of the oppressions of colonial administrations, are seen by many to be unjust and to violate international human rights principles.⁶² For example, a number of "customary" rules developed in tribes and villages in Africa during colonization that have the effect to deny or severely limit women's access to property and increase the powers of elder men in village at the detriment of the young and the women.⁶³

Instead of formalizing the informal and running the risk of crystallising unjust practices, this thesis favors an approach that aims to *reconcile* the formal with the informal rather than integrate the latter into the former.

Despite numerous critics of De Soto's approach, clinical legal pluralism also recognizes its merits. One such merit is his teaching that in order to design and carry out efficient legal reform, one that will contribute to economic development, reformers need to take cognizance of extra-legal business practices and socio-economic conventions. Accordingly, this project draws from De Soto's empirical methods for identifying and understanding extra-legal arrangements while being careful not to consider such arrangements as fixed data and to account for their easily changing nature.

⁶¹ *Ibid* at 34-40.

⁶² SF Joireman, "The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property Rights and Customary Law" 2008 36:7 World Development 1233, online: www.elsevier.com/locate/worlddev (In this text, Joireman provides two specific examples that show the necessity to account for the context of the country in which property law reform measures are to be applied. She discusses the impact of customary law in Africa and in particular on women's situation and shows how a "one-template reform-fits-all" and the formalization of informal property arrangements can lead to perverse effects for women in East and Southern Africa.)

⁶³ *Ibid*.

In the particular context of Benin, geographer John O. Igué's works on the Yoruba communities' practices in West Africa,⁶⁴ on the dynamics, nature, history and characteristics of the Beninese economy⁶⁵ and on the political geography of the region⁶⁶ constitute revealing secondary empirical data on extra-legal trade practices in Benin. This data also helped structure the empirical research conducted in support of this thesis, alongside anthropologist's Anita Spring's criteria for mapping African women's business practices.⁶⁷

D. Scope and Nature of Empirical Research in Benin

The theoretical components of this thesis are grounded in empirical qualitative data collected in Benin in the course of the following trips:

a) A three-month stay (9 April to 3 July 2009) in the course of which I informally discussed with residents and observed of local modes.⁶⁸ Areas visited include Abomey, Aklampa, Calavi, Cotonou, Dassa, Glo Yekon and neighboring villages, Grand Popo, Natitingou, Ouidah, Porto-Novo.

b) A one-month (23 May to 25 June 2010) preparatory discovery mission in the course of which I conducted informal discussions with twelve (12) businesswomen, three (3) commercial litigation lawyers, one judge, one professor of law at Université d'Abomey Calavi, one law student, one man directing a non-for-profit organisation (rural areas health insurance), three (3) agents working at OHADA's École Régionale Supérieure de la Magistrature ("ERSUMA"), one representative of the Chambre de conciliation et d'arbitrage du Bénin. I also attended a

⁶⁴ John O Igué, *Les Yoruba en Afrique de l'ouest francophone, 1910-1980* (Paris, Dakar : Présence africaine, 2003) [Igué, *Yoruba*].

⁶⁵ John O Igué, *Le Bénin et la mondialisation de l'économie* (Paris: Karthala Editions, 1999); Igué, John O & Bio G Soule, *L'Etat entrepôt au Bénin: commerce informel ou solution à la crise?* (Paris: Karthala Editions, 1992).

⁶⁶ John O Igué, *L'Afrique de l'Ouest entre espace, pouvoir et société: une géographie de l'incertitude* (Paris: Karthala Editions, 2006) [Igué, *Géographie de l'espace*]; *Les états-nations face à l'intégration régionale en Afrique de l'Ouest: le cas du Bénin* (Paris: Karthala Editions, 2006); *Le territoire et l'état en Afrique: les dimensions spatiales du développement* (Paris: Karthala Editions, 1995).

⁶⁷ Anita Spring, "African Women in the Entrepreneurial Landscape: Reconsidering the Formal and Informal Sectors" (2009) 10:1 *Journal of African Business* 11, 13 (Canadian Research Knowledge Network).

⁶⁸ This was prior to my graduate studies at McGill. No academic funding was received for this trip.

meeting between Nigerian and Beninese businesswomen at the Chambre de l'Industrie et du Commerce du Bénin.⁶⁹ This mission was conducted in Cotonou.

c) A sixteen-day (19 June to 5 July 2011) field trip⁷⁰ in the course of which:

i) I conducted semi-formal interviews with:

- sixteen (16) businesswomen (aged late twenties to early sixties; operating small and medium registered and non-registered local businesses; mostly in retail and/or wholesale sector; ethnic origin mostly Fon) (“**Sample**”). Data collected in the course of these interviews is synthesised and compiled in Appendices D and E. All data collected was provided voluntarily. Information provided was tabulated without verification of authenticity or of accuracy outside of the scope of the interview. Pseudonyms have been used to identify subjects for confidentiality purposes;
- two (2) businessmen (aged in twenties and in forties; one operating a small local non-registered business and the other a large local business; both in information technology sector; ethnic origin Fon and Lebanese);
- one journalist; and
- three (3) agents working at ERSUMA;

and

ii) I conducted informal discussions with:

- one businesswoman (aged late twenties; operating small non-registered businesses);
- one commercial litigation and public law lawyer and university professor.

The interviews and discussions took place in Cotonou, Porto-Novo and Glo Yekon village.

While my empirical findings support arguments developed throughout this thesis, their particulars are discussed in Chapters III and IV. These Chapters examine

⁶⁹ This was prior to my graduate studies at McGill. No academic funding was received for this trip.

⁷⁰ This research was conducted in the course of my graduate studies and was funded by McGill Graduate and Post-Graduate Studies. See Appendices A and B for Research and Ethics Board application and consent forms. Appendix C reproduces template questionnaires used.

socio-cultural profiles of Beninese businesswomen as well as their economic modes and practices.

E. Clinical Legal Pluralism: Context, Diagnosis and Solutions

Clinical Legal Pluralism is founded on four core lessons inspired from the law, economics and development teachings discussed in subsections A to D. First, any legal reform work 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. Moreover, in the particular case study of this thesis, clinical legal pluralism reminds that just as the situation of each country merits specific attention and diagnosis, so does the situation of each subject interviewed. Care must thus be taken not to reach conclusions based on overgeneralisation. Circumscribing and identifying the limits of findings can prevent such overgeneralisation. Ultimately, the right balance needs to be found between the particular empirical data and more general theoretical or secondary empirical information.

The second lesson relates to the importance of adopting a multifaceted approach to legal reform aimed at identifying the legal practices and conditions in the host country and not taking them for granted. A differential diagnosis needs to be reached so that the reform project mirrors and serves local mode.

The third lesson concerns the objective of finding solutions that account for the multiple legal orders in a given society and prioritize human agency. In other words, proposing legal solutions that recognize the individual's (as opposed to the State's) central role as norm creator as well as the multiple, sometimes competing, normative orders from within and outside the State.

Fourth, legal reform work aimed at promoting socio-economic development and at enhancing the quality of choice⁷¹ of citizens in the poorest (in terms of material goods and physical living conditions) regions of the world calls for

⁷¹ Amartya Sen, *Development as Freedom* (New York: Alfred Knopf, 1999).

perseverant monitoring of actual outcomes rather than looking at the fulfillment of prescribed methods.

These lessons must guide both the theoretical and empirical aspects of this research project. In particular, they should assist in reaching diagnosis about the issues and challenges Beninese citizens face and in framing appropriate legal reform proposals. Such diagnosis first requires a comprehensive understanding of the country and of its citizens, including of the political and economic events that shaped local and formal (colonial) inherited trade laws in Benin.

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

In this Chapter I highlight some of the characteristics of trade and business practices in Benin from pre-colonial times to present. I do so in order to draw attention on the often forgotten, overlooked or neglected (especially by Westerners) fact that prior to the arrival of European merchants, settlers and colonisers in Africa, trade and commerce took place within and between African peoples with varying degrees of intensity. Merchants and other economic actors in pre-colonial Africa thus developed a number of business rules and practices, some of which still exist today, in a more or less similar form. From a law reform perspective, it is important to understand the historical, political, economic and cultural context in which these rules and practices were formed and transformed with colonisation and after independence in order to elaborate realistic and adapted law reform proposals.

A. The Pre-Colonial Era: 1600's to 1880's

After the fall of one of the greatest and largest empires of Africa, the Songhai Empire, at the end of the sixteenth century, a number of small and centralised kingdoms emerged in West Africa.⁷² With time, royal economies became increasingly founded on slave trade⁷³ and on warfare between kingdoms, the latter being necessary to capture slaves. France, amongst other European states, and the kings of current Benin played a prominent role in the slave trade.⁷⁴ As for tribal rural economy, it was essentially subsistence-based.⁷⁵ Community trade and economic activity were centered

⁷² Igue, *Géographie de l'espace*, *supra* note 66 at 502. One such kingdoms, the Abomey kingdom from which originates part of the current Republic of Benin, is thought to have consolidated itself around 1620.

⁷³ It is said that in 1765, nine thousand slaves were sent for exchange at the Ouidah port by the Abomey kingdom.

⁷⁴ In 1726 the King of Dahomey suggested that Europeans establish plantations in his kingdom and offered to supply the slaves: BBC World Service, "The Story of Africa - Slavery, Remarkable facts" BBC, online: <http://www.bbc.co.uk/worldservice/africa/features/storyofafrica/9generic2.shtml>.

⁷⁵ Catherine Coquery-Vidrovitch, "Karl Polanyi, Dahomey and the slave trade. An analysis of an Archaic Economy" Book Review of *Dahomey and the slave trade. An analysis of an Archaic Economy* by Karl Polanyi, (1969) 24:3 *Annales. Économies, Sociétés, Civilisations* 651.

on the family, which constituted the core economic unit of society. Chores were shared relatively equally between women, men and children.

This thesis focuses on this second 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 trade,⁷⁶ which was not integrated in tribal modes and relations.

Money consisted in cowry shells⁷⁷ that could be deposited with 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 of handicraft.⁷⁸ 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 spices.⁷⁹ 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 trade.⁸⁰ Other than their primary commercial function, markets also constituted cultural and social centers. This remains the case today.

Trade was also practised regionally as caravans pulled by horses, camels or donkeys moved freely on north-south and east-west axes. Protection on the roads was

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* 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, *Géographie de l'espace*, *supra* note 66 at 505. An interesting example of the continuing influence of pre-colonial commerce in modern times 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.

⁷⁸ Ambe J Njoh, *Tradition, Culture and Development in Africa : Historical Lessons for Modern Development Planning* (Aldershot, UK : Ashgate, 2006), ch 3.

⁷⁹ Igue, *Géographie de l'espace*, *supra* note 66 at 502.

⁸⁰ Catherine Coquery-Vidrovitch, “Des femmes colonisées aux femmes de l'indépendance, ou du misérabilisme au développement par les femmes : approche historique » (Paper delivered at the Colloque International Genre, population et développement en Afrique, Abidjan, 16-21 July 2001), online : http://www.ined.fr/coll_abidjan/publis/pdf/session2/coquery.pdf, at 9 [Coquery, « Femmes colonisées »]. Rural small-scale palm oil production continues today in Benin.

provided by villagers living in the travel areas. They instituted tolls as well as received money and goods in exchange for protection.⁸¹ Remnants of this arrangement still exist today in West Africa where non-official tolls are very frequent notwithstanding the existence of States and their exclusive statutory competence over road transport.⁸²

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 recounted.⁸³

Three ethnic groups dominated pre-colonial commerce: the Mandé, the Haoussa and the Yoruba. Mandé encompassed Dioula, Wangara and Dendi, the latter of whom founded the towns of Kandi and Djougo in Benin where they organised markets and managed structures for visiting caravans. The Yoruba principally traded cloth and kola. Yoruba people continue to be particularly active in Benin's markets today.⁸⁴

Internationally, the region of what is now Benin was known for its indigo (cloth dye), shea butter, cloth, copper and kola.⁸⁵ Trade of these products and others with Europeans took place at the southern frontier of the Sahel and along the West African Atlantic coast.⁸⁶ Technology and handicraft expertise was developed and passed on through family run corporations.⁸⁷

⁸¹ Igue, *Géographie de l'espace*, *supra* note 66 503 and 505.

⁸² The persistence of unofficial tolls and road barriers is due in part to States' failure to provide proper roads. Villagers more or less effectively repair and maintain roads, asking small contributions from passers by. In some places, an informal toll is charged by citizens claiming control over a given area.

⁸³ Jeanne Maddox Toungara, *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) [unpublished] at 63-70 (for an account of Bete women sourcing and selling kola nuts in 19th century Ivory Coast.)

⁸⁴ See Chapter IV for more detail on the presence of Yoruba in Benin and West Africa.

⁸⁵ Igue, *Géographie de l'espace*, *supra* note 66 at 502-05.

⁸⁶ European export companies such as Maison Régis Marseille, Maison Renhard had trading posts on the coast operated by African merchants: *Ibid.*

⁸⁷ One of these families was the blacksmith Hountondki family in Abomey. They apparently continue the tradition today: Michel Bourbao, "Orfèvres d'Abomey - La famille Hountondji perpétue la tradition des bronze à la cire perdue" April 2006, Maître d'Afrique de l'Ouest- Maître du Luberon, online:< <http://pedagogie84.pagesperso-orange.fr/orfevre.htm>>.

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

In 1884 and 1885, European States regrouped at the Berlin Conference (Congo Conference), proclaimed the end of the transatlantic slave trade⁸⁸ and divided Africa between and amongst themselves as a means to end commercial tensions between them. West Africa was separated into sixteen territories under the control of four powers: France, Germany, Great Britain and Portugal. This division was determined essentially by the European metropolises' trading interests.

In 1894, through political, strategic and/or coerced alliances, France annexed the kingdoms of Porto-Novo, Abomey and Allada to its colonial empire.⁸⁹ This marked the beginning of what would turn out to be a long-lasting ambivalent relationship between the Beninese (and other Africans), the European nation-State and its by-product formal law.⁹⁰ For Beninese citizens, political life became centered on relationships with their chiefs and rulers on the one hand and with colonial officials on the other.⁹¹

⁸⁸ Berlin Conference documents show that heads of State claimed they were to "save Africa from itself through civilization and Christianization": Adi, Hakim. "Africa and the Transatlantic Slave Trade", *BBC* (last updated 17 February 2011) online: BBC <<http://www.bbc.co.uk>>. Although slavery and slave trade already existed within African kingdoms prior to the Europeans' 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 century to the end of the 19th century.

⁸⁹ By decree, the kingdoms were renamed "Colonie du Dahomey et ses dépendances": Gouvernement du Bénin, « Information générale - Histoire » *Gouvernement du Bénin* (7 December 2011) online: Gouvernement du Bénin <<http://www.gouv.bj/spip.php?article644>>.

⁹⁰ 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. For a more radical analysis of the issue see: Achille Mbembe, "Provisional Notes on the Postcolony" (1992) 62 *Africa* 3. Moreover, a form of centralized administration emerged with the consolidation of kingdoms from around the 17th century until colonization: Catherine Coquery-Vidrovitch, "A. Akinjogbin, Dahomey and its neighbours, 1708-1818. W. J. Argyle, *The Fon of Dahomey. A History and ethnography of the Old Kingdom*" Book Review of *Dahomey and its neighbours, 1708-1818* by A I Akinjogbin and of *The Fon of Dahomey. A History and ethnography of the Old Kingdom* by W J Argyle, (1969) 24:3 *Annales. Économies, Sociétés, Civilisations* 653. One could however hardly claim identity between this political and administrative structure, which had limited control over the daily lives of tribal communities, and that of the nation-State, whose regulatory ambition is much broader.

⁹¹ BBC World Service, "The Story of Africa – Africa and Europe 1800 to 1914, Political Resistance", *BBC World Service*, online: BBC World Service, online: www.bbc.co.uk.

It was also the beginning of the cohabitation between formal State regulated commerce and non-State regulated trade in Benin. With colonization came rigidity for commerce. The establishment of firmly delimited frontiers between colonial empires, of different currencies between colonies and of prices disparities (due to prices for same products being dependent on each metropolis' economic policy rather than local conditions) constituted obstacles to regional commerce. These obstacles, in addition to the increased presence of large European trade companies on the African shores resulted in the near disappearance of caravan merchant communities and commerce. The objective of the French authorities and the effect of their law including company law in Benin was to serve French interests, enable exploitation of natural resources and facilitate commercial relations between and amongst French colonizers and/or traders, without consideration for Beninese merchants' particular interests.⁹²

Still, local commerce continued in parallel with colonial north-south structured commerce so that indigenous needs could be met.⁹³ Local commerce however became more covert and new business modes developed. The Dahomey colony thus comprised at least two commercial normative orders: the indigenous one composed of local, pre-colonial rules and practices and the French one, composed of rules codified in the French 1807 *Code de commerce*, the 1804 *Code civil des Français*⁹⁴ and other statutes⁹⁵ including some drafted specifically for colonial

⁹² Hélène d'Almeida Topor, *Histoire économique du Dahomey (Bénin), 1890-1920*, t2 (Paris : L'Harmattan, 1995), 268. See also: Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 173; Toungara, *supra* note 83 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. This explains in part the rigidity of the colonial trade rules and system imposed by the French.)

⁹³ Igue, *Géographie de l'espace*, *supra* note 66 at 507. See also Kate Meagher, « Le commerce parallèle en Afrique de l'Ouest: Intégration informelle ou subversion économique? » in Réal Lavergne, ed, *Intégration et coopération régionales en Afrique de l'Ouest* (Paris, Ottawa; Karthala, CRDI, 1996) 197 (arguing against the idea that the informal sector in West Africa is a reaffirmation of African solidarity against colonialism).

⁹⁴ Under art 1125 CcF, married women were deemed incapable: *Code civil des Français: édition originale et seule officielle - A Paris, de l'Imprimerie de la République, An XII 1804*, online: Assemblée Nationale < <http://www.assemblee-nationale.fr/evenements/code-civil-1804-1.asp>> (applied overseas). Colonial administration reports (which accuracy can be challenged) of local customs also indicate that Beninese women could not reach emancipation: *Coutumier du Dahomey*, Circulaire 128 AP, 19 mars

application. 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 businesses.⁹⁶ Despite post-independence modifications, basic conceptual and institutional structures of this system still remain in place.⁹⁷

The appearance of cash crops (ex. cotton, palm trees)⁹⁸ as a means to support the French colonial economy in the region⁹⁹ and to compensate for losses resulting from the decreasing slave trade¹⁰⁰ 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 work.¹⁰¹ Some contend this is at the origin and/or contributed to the gender divide in labour that persists today in Africa especially in rural areas.¹⁰² The predominant if not sole outside economic activity of rural women consisted in small-scale sale¹⁰³ and catering for rural

1931, s. 127. Some authors contend that the colonial administration contributed and/or encouraged development of customs that limited women's rights: Joireman, *supra* note 62.

⁹⁵ These include the 24 July 1867 *Loi sur les sociétés anonymes*, the 7 March 1925 *Loi sur les sociétés à responsabilité limitée*: Alhousseini Mouloul, "Comprendre l'Organisation pour l'harmonisation en Afrique du droit des affaires (O.H.A.D.A.)" 2nd ed (December 2008), online: Ohada.com <<http://www.ohada.com>>.

⁹⁶ Topor, *supra* note 92 at 275- Annexe IXI.

⁹⁷ See Appendix E-1 for empirical evidence amongst the sixteen businesswomen interviewed in Benin in June/July 2011 of the continuation of the French colonial-type patent taxing system in Benin. Some of the subjects interviewed indicated that the amount of the patent is determined more or less arbitrarily.

⁹⁸ Topor, *supra* note 92 at 259 and 263.

⁹⁹ Toungara, *supra* note 83 at 37 (for an explanation of the factors that led to the instauration of cash 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).

¹⁰⁰ Encyclopædia Britannica, "Benin" *Encyclopædia Britannica Online* (2 April 2011) online: Encyclopædia Britannica Online <<http://www.britannica.com/EBchecked/topic/60879/Benin>>.

Various forms of forced labour remained during colonial times: Topor, *supra* note 92 at 266-67.

¹⁰¹ Toungara, *supra* note 83 at 176.

¹⁰² Njoh, *supra* note 78; Adelle Blackett, "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; Dzodzi Tsikata, "Toward a decent work regime for informal employment in Ghana: Some Preliminary Considerations" (2011) 32:2 *Comp Lab L & Pol'y J* 311.

¹⁰³ *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 such as Firmin Médénouvo (*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

road workers.¹⁰⁴ 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 collected by village chiefs who at times abused their powers in this regard.¹⁰⁵

In urban areas, market women's business started rising in numbers and scope.¹⁰⁶ This was especially the case for Ibo and Yoruba women who migrated from current Nigeria.

C. 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.¹⁰⁷ 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 region.¹⁰⁸

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

administration purposes. Moreover, no contextual explanation of the practices listed in the document is provided. The absence of context means that the document probably does not present a balanced big-picture understanding of these local customs. The Beninese constitutional court refused to grant the document legal force or recognition by its ruling DCC 96-063 of 26 September 1996.

¹⁰⁴ Toungara, *supra* note 83 at 245. Rural women also helped with road works themselves when no men were left in the village.

¹⁰⁵ *Ibid* at 163-77.

¹⁰⁶ Coquery, "Femmes colonisées », *supra* note 80 at 9 and 13. Parallels can also be made with Togo where powerful market women, sometimes called "Nana-Benz", became particularly active from 1930 onwards.

¹⁰⁷ Sui generis forms of Nation-States were tried with mitigated if any success in various "newly" independent African States along with different types of market organisation such as socialism, Marxist-Leninism and capitalism.

¹⁰⁸ The number of currencies in West and Central Africa rose from four during colonial times to eleven after independances. Before colonization, three currencies were used by the people, of which two at the regional and international level: Igue, *Géographie de l'espace*, *supra* note 66 at 513.

activities and opened their share capital to nationals.¹⁰⁹ Lebanese and Syrian communities settled and expanded, operating businesses 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 Chapters III and IV. 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 1945,¹¹⁰ plummeted to 50% of its value. This crisis coupled with outdated business laws¹¹¹ and a stated objective of promoting regional economic integration and development through modernisation and harmonisation of business laws¹¹² incited the creation in

¹⁰⁹ *Ibid* at 511.

¹¹⁰ 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 multiple reasons including political and monetary sovereignty: *Ibid* at 513)

¹¹¹ For example, in 1993, statutory secured transactions law in the region was still regulated by the 1804 *Code civil des Français*, the 1807 *Code de commerce* and other French special statutes, some of which were over two hundred years old: *supra* note 94; Joseph Issa-Sayegh “Définition et domaine d’application-Acte Uniforme du 17 avril 1997 portant organization des sûretés” in Joseph Issa-Sayegh et al, *OHADA, Traité et actes uniformes commentés et annotés* (Paris: JURISCOPE, 2008), 655.

¹¹² *Traité relatif à l’harmonisation du droit des affaires en Afrique*, 17 October 1993, 4 JO OHADA 1 (1 November 1997), online: OHADA Secrétariat Permanent <<http://www.ohada.org>>, 16 ratifications on 3 April 2001 [*OHADA Treaty*], preamble. See also: Blackett, *supra* note 102 at 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).

1993 of the Organisation for Harmonization of Business Law in Africa (“OHADA”)¹¹³ between fourteen West and Central African States¹¹⁴ including Benin.

1. The OHADA Regime

OHADA was and remains largely funded by the French Government, which in so doing furthers its international cooperation policy of “solidarity” and “influence”.¹¹⁵ The World Bank has also substantially funded recent projects.¹¹⁶

Since its creation, two more Central and West African States have joined the organisation¹¹⁷ and the Democratic Republic of Congo’s adhesion is said to be under way.¹¹⁸ Initially, member-States could be grouped on the basis of common

¹¹³ In the face of the various regional economic integration organizations that were created on the continent over the past five decades and of their alleged failure to follow through on the legal harmonization objective they set themselves, OHADA presented and presents itself as the necessary and missing tool for African integration. There are other legal integration initiatives such as the African Organization for Intellectual Property and the InterAfrican Conference of Insurance Markets but OHADA is the most ambitious project. Given such an ambition, which is supported by the broad definition of “business law” in section 2 of the OHADA Treaty, some contend that OHADA law conflicts with, more than serves, economic integration efforts of other regional organisations. One argument put forward is that conflicts of rules and regulations between those enacted by OHADA and by other regional unions and communities may lead to legal uncertainty and adversely affect economic activity in the region.

Given this situation, OHADA Secrétariat Permanent recently recommended that OHADA refrain from regulating in such areas as intellectual property (initially engulfed in the definition of “business law”) and banking law. It was also decided that OHADA will refrain from directly regulating contracts. Accordingly, the draft Uniform Act on Contract law prepared by UNIDROIT has been shelved: Interview conducted with OHADA Permanent Secretary Prof. Dorothé Sossa, in Yaoundé, July 2011.

¹¹⁴ These states are: 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 former colonies have inherited civil law systems.

¹¹⁵ 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, *supra* note 95. See: France Diplomatie, “Rencontre entre le ministre chargé de la coopération, M. Henri de Rincourt, et le Secrétaire Permanent de l’OHADA, Me Dorothé Sossa (16 mars 2011)”, *Ministère des Affaires Étrangère et Européennes-France* (16 March 2011), online: France Diplomatie www.diplomatie.gouv.fr (for a more recent reflection of France’s active diplomacy and other support in the OHADA project).

¹¹⁶ 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, Belgium and the African Development Bank. The latter’s assistance consists in punctual project funding: Interview conducted with Médard Désiré Backidi, Directeur des Études et des Stages at ERSUMA, Porto-Novo, June 2011.

¹¹⁷ These states are Guinea Bissau and Guinea Conakry.

¹¹⁸ Ohada.com, “Pays” Ohada.com (12 May 2011) online: Ohada.com <<http://www.ohada.com/pays/>>. Many believe that RDC’s adhesion to OHADA is incompatible with its current cumulated membership within the Economic Community of Central African States (ECCAS),

borders (in many cases), a common official language (French—except in the case of Guinea-Bissau) and common colonial legal inheritance (civil law systems)¹¹⁹.

Notwithstanding its stated aim to *harmonise* business laws, OHADA has adopted nine Uniform Acts¹²⁰ (“Actes Uniformes”), which *unify*¹²¹ the commercial legislation of the member States. The scope of the definition “business law” in the OHADA treaty¹²² reveals the regime’s monopolistic ambitions.¹²³ It defines business law as encompassing arbitration, general commercial law, secured transactions, transportation of goods by road, cooperative societies, insolvency, commercial societies, accounting law, recovery procedures, labour law, accounting practices, law of sale and any other subject that the Council of Ministers may deem fit to introduce in

the Southern Africa Development Community (SADC), the Common Market for East and Southern Africa (COMESA), and the Economic Community of Great Lakes Countries (ECGLC): Ohada.com, “Lettre d’information OHADA.com du 19/02/2010 - Un tournant décisif : l’adhésion de la RDC à l’OHADA », *Ohada.com Newsletter* (19 February 2010), online: Ohada.com <<http://www.ohada.com>>.

¹¹⁹ Depending on the State in question the particular inheritance may derive from France, Belgium, Portugal or Germany.

¹²⁰ *Acte uniforme relatif au droit de l’arbitrage*, 11 March 1999, 8 JO OHADA 1 (15 May 1999), online: OHADA Secrétariat Permanent <http://www.ohada.org>; *Acte uniforme relatif au droit commercial général*, 17 April 1997, 1 JO OHADA 1 (1 October 1997), online: OHADA Secrétariat Permanent <<http://www.ohada.org>> replaced by a revised Act on 16 May 2011 : *Acte uniforme relatif au droit commercial général*, 15 December 2010, 23 JO OHADA 1 (15 February 2011), online: OHADA Secrétariat Permanent <<http://www.ohada.org>> [*Revised Uniform Act on Commercial Law*]; *Acte uniforme relatif au droit des sociétés commerciales du groupement d’intérêt économique*, 17 April 1997, 2 JO OHADA 1 (1 October 1997), online: OHADA Secrétariat Permanent <http://www.ohada.org>; *Acte uniforme portant organisation des sûretés*, 17 April 1997, 3 JO OHADA 1 (1 October 1997), online: Ohada.com <<http://www.ohada.com>> replaced by a revised Act on 16 May 2011 : *Acte uniforme du portant organisation des sûretés*, 15 December 2010, 22 JO OHADA 1 (15 February 2011), online: OHADA Secrétariat Permanent <<http://www.ohada.org>> [*Revised Uniform Act on Secured Transactions*]; *Acte uniforme portant organisation et harmonisation des comptabilité d’entreprises*, 22 February 2000, 10 JO OHADA 1 (20 November 2000), online: OHADA Secrétariat Permanent <<http://www.ohada.org>>; *Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d’exécution*, 10 April 1998, 6 JO OHADA 1 (1 July 1998), online: OHADA Secrétariat Permanent <<http://www.ohada.org>>; *Acte uniforme portant organisation des procédures collective d’apurement du passif*, 10 April 1998, 7 JO OHADA 1 (1 July 1998), online: OHADA Secrétariat Permanent <<http://www.ohada.org>>; *Acte uniforme relatif au droit des sociétés coopératives*, 15 December 2010, 23 JO OHADA 1 (15 February 2011), online: OHADA Secrétariat Permanent <http://www.ohada.org> [*Uniform Act on Cooperative Societies*]; *Acte uniforme relatif aux contrats de transport de marchandises par route*, 22 March 2003, 13 JO OHADA 3 (31 July 2003), online: OHADA Secrétariat Permanent <<http://www.ohada.org>> [*Uniform Act on Transport of Goods*].

¹²¹ For an explanation of legal harmonization, of its nature and its effects see: Boodman, *supra* note 29. See Chapter V for further discussion on legal reform techniques.

¹²² *OHADA Treaty*, *supra* note 112, s 2.

¹²³ Cf. note 101.

accordance with appropriate procedure. Work relating to the adoption of labour law and consumer law Uniform Acts is on-going.¹²⁴

The Acts apply directly and uniformly within member States.¹²⁵ They are largely inspired by French and other Western law¹²⁶ and constitute the primary source of formal business law in Benin. They seek to regulate their respective area in a quasi-exclusive fashion: in principle, their coming into force abrogates any incompatible national legislation. This reveals the regime's strong positivistic nature.¹²⁷

Two of the Acts, one on secured transactions and one on general commercial law, were recently rewritten.¹²⁸ World Bank agents drafted the amendments along with jurists from France and Africa, most if not all of who completed their legal studies in France. No public consultation was held. One of the main drafters, law professor Pierre Crocq of Université Panthéon-Assas in France, wrote the following:

*« Ce projet demeure fortement inspiré par le droit français, ce qui est naturel, car celui-ci constitue le socle du droit uniforme de l'OHADA, mais cette source d'inspiration ne constitue pas, pour autant, un modèle absolu. »*¹²⁹ [This project remains largely inspired by French law, which is normal, since the latter constitutes the core of uniform OHADA law, but this source of inspiration does not constitute an absolute model. (Author's translation)]

¹²⁴ Interview conducted with OHADA Permanent Secretary Professor Dorothé Sossa, Yaoundé, July 2011.

¹²⁵ *OHADA Treaty*, *supra* note 112, s 10: "les Actes Uniformes sont directement applicables et obligatoires dans les Etats parties, nonobstant toute disposition contraire de droit interne, antérieure ou postérieure".

¹²⁶ For example, the draft Uniform Act on the Transport of Goods by Road was written by Canadian jurists. Canadian experts are also currently drafting the proposed Uniform Act on Consumer Protection.

¹²⁷ The abrogation principle has however been challenged on various occasions and its application is problematic. For example, in Benin, the 1807 French Code de commerce still competes and/or is applied in concomitance with Uniform Acts.

¹²⁸ *Revised Uniform Act on Commercial Law* and *Revised Uniform Act on Secured Transactions*, *supra* note 120. They came into force on 16 May 2011: Ohada.com, "Journées de recyclage sur les nouveaux Actes uniformes Droit commercial général et Droit des Sûretés, organisées par le CADEV, Douala, 28 et 29 mars 2011", Ohada.com Newsletter, online: www.ohada.com.

¹²⁹ Pierre Crocq, "Les grandes orientations du projet de réforme de l'Acte uniforme portant organisation des sûretés" (2007) 197 *Droit et Patrimoine* 52, 52. Apart from French law, the new Acts incorporate certain guidelines and principles from UNCITRAL's Legislative Guide on Secured Transactions, rules from the International Chamber of Commerce in Paris, and also draw inspiration from the law of Luxembourg.

This quotation hints at two modern realities for States seeking to modernize business law. One is the competition between U.S. inspired common law solutions such as Article 9 of the Uniform Commercial Code and French civil law.¹³⁰ The other is the significant gap that exists between formal business law and citizens' and companies' realities in Benin.

The above historical account of commercial activity in Benin shows that modern-day economic behavior 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 trade and commercial law continued to develop separately from the formal economy. The latter continued to be regulated by colonial business statutes. Today, French (colonial) and other Western law continue to frame positive business law (principally OHADA law) in Benin.

Chapter III turns to sociocultural factors that, alongside history, influence women's economic and normative behavior in contemporary Benin. The point is not to assess how effectively (foreign) 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. Analysing Beninese women's socio-cultural profiles and mapping their economic practices will assist in determining whether OHADA formal law has any bearing on how women conduct their business and whether or not OHADA Acts continue to serve predominantly French and other foreign interests as was the case for French colonial law.

¹³⁰ Boodman, *supra* note 29 at 723 (for an example in Canada of the competition between families of law in the regulation of personal property security) and 714 (defining the notion of markets for laws as "the competition which can exist among jurisdictions to attract commercial and other revenue producing activities based on the diverse attributes of their laws.")

III. Doing business in Benin: Socio-Cultural Profiles of Women Entrepreneurs

This chapter paints socio-cultural profiles of Beninese women entrepreneurs on the basis of theoretical and empirical findings. Its aim is to help assess how social and cultural realities shape female business practices in the region. Maternity (A), spousal unions (B), religion (C), ethnicity (D) and literacy (E) are considered. Other relevant factors include geography and climate (F) and will be briefly discussed. Throughout this chapter, selected examples of dichotomies between formal OHADA law and women entrepreneurs' socio-cultural experiences will be highlighted.

A. “Mamans” Women Entrepreneurs

Benin has a population of approximately nine million inhabitants, half of who are women whose average age is 17.9 years and whose life expectancy is 61.14 years.¹³¹ The average number of births per woman is 5.31, making Benin fourteenth worldwide in terms of fertility rates.¹³² 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 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 Sample reported in this thesis, the average number of births per woman is 2.81. Although this cannot be interpreted as representing a trend, the difference between the national average and that of the Sample suggests that the operation of business (as opposed to agricultural or house

¹³¹ Central Intelligence Agency, *World Fact Book - Benin* (8 December 2011), online: Central Intelligence Agency <<https://www.cia.gov>>. Women's life expectancy in Benin is close to three years over men's life expectancy.

¹³² *Ibid*

work) negatively impacts birth rates in Benin. In the course of interviews conducted with the Sample women, I enquired into the extent of the influence between motherhood and business and asked whether and what arrangements are taken in this regard.

I found a common pattern: women marry at the end of their teenage years or early twenties. Soon after, they conceive one, two, three, four or more children (in general one to three – See Appendix D). They stay at home for a few years at the beginning of their conjugal lives. Financial needs (including the need to feed their children) then induce them to seek remunerative activity.¹³³ Most women in the Sample have recourse to a or some foster child(ren) as a housemaid(s), childminder(s) and/or unpaid helper(s) at the market (See Appendix E-1). While this was not directly asked to interlocutors, circumstantial evidence suggests that in many cases, this arrangement can be linked to the now condemned “vidomington” practice.¹³⁴ Many of the women interviewed indicated that their children sometimes assist them with

¹³³ In this regard, Lydia explained that her small market stall earnings are insufficient to care for her three children, of whom she is solely responsible. Her husband, from whom she is now separated, lives in another city, is polygamous and has at least twelve other children: Interview no. 12 conducted with Lydia (pseudonym), Cotonou (Benin), June 2011; Appendix D. Traditionally in Africa, the man would be the family bread earner while women’s earnings would be for their own personal use: Douglas J Falen, “Polygyny and Christian Marriage in Africa: The Case of Benin” (2008) 51:2 African Studies Review 51, 60-61 (discussing traditional marriage practices and expectations among the Fon in Benin). This pattern appears to have changed: Observations and informal discussions with local residents in Cotonou (Benin), April/June 2009, May/June 2010 and June/July 2011.

¹³⁴ Circumstantial evidence in interviews conducted with Augustine, Cotonou (Bénin), June/July 2011, Odile, Cotonou (Bénin), Nadège, Calavi (Benin) June/July 2011). In Augustine’s case, she explained having two maids that helped her with her business. They receive no remuneration other than accommodation, food and some limited assistance for their families in their home village in times of need. The maids arrived at Augustine’s home when they were respectively 4 and 6 years old and are to be “freed” (“libérées” was the word used by Augustine) upon marriage. The vidomington practice is a frequent arrangement that families suffering from financial hardship (often in rural areas) take with wealthier families. The practice 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 (often girls) to the care of richer urban businesswomen. In exchange for taking care and educating the children, the latter were expected to do housework. This practice has however evolved today into what can sometimes be assimilated to child labour and/or slavery. Cases of sexual and physical abuse continue to be reported. See: Joan Tilouine, “Bénin: Les vidomegon, nouveaux esclaves urbains” Afrik.com (11 December 2007), online: www.Afrik.com. (For a description of the on-going practice in Benin); Janice Boddy, “womb as oasis: the symbolic context of Pharaonic circumcision in rural Northern Sudan” (1982) 9 American Ethnologist 682 (suggesting that practices (in this Pharaonic circumcision) that constitute barriers to women’s emancipation should be approached and reformed from within traditions rather than from outside. Parallels can be made with the vidomington practice).

business when they are not in school (as they did with their mothers as a child). Thus, in the majority of cases, housemaids, foster children and biological children all assist mothers in the business as unpaid and unregulated helpers. The range and extent of family help arrangements in businesses in Benin (and elsewhere in Africa) is typically much greater than what is usually found in Western societies and should be borne in mind by commercial law drafters.

Another motherhood/commerce arrangement observed consists in mothers calling upon elder women in the family to care for new-borns while they sell their products outside the house.¹³⁵

The above data thus tends to confirm that motherhood influences and constrains the type of commercial activity being undertaken by women. It also shapes the arrangements made and the practices developed by women in the course of their business.

Closely related to motherhood and childbirth is the issue of age calculation in Benin. Indeed, many Beninese citizens do not hold a birth certificate or have obtained one issued weeks, months or even years after their birth. In such cases, alternative techniques for assessing age are used, such as measuring moon cycles. This is particularly the case in rural areas and amongst older generations. The difference between the age calculated according to local or customary methods and the one that would reflect Western age-calculations techniques can sometimes represent five, ten or fifteen years.¹³⁶ This reality should be borne in mind by lawmakers and reformers working on OHADA or other Beninese norms that require (legal) capacity.

This is especially true in light of the considerable number of Western-inspired commercial rules requiring legal capacity and/or consent for performing a

¹³⁵ In one of the cases I witnessed, the newborn was left at its grandmother's care while its mother went to the market to sell her products. The baby was too young to be brought at 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: Observations made in Aïmlonfidé, Ladjì (Cotonou, Benin), May/June 2010.

¹³⁶ This appears to be the case for Hermine, who indicated during an interview that she is forty. Shortly after, she indicated that her eldest son is twenty-eight. This, as well as Hermine's physical appearance, suggests that her Western calculated age is closer to fifty-five years old than to forty: Interview conducted with Hermine (pseudonym) in Aïmlonfidé, Ladjì, Cotonou (Benin), June/July 2011.

transaction. For example, sections 6 and 7 of the new *Uniform Act on General Commercial*¹³⁷ provide that:

“ARTICLE 6- Nul ne peut accomplir des actes de commerce à titre de profession, s'il n'est juridiquement capable d'exercer le commerce. [No one can accomplish a commercial act as a professional, if he does not have legal capacity to engage in commerce (Author's translation)]

ARTICLE 7- Le mineur, sauf s'il est émancipé, ne peut avoir la qualité de commerçant ni effectuer des actes de commerce.” [A minor, unless emancipated, cannot acquire the status of commercial agent nor carry out commercial acts. (Author's translation)]¹³⁸

Given the above, a reassessment of the criteria used to establish minority and legal capacity in OHADA and other Beninese law would be advisable.

B. Spousal Unions

Closely linked to maternity and motherhood is the question of how one form of spousal union or another influences women's commercial modes. Parallel to this is the question of 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 code,¹³⁹ polygyny is common in Benin. Percentage rates vary between 15 and 41% depending on the region.¹⁴⁰ However, the interplay between the family code provisions defining residence and prohibiting polygyny, and OHADA secured transactions rules aimed at excluding residential property from seizure¹⁴¹ results in a paradoxical inequitable

¹³⁷ *Revised Uniform Act on Commercial Law*, *supra* note 120.

¹³⁸ *Ibid.* See also: *ibid.*, ss 30, 83, 101, 178, 201 and 210.

¹³⁹ *Code des personnes et de la de la République du Bénin – Loi no. 2002 -07*, 14 June 2004, online: http://www.law.yale.edu/rcw/rcw/jurisdictions/afw/benin/benin_family_code.htm, [Code la famille] ss123 and 143. Polygyny is more widely practiced in the North of the country given a predominantly Muslim population.

¹⁴⁰ Organisation for Economic Cooperation and Development - Social Institution and Gender Index, “Gender and Social Organisations in Benin” OECD, online: <http://genderindex.org/country/benin>.

¹⁴¹ *Revised Uniform Act on Secured Transactions*, *supra* note 120, ss 198-99; *Code de la famille*, *supra* note 139, ss 14, 15, 74, 123, 131.

situation. Indeed, the residence of a “legally” married (business)woman in a polygamous marriage is protected from seizure while the residences (if different)¹⁴² of “illegally” married (business)women in the same family will not be protected. This is an example of legal reform that failed to acknowledge the existence of a social practice, polygyny.

Circumstantial evidence taken from interviews with women of the Sample suggests that the majority is (or was, in the case of widowed or divorced women)¹⁴³ in monogamous unions. Some women appeared reluctant to openly disclose that they are in a polygynous union (only two women explicitly confirmed that they are or were)¹⁴⁴ and little was discussed regarding the influence that the form of spousal unions of my interlocutors has or not on their business.

More information on this nexus can be drawn from the works of Douglas J Falen, including in an article entitled “Polygyny and Christian Marriage in Africa: The Case of Benin”.¹⁴⁵ In particular, he finds that “for women, financial concerns are important in their marriage strategy”.¹⁴⁶ This strategy can consist in monogamy, varying forms of polygyny or multiples unions outside of a wedlock. As for financial concerns, these may include the need for financing business activities. This is discussed in Chapter IV.

C. Religious beliefs

Religion occupies a significant part of Beninese citizens’ lives. One set of statistics provides the following picture of religious affiliations: Christian¹⁴⁷: 42.8% (Catholic 27.1%, Celestial Christianity: 5%, Methodists 3.2%, other Protestants 2.2%,

¹⁴² Falen, *supra* note 133 at 61 (Noting that in Benin polygynous men in modern-day “often try to avoid cowife jealousy by housing wives in different places, sometimes in different towns.”)

¹⁴³ This is the case for Augustine (widow) and for Gloria (divorced) : Appendix D.

¹⁴⁴ They are Hermine and Lydia : Appendix D.

¹⁴⁵ (2008) 51:2 African Studies Review 51.

¹⁴⁶ *Ibid.*

¹⁴⁷ Christianity arrived from Europe in Africa prior to the colonization era but missionaries’ presence increased significantly in the 19th century. Missionaries also pleaded strongly against slave trade. BBC World Service, “The Story of Africa – Africa and Europe: 1800-1914, Religious conversion”, online: BBC World Service <<http://www.bbc.co.uk/worldservice/africa/features/storyofafrica>> [BBC, “Conversion”].

other: 5.3%), Muslim: 24.4%, Voodoo: 17.3%, others 15.5%).¹⁴⁸ It is frequent for Beninese to have more than one set of religious beliefs; for example, Catholic and Voodoo.

The prescriptions of Islam in the areas of insurance, finance and other aspects of economic activity constitute a clear example of the normative power of religion on commerce. Indeed, the prohibition to charge interest under widespread interpretations of Islamic law¹⁴⁹ is founded on prescriptions of the Koran that prohibit *riba*. Another example of the interactions between religion and commerce can be found in the existence of many religious associations (Muslim dahiras, choir groups, etc.)¹⁵⁰ in Benin and elsewhere in West Africa through which members network and obtain credit or assistance in case of financial difficulty.

One of the objectives my 2011 field trip to Benin was to carry out an initial scan of the extent and manner in which religion influences women's commercial modes today. Data collected and observations made support the initial hypothesis that religion influences women's everyday business practices, their work schedule, their relations with other business or their competitors and their business decisions.¹⁵¹

Indeed, Augustine's alleged sorcery-induced commercial downfall shows how a religious belief (e.g. that she was spellbound) can lead to harsh business decisions (e.g. closing her shop and leaving the market). Moreover, most of the women interviewed in the Sample indicated taking Sunday off in order to attend religious celebration (as well as to rest). After an interview conducted in Mosebo market in Cotonou in the middle of the afternoon, my interlocutor Monique, a loincloth wholesaler, indicated she had to go pray with her colleagues to ask for better

¹⁴⁸ Central Intelligence Agency, *supra* note 131.

¹⁴⁹ *Contra* Mahmoud A El-Gamal, «“Interest” and the Paradox of Contemporary Islamic Law and Finance » [unpublished], online : Rice University < <http://www.ruf.rice.edu/~elgamal/files/interest.pdf>>.

¹⁵⁰ Observations in Glo Yekon village, Benin in April-June 2009. *C.f.* Emmanuël Seyni Ndioune, *L'économie urbaine en Afrique: Le don et le recours* (Karthala: Paris, 1994) at 29.

¹⁵¹ *C.f.* Rubya Mehdi et al, eds, *Law and Religion in Multicultural Societies* (Copenhagen: DJØF Publishing, 2008); Gordon R Woodman, “Ghana: How does state law accommodate religious, cultural, linguistic and ethnic diversity?” in Marie-Claire Foblets, Jean-François Gaudreault-Desbiens and Alison Dundes Renteln, eds, *Cultural Diversity and the Law: State Responses from Around the World* (Brussels: Bruylant, Éditions Yvon Blais, 2010), 255 (These sources show the relation between religion, cultural modes and State laws and institution as well as explore the possibilities for cohabitation between these normative orders).

business.¹⁵² She had also been fasting for similar reasons. She as well as Hermine, a Dantokpa market fish seller, have a general attitude that any good or misfortune in business results from God's hand rather than, for example, poor strategic planning, badly negotiated loan conditions or a market crisis.¹⁵³ This contrasts with widespread Western conceptions of entrepreneurship.

D. Ethnic identity

In Benin, women's traditional commercial modes are often shaped by their ethnic identity. There are eight main ethnic groups in the country: Fon, who constitute over a third of the population,¹⁵⁴ Adja (15.2%), Yoruba, who migrated from Nigeria¹⁵⁵ (12.3%), Bariba (9.2%), nomadic Peulh (7%), Ottamari (6.1%), Yoa-Lokps (4%) and Dendi (2.5%).¹⁵⁶

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-registered) 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."
¹⁵⁷ (Emphasis added)

¹⁵² Interview conducted with Monique (pseudonym), Mosebo Market, Cotonou (Benin), June/July 2011.

¹⁵³ Similar attitudes exist amongst businessmen and women in the West; however they are less widespread. Moreover, their impact on commercial modes in the West goes beyond the scope of this research.

¹⁵⁴ They are concentrated in the South.

¹⁵⁵ They are most numerous in the capital region of Porto-Novo and in northern regions: Igue, *Yoruba*, *supra* note 64.

¹⁵⁶ Central Intelligence Agency, *supra* note 131.

¹⁵⁷ Igue, *Yoruba*, *supra* note 64.

Founded on a clearly legislated, formality based approach, the OHADA Uniform Acts and institutions do not account for the informal manner in which commerce is taught, transmitted and exercised between (women) entrepreneurs in the region. For example, one of the four institutions of the OHADA, the ERSUMA located in Porto-Novo, is aimed at training and research in business law.¹⁵⁸ However, the school's projects, which consist mostly in seminars and conferences, are primarily aimed at magistrates, lawyers, chartered accountants, notaries, bailiffs and "judicial experts".¹⁵⁹ Moreover, fees to attend the conferences and seminars organised by ERSUMA and open to a larger public are often prohibitive for students and micro, small or medium business owners who might be interested in attending.¹⁶⁰

What is more, the OHADA's formal regional organisation structure for integration does not envisage the unofficial on-the-ground form that commerce takes through migration movements. Again explaining Yoruba modes, Igué writes:

"The manner in which foreign [Yoruba] traders use their connections between the host country and their native lands shows the specific nature of this commercial migration. The role of these connections seems to be one of the assets of this type of migration.

*By becoming precious middlemen for companies which cover both host and native countries, migrants participate in this manner in the process of regional integration."*¹⁶¹ (Emphasis added)

Yoruba constitute one of many ethnic groups in the region that have specific defining commercial practices. The Peulh are another. Within this community, men are traditionally cattle herders while women collect milk for sale in the markets.

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¹⁵⁸ OHADA Treaty, *supra* note 112, s 41.

¹⁵⁹ OHADA, « Conditions d'admission et de séjour pour la formation à l'ERSUMA » (1 July 2010), online : OHADA Secrétariat Permanent < <http://www.ohada.org/formation.html>>.

¹⁶⁰ Ibid. The webpage indicates that a five-day training course costs FCFA 350,000 (EUR 534).

¹⁶¹ Igué, *Yoruba*, *supra* note 64.

¹⁶² Observations made during travels in Gorum Gorum market, Burkina Faso in July 2009. In this market, stalls were predominantly occupied by men, the sale of cattle exclusively took place between men, and the sale of meat was done by men – women were mostly peddlers selling milk (Peulh women) and small food products for immediate consumption.

Within Haoussa communities and in Sahel countries, Islamic tradition calls for a clearer and greater division of labour roles between men and women: the former are expected act in the public sphere including markets, the latter are expected to remain mostly inside the house.¹⁶³ Muslim Yoruba women are however not subjected to these rules in these countries and they occupy a significant place in commerce because they have traditionally occupied a predominant role in (urban) commerce that predates the arrival of Islam. Such a role remains today, as Yoruba women are known for their patience and endurance.

Other examples of influences between ethnic origins and economic practices can be found within the Tofin communities in Benin. They are small and impoverished communities who live in Beninese southern lakeside villages and have customarily been involved in fishing activities. Men catch fishes and women collect and sell them at the market. One woman in the Sample, Hermine, is Tofin and is a living example of the continuance of these practices and role-sharing today (see Appendix D).¹⁶⁴

Other than Hermine, the majority of the women in the Sample are Fon.¹⁶⁵ Similarly to the Yoruba, the Fon also cultivate a tradition of female marketplace commerce. Indeed, where asked, most interlocutors agreed that only daughters and not sons could follow their traces as merchants (see Appendix E).

There is limited recognition and deference toward indigenous business models in OHADA Uniform Acts other than in selected provisions such ones aimed at illiterate parties or at small-scale non-registered entrepreneurs, which may only incidentally be relevant for members of the communities described above. Chapter IV turns to some of these provisions.

E. Literacy

¹⁶³ *Ibid.*

¹⁶⁴ Interview conducted with Hermine in Aïmlonfidé, Ladj (Cotonou, Benin) in June/July 2011.

¹⁶⁵ Eleven out of sixteen women indicating being Fon: Appendix D.

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 Benin.¹⁶⁶ 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 a number of implications on OHADA law and women's access to it.

First, this means that almost 80% of the Beninese women are faced with a structural obstacle to become acquainted with OHADA law because they cannot read. And even if they could read, many of them would not understand the rules because they are in a language (French) foreign to their mother tongue (Fon, Yoruba, Dendi, Gbe, Adja, etc.).¹⁶⁷ 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 recently enacted *Uniform Act on Cooperative Societies*¹⁶⁸ requires that multiple documents be filled and signed by members of cooperative societies. Another example comes from the newly introduced category of “entrepreneur” (‘enterpriser’) businessperson in the *Revised Uniform Act Commercial Law*.¹⁶⁹ The introduction of this category aims at bringing current small non-registered entrepreneurs within the scope of application of the law by alleviating costs and registration requirements. However, the Act still requires that the “entrepreneur” register in writing, keep ledgers and precise chronological data of all sales. The dichotomy is apparent: most small traders,

¹⁶⁶ Central Intelligence Agency, *supra* note 131. As in Canada and elsewhere in the world, missionaries played a significant role in disseminating literacy in the countries they explored so as to spread the word of God: BBC “Conversion”, *supra* note 147.

¹⁶⁷ The problem is not only one of literacy but is also linked to the multiplicity of languages in the country. Indeed, there are fifty-four living languages in Benin, the most prevalent of which are French, Fon and Yoruba: M Paul Lewis, ed, “Languages of Benin” in M Paul Lewis, ed, *Ethnologue: Languages of the World*, 16th ed (Dallas, Tex: SIL International, 2009), online: [Ethnologue Languages of the world <http://www.ethnologue.com>](http://www.ethnologue.com). Solutions need to be imagined to ensure appropriation and understanding of (official) law by the widest number. These solutions can be: multiple linguistic translations, production of lexical compilation of key concepts, oral legal education seminars, legal education choirs, etc.

¹⁶⁸ *Supra* note 120.

¹⁶⁹ *Ibid*, ss 30 and after.

including many women,¹⁷⁰ are illiterate and hold little if any ledgers or rely on a community “grand frère” (big brother) for accounting.¹⁷¹ In such circumstance, it is predictable that these small entrepreneurs will not seek to apply formal OHADA law since it is not adapted to their local realities.

In the particular case of the Sample women, while most had some level of literacy, at least five—Augustine, Hermine, Jacqueline, Lydia, Prisca—do not bookkeep or hold an inventory (See Appendix E-1). Two of them, Hermine and Prisca, are illiterate. What this means is that these women rely on their memory for keeping track of their inventory and of their prices. It can be expected that this will be an obstacle to business expansion—a goal shared by many women in the Sample—given the necessity of written registers in larger business. As a matter of fact, only one of the five interviewees who do not bookkeep has registered her business.¹⁷² Moreover, only three out of the sixteen women in the Sample said they had vague knowledge of OHADA. All others were completely oblivious to its existence.

Another potential difficulty relates to ss 10, 18 and 72 of the *Revised Uniform Act Commercial Law*.¹⁷³ They provide for the possibility of replacing a required signature with a digital imprint. The difficulty posed by this rule in the Beninese context is that signature requirements normally serve to confirm a party’s consent to normally serve to confirm a party’s consent to terms appearing in writing. Hence, replacing an oral confirmation of understanding with a digital imprint defeats the purpose of the signature requirement (namely to ensure that the party understands and consents to the agreement). 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

¹⁷⁰ A 1992 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%): Martha Alter Chen, “Women in the informal sector: A Global Picture, The Global Movement” (Paper delivered at the 90th Session of the International Labour Conference, 4-20 June 2002), online: ILO Bureau of Statistics <<http://laborsta.ilo.org/default.html>>.

¹⁷¹ Igue, *Yoruba*, *supra* note 64. See also: Sources of Financing in Chapter IV below; Appendix E-3 (for the detail of the widespread tontine (daily, monthly) membership of interlocutors).

¹⁷² Prisca is the only one of the Sample women who does not bookkeep and has registered her business: Appendices E-1 and E-2.

¹⁷³ *Supra* note 120.

or her behalf. This rule in itself though is not sufficient to palliate all the negative consequences of Beninese businesswomen's illiteracy on commerce.

F. Geography and climate

*“They [Laws] should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. (...)”*¹⁷⁴

This quote from Montesquieu's *The Spirit of the Laws* remains relevant after close to three hundred years. And while a detailed study of Benin's climate and geography goes beyond the scope of this project, the point of this subsection is to highlight the necessity for OHADA laws to be adapted and attentive to such variables. As a matter of fact, the adoption of a Uniform Act on contracts for the transport of goods by road¹⁷⁵ is in and of itself a reflection of the relation between geography and law.

The draft Act was written by a Canadian professor Nicole Lacasse¹⁷⁶ assisted by an Ivoirian doctoral student (Serge Kablan).¹⁷⁷ Prof Lacasse indicated that the preparation of the Act included consultations with numerous ministries and with representatives of the transport industry with a view of adapting the Act to the countries realities.¹⁷⁸ Some sections of the Act can be read as specifically relevant to OHADA States such as section 18, which limits a carrier's liability to FCFA 5000/kg (approximately EUR 7.60/kg).¹⁷⁹

¹⁷⁴ Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (Kitchener: Batoche Books, 2001) translated by Thomas Nugent (1752), 23.

¹⁷⁵ *Uniform Act on Transport of Goods*, *supra* note 120.

¹⁷⁶ Professor Lacasse teaches in the Department of Management at Laval University in Quebec city. Previously, she taught transportation law at University of Ottawa: Yvon Larose, « Sur les chemins de l'harmonisation » (11 December 2003) online: Université Laval <<http://www.scom.ulaval.ca/Au.fil.des.evenements/2003/12.11/transport.html>>.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Uniform Act on Transport of Goods*, *supra* note 120.

While steps were taken to integrate some of the economic realities of OHADA countries in the Uniform Act on contract for the transport of goods by road, further inquiry is needed to determine whether this Act is adapted and efficient in light of the geographical and road conditions of OHADA States and in particular of Benin. For example, how does the Act account for the wretched and often unpredictable or impracticable state of the roads in Benin and other OHADA States? This can considerably impact delivery times as well as the state of merchandises transported.

Similarly, one might ask if the voices of the numerous women operating micro, small and medium businesses in Benin (and elsewhere in OHADA countries) sought and heard by the drafters of the Act. Many of these women, including at least two in the Sample,¹⁸⁰ travel to Nigeria, Togo and Ghana on their own or with others to source products. Thus geography influences their business practices: the proximity of Togo, Nigeria and Ghana allow them to source cheaper goods in neighboring countries. These women travel by road and sometimes have a relatively complex set of arrangements with taxi drivers and other types of transporters to have the merchandise carried home. These arrangements must account for the sometimes inevitable corruption that occurs at the borders. Augustine and Isabelle of the Sample indicated having had experiences where the merchandise purchased outside the country was either stalled at customs due to zealous agents or arrived in a wretched state, possibly because of bad roads. Thus geography influences the dynamics of commerce and is relevant for jurists designing transport laws in Benin and elsewhere in West and Central Africa.

As for climate, a telling example of the extent to which it influences merchants' and in particular women entrepreneurs' modes in Benin is rain. Indeed, when rain falls in Cotonou, one can expect that the city will be paralysed until the end of the rainfall. During the rainy season, the likelihood that business meeting, transactions, deliveries, pick-ups, and so on will be cancelled or suspended as a result

¹⁸⁰ Interview conducted with Augustine (pseudonym), Cotonou (Benin), June 2011; Interview conducted with Isabelle (pseudonym), Cotonou (Benin), June 2011. Both are micro and small business female entrepreneurs.

of the rain is high. This slows business down. In fact, of the women interviewed, at least three commented on the adverse effects of climate, and more precisely of rainfall on their business: Bernadette (tourism), Divine (juice and ice) and Estelle (lollypops and ice cream) (see Appendix E-4). In Lydia's case, it is the heat that adversely affects her candy selling business since the products melt under the harsh African sun. Accordingly, she needs to source her products in small quantities and very frequently.

The above hints at the extent and manner in which geography and climate can affect business and business practices in Benin. It also indicates the need for legislators and law reformers to consider these elements when designing laws.¹⁸¹

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

It charts 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 conducted with jurists and women entrepreneurs in Benin in 2010 and 2011 and other data collected during field trips to those years.

¹⁸¹ See also Sachs, *supra* note 11.

IV. Doing business in Benin: Map of Women Entrepreneurs' Economic Practices

The following paragraphs analyse the landscape of female commerce in Benin (A); the type of businesses women operate and their size (B); their products and their product sourcing arrangements (C) their financing methods (D) and their membership to networks and associations (if any) (E).

A. Landscape of Female Commerce in Benin

As seen in Chapter II, the emergence of a formal/informal opposition in Benin dates only from the colonial period when the concept of the organised European nation-State made its way to the Dahomey (and many other parts of Africa). Such duality appeared gendered from the start as a result of the divide between urban, cash crop or salaried male work and rural, informal and agricultural female work induced by the colonial economy.¹⁸² One could speak of the “colonial gendered formalisation” of the economy.¹⁸³

Defining formal and informal sectors is a goal towards which many have aspired¹⁸⁴ and this thesis does not seek to argue for or provide a competing definition. Rather, it uses the general distinction between registered enterprises (individual or plural) that submit and comply with statutory law on the hand, and non-registered enterprises (individual or plural) that are more or less oblivious to statutory law (acting ‘extra-legally’) for the purposes of delimiting the landscape of women’s economic activities in Benin. De Sousa Santos would categorize these types of enterprises with a dual “formal/informal” label.¹⁸⁵

¹⁸² See Chapter II.

¹⁸³ Others refer to “gendered informalisation”: Blackett, *supra* note 102; Tsikata, *supra* note 102. This term seems inadequate since it is formality and not informality that was transplanted to Africa by colonizing powers. Informality already existed - it was the form in which relations took place.

¹⁸⁴ Spring, *supra* note 67 at 12 (Noting the difficulty of distinguishing the formal from the informal sector); Claire Moore Dickerson, “OHADA on the Ground: Harmonizing Business Laws In Three Dimensions” (2010) 25 Tul Eur & Civ LF 103, 112 (HeinOnline) [Dickerson, “OHADA on the Ground”] (Referring to a definition of International Labour Organisation, one of the World Bank and formulating her own legal-oriented one.)

¹⁸⁵ See Chapter I for a discussion on the merits and critics of this dual categorization.

Presently, some estimates indicate that approximately 80% of Benin's active population exercises economic activity in the informal sector,¹⁸⁶ which is largely dominated by retail sale and services. Retail activities are predominantly carried out by 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 country.¹⁸⁷ Moreover, 99.1% of Beninese women in trade do this informally.¹⁸⁸

Non-registered extra-legal retail responds to a widespread need within the Beninese (and other West African) population, whose majority is illiterate and/or does not have sufficient means to consume in large urban formal sector department stores where prices are written and non-negotiable. 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 non-officialised retail sale and larger import/export formal companies.¹⁸⁹

A considerable portion of these officially-registered larger companies are French and they dominate significant segments of their target market in Benin as in the rest of the CFA Franc area.¹⁹⁰ French businesses' average market share in Benin (all areas of trade included) for the period of 1998 to 2001 has been estimated at significant percentages of 20% to 30%.¹⁹¹ 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, Fougères, Dumez, Sogea), large-scale distribution (Cfao), transport (Air France), banking and related services (Accor, BnpParibas, Société Générale, Crédit Lyonnais), agro-industry (Cfdt, Saupiquet,

¹⁸⁶ Carlos Maldonado, "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, *supra* note 102; Tsikata, *supra* note 102. 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.

¹⁸⁷ Martha Alter Chen, *supra* note 170.

¹⁸⁸ *Ibid.*

¹⁸⁹ Igue, *Yoruba*, *supra* note 64.

¹⁹⁰ Enquête filiales DREE - <http://www.izf.net/pages/accueil/4786/>

¹⁹¹ *Ibid.*

brasseries du groupe Castel), telecommunications (France Télécom, Alcatel, Satom) and industry.¹⁹²

While OHADA's stated objective is the economic integration of its member States for *regional* development, Uniform Acts are better tailored for the activities and structures of these larger foreign companies than to those of the numerous local extra-legal traders. The lonely set of OHADA rules on "entrepreneur" aimed at small non-registered individual vendors referred to in Chapter III does not constitute an adequate recognition of the quantitative, qualitative, social and cultural importance of extra-legal businesses in Africa, and more particularly in Benin.

Moreover, the fact that the Uniform Acts at times conflict with OHADA States' national formal civil and commercial rules can also explain the extent, if not the boom in unregistered commercial activity. As mentioned earlier, many of the French inherited commercial and civil codes still remain into force and continue to be applied by jurists and economic actors in Benin notwithstanding the abrogation principle.

The reasons for this are diverse: a preference on the part of jurists and their clients for a law that is already known, constitutional contestation of the supra-nationality of the Uniform Acts, a jealousy of certain courts of their own national competence. This leads to conflict between OHADA law and national laws and formal legal actors. It thus becomes predictable that Beninese citizens' already low confidence in formal and/or statutory law will further deteriorate (and that legal insecurity will increase). Citizens and small and medium enterprises will thus have recourse to their own extra-legal business order and rules rather than to the formal structures. A form of cherry picking takes place whereby the conduct of businesses and citizens is at times guided by formal rules and at others by informal practices.

The empirical research conducted in Benin in June/July 2011 support these assertions. Indeed, whether their business was registered or not, the businesswomen interviewed always conformed in some way to selected official rules (for example by paying tax or a patent) while managing their operations in a more or less extra-legal fashion (for example, by using unpaid, unregistered helpers; by having recourse to

¹⁹²

Ibid.

(non-State recognized) “tontines” in order to save and obtain credit; etc.) (See Appendices D and E-1 to E-4).

Subsection b) further reveals the gap between OHADA laws and commercial modes of women entrepreneurs in Benin through the analysis of the type and size of enterprises they operate. These contrast with the French businesses operating in Benin.

B. Types and Size of Businesses

In an article discussing the characteristics of women entrepreneurs in the formal and informal sectors in Sub-Saharan Africa, anthropologist Anita Spring categorizes women’s business types, sizes and products as follows:¹⁹³

Informal Sector		Formal Sector			
Micro →→→→→Large		Small →→→→Medium→→→→Large			NGAEs
Enterprises		Firms/companies			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	◆ Retail shops	◆ Supermarkets	◆ Tourism
◆ Crafts	◆ Transport	◆ Bakeries	◆ Transport firms	◆ Transport firms	◆ Computers
◆ Herbals	◆ Furniture	◆ Retail shops		◆ Retail shops chains	◆ Real estate
◆ Household goods	◆ Household goods				◆ Public relations
◆ Hair-dressing					◆ Manufacturing technology
					◆ Manufactured products
					◆ TV/radio

¹⁹³ Spring, *supra* note 67. See Dickerson, Claire Moore. “Sex and Capital: What they tell us about ourselves” (2005) 79 St John’s L Rev 1161, 1176 (HeinOnline) (for another proposed categorisation of West African businesswomen. She suggests there are two groups: i) Elite businesswomen, who trade a wider variety of products, have more wealth and formal education); and ii) small scale businesswomen, mostly trading informally, and who can be distinguished by the type of products they sell and their geographical location. While the empirical data gathered for this research project does not contradict Dickerson’s categorisation, this categorisation leaves little room for consideration of socio-cultural elements. Moreover, its a dual nature contradicts proposals of critical legal pluralism and principles cultural hybridity adopted by the clinical legal pluralism methodology discussed in chapter I.

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”.¹⁹⁴

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 to 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) in markets. 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 every day 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 past visits in Benin. 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.

¹⁹⁴ *Ibid* at 13.

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. In light of the fact that women peddlers comprise 26 percent of urban informal labour force in Benin and 24 percent of the country's total urban labour force, a more adapted recognition of their practices than what can be found in current OHADA Acts (including sections on "entreprenant") is needed.

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. In this regard, apart from Bernadette and Gloria who run medium and small businesses in the areas of services (tourism; office furniture order and delivery, see Appendices E), all other fourteen women from the Sample operate wholesale and retail micro or small enterprises.¹⁹⁵

Given the scale of retail and wholesale in Benin and elsewhere in OHADA member States, one might ask why OHADA has not yet adopted a Uniform Act on Sale, especially considering that this is one of the subjects specifically listed in the definition of "business law" in section 2 of the OHADA Treaty.¹⁹⁶

Moreover, the majority of the women I interviewed could potentially become an "entreprenant" as defined in the *Revised Uniform Act on Commercial Law*.¹⁹⁷ However, for reasons exposed in Chapter III, it is unlikely that they take the necessary steps. As a matter of fact, many of the women in the Sample expressed the view that moving into the "formal" sector is too costly. They did however express an interest in eventually converting a non-registered business into a registered one, if and when they have sufficient money to do so.

C. Types of Products and Product Sourcing

¹⁹⁵ For purposes of this thesis and given the lack of information on interlocutors' sales, the following categorisation has been established for distinguishing businesses based on size: Very small business: 0 to 1 helper, contractor or employee and expected very low sales figure and profits ; Small business: 1 to 3 helpers, contractors or employees and expected low sales figure and profits; Medium business: 3 to 50 helpers, contractors or employees, expected medium sales figures and profits.

¹⁹⁶ Reasons similar to the ones that led to the shelving of the UNIDROIT draft Uniform Act on contract law could explain the absence of a Uniform Act on Sale. See note 113.

¹⁹⁷ *Supra* note 120.

Within the Yoruba community, product sourcing takes a hierarchical structure with the family chief negotiating purchase contract with wholesalers and redistributing products to his wives and trainees for retail sale.¹⁹⁸

Empirical data collected in Benin in June and July 2011 tends to show that no such hierarchical structure exists within the Fon community. Indeed, most interlocutors were Fon and all indicated being solely responsible for product sourcing. As a matter of fact, when asked if their husbands' assist them with their business the majority responded negatively. Only one interlocutor indicated that her husband sometimes helps her sell (but not source) the products.

The Sample women source their products either from Beninese or foreign wholesalers in Cotonou (including at Dantokpa market), from neighboring countries to which they travel by road alone or with other women to share the costs of transporting the goods back, or from China, Europe and/or Dubai. In the latter case, a merchant travels overseas, purchases goods and costs are again often shared amongst women merchants who have regrouped.

Women interviewed explained that they sometimes encounter difficulties encountered when sourcing products alone from neighboring countries: bribes to be paid to custom agents, long waiting times at borders, etc. The poor state of some Beninese roads mentioned in Chapter III could be added to the list. These conditions inevitably constitute obstacles to commerce and should also be considered OHADA lawmakers, in particular with respect to rules enacted in the *Uniform Act on Transport of Goods*.¹⁹⁹

D. 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. Again, Spring's compilation on African women entrepreneurs' sources of start-up

¹⁹⁸ Igue, *Yoruba*, *supra* note 64. 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".

¹⁹⁹ *Supra* note 120.

capital for a general landscape of these sources is helpful: ²⁰⁰

	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).

Appendix E-3 details the sources of financing used by the sixteen women interviewed. This section will focus on 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 one²⁰¹ is a traditional informal credit and savings arrangement between a limited number of members from a same community (village, neighbourhood, work). Each member 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

²⁰⁰ See also: Lein-Lein Chen & 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.

²⁰¹ This form of « tontine » is called *esusu* in Yoruba language.

tontine members on a confidence basis.²⁰² Tontines have strong social characteristics and are a form of what some generically call ROSCAs (Rotating Savings and Credit Associations).

The second type of tontine is the “tontine journalière” (daily tontine).²⁰³ 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 however 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.

Tontines can also have social and insurance-like functions. For example in cases involving the death of a tontine member’s family, money may be available to help pay for the funeral; members of the tontine also often attend and dance at the funeral celebration. The Sample women, however, appeared to have recourse to tontines predominantly for their savings (and in some cases credit) function.

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 Act on Cooperative Societies. However, many of the Act’s provisions 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 in the OHADA regime.

E. Networks and Associations

²⁰² Igue, *Yoruba*, *supra* note 64 at 90-91.

²⁰³ *Ajo Ojojumon* in Yoruba language.

Another aspect of women's economic activities that can 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 concerns the networks and associations they are a party to. Among better known ones in Benin are the Chamber of Industry and Commerce of Benin, the International Chamber of Commerce, Association inter-professionnelle de coton, Tokpa Association of Merchants and other.

All except one (Odile) women indicated not pertaining to a commercial or other network (this excludes religious gatherings). Aurélie expressed an interest to join another association but most seemed to do so for fear of quarrels with other members amongst other things.²⁰⁴

Odile is a member of an international union operating in Dantokpa market (amongst other places). She belongs to a market women's association. She claimed that her participation in these two groupings allowed her to better understand her rights and that she now feels equipped for better defending them. She mentioned that thanks to her union and to her association, she thought she was now paying lower charges for operating her business. She also indicated that while she used to be suspicious about the "formal sector" and as such refused to register her enterprise, she is now in the process of formalizing her business. This decision, taken after more than twenty years of exercising unregistered extra-legal business, results she said from the knowledge and information received through her union and association.²⁰⁵

Thus Odile's associations constitute a site of interaction between "formal" and "informal" normative orders. Legal reformers and other agents seeking the implement a new law could organize legal education seminars and public consultations during associations' meetings, for example, as a means to reform commercial law in a manner more in line with clinical legal pluralist teachings.²⁰⁶

²⁰⁴ Interviews with Clarisse and Kemi, Mosebo market, Cotonou, Benin, June/July 2011

²⁰⁵ Interview conducted with Odile (pseudonym) in Cotonou (Benin), June/July 2011.

²⁰⁶ See chapter V for more discussion on legal reform techniques and avenues.

The contextual analysis of the history of trade and business law (officially and non-officially regulated) in Benin, of the country's businesswomen's socio-economic profiles and of some of their economic arrangements provides telling examples of contrasts between OHADA laws and Beninese realities.

Other such examples concern i) the overly ambitious provisions of the *Revised Uniform Act on Secured Transactions*²⁰⁷ that provide for electronic registries and web access in a region (the OHADA zone) where power shortages are frequent, financial resources limited and IT education levels very low; ii) the inadequacy of various French legal transplants (such as the French "agent de sûreté"²⁰⁸ transplanted in the *Revised Uniform Act on Secured Transactions*), which are completely foreign to Beninese modes;²⁰⁹ and iii) the writing of most if not all Uniform Acts by foreign (and foreign trained) jurists and experts practicing in different countries and/or legal systems, which results in the absence of uniformity of language, form and to some extent of coherence of substance between the Acts.²¹⁰

It is likely that the disparities between law-in-action and law-in-the-books shown above will result in further distancing of the Acts from the citizens and local (female) businesses. At the same time, the Acts much better reflect the practices and modes of French and foreign citizens and enterprises. The diagnosis this leads to is that OHADA's economic development strategy is still haunted by colonial spirits. Indeed,

²⁰⁷ *Supra* note 120.

²⁰⁸ The integration of the "agent de sûretés", who already exists (and whose function was created) in France aims at encouraging and facilitating large corporate financing projects such as infrastructure and natural resources ones. The agent is meant to act as coordinator between banks and other parties in the transaction and could be associated to a surety manager: Lionel Yondo Black, "L'enjeu économique de la réforme de l'Acte uniforme OHADA portant organisation des sûretés: un atout pour faciliter l'accès au crédit (2007) 197 *Droit et Patrimoine* 46, 49-50.

²⁰⁹ The "agent de sûreté" may be adapted to and useful in France but it appears that the main (if not only) addition an "agent de sûretés" would bring to infrastructure transactions taking place in Benin would be his professional costs. Indeed, the Benin's (as other OHADA member States) economy, the type of national resources it contains (.e.g no metals, no petrol) and the relatively small-scale financial and banking operations it attracts do not require nor allow for a multiplicity of transaction agents.

²¹⁰ For example, as already mentioned, the writing of the draft Uniform Acts on the Transport of Goods by Road and on Consumer Protection have been commissioned to Canadian jurists, those of the draft *Revised Uniform Act on Secured Transactions* and *Revised Uniform Act on Commercial Law* to French ones and the now shelved draft Uniform Act on Contract Law, from UNIDROIT (mostly Western) experts. Although there are similarities between Western legal systems, the scope of conflicts of laws jurisprudence reveals the extent of the discrepancies that also exist between them. It is thus predictable that such discrepancies will arise when reading attempting to apply provisions of two or more Uniform Acts. This is in addition to discrepancies between the Acts and local practices.

as was the case for commercial laws applicable in the Dahomey under the French administration, OHADA Acts predominantly respond to French (and foreign) interests.

The following paragraphs aim at outlining proposals inspired by critical legal pluralist theories to help resolve the challenges and dichotomies highlighted above. This involves looking at the actors, the tools, the location and generally recognised principles for operating commercial law reform. Underlying the critical (and clinical) legal pluralist approach is the need to transcend official discourse as to who and what these should be and move away from the current conception and methodology of commercial law reform. This need must however be balanced with the predictable resistance of more positivist inclined reformers and State officials to a clear-cut rupture from current ways. Accordingly, in order to ensure their applicability, the solutions suggested must be framed in a manner that is attentive to current structures.

V. Bridging the Gaps Through Applied Clinical Legal Pluralism

This chapter suggests three types of potential solutions to the challenges identified for reconciling discrepancies between women's on-the-ground commercial practices and OHADA Acts. The first category consists in the formulation of general principles aimed at contributing to a legal reform that is more culture-attentive and deferent to human agency in law-making (A), the second in more technical solutions and methods for law reform (B) and the third category concerns critical legal pluralist responses to specific dichotomies identified in this thesis (C).

A. General clinical legal pluralist solutions

A first guiding clinical legal pluralist principle would call for development jurists and law reformers in Benin or acting on the country's behalf to be more aware and mindful of defining the nature of the reform activity intended. The point is to distinguish law reform clearly from law making, as the latter is a prerogative of the Beninese citizens. Recognizing the legal creative role of citizens (as opposed to them being passive subjects who receive or endure the State order) would create the space needed to allow them to play a more effective part in their own development, that of their families, of their communities and so on.

Envisaging citizens as norm creators and cultivating deference towards all normative orders involves looking 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 OHADA.

The idea is to look at the main actors, Beninese (women) entrepreneurs and financiers, and identify their dominant narratives so 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.

B. Clinical legal pluralist inspired law reform techniques

Looking at techniques of law reform, the goal is to identify the ones that can best serve the human agency objective referred to above. More specifically, the goal is to identify which of model laws, harmonization, unification, transplantation, viral propagation, legislative guides, recommended standards²¹¹ 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 local modes.²¹² As Macdonald puts it, “*the issue is fundamentally one of legislative technique: how best to formulate the desired legal rule.*”²¹³

In order to find and elaborate the right technique, one first needs to consider and compare the conventional, generally recognised legal reform methods referred to above.

Given OHADA’s stated mission, it is appropriate to start with harmonization. In “The Myth of Harmonization of Laws”,²¹⁴ Boodman condemns those who defend the advantages of harmonization as an abstract concept. He insists that such pretensions are useless and meaningless since harmonization can be either

²¹¹ See Baranes, *supra* note 30 (for an empirically-based proposal for the adoption of “globally recommended standards” for creating and/or modernizing secured financing registries. The author argues that four main potential benefits call for such an instrument to be put in place: i) better use funds and prevention overspending on law reform efforts; ii) promotion of good practices amongst reformers; iii) facilitation of local jurists’ and civil servants’ work in putting in place a modern registry; iv) correction of gaps and inadequacies in badly reformed registries.) In my view, difficulties linked with the contextual application of the standards (whether it be for a registry or other legal instrument) are the same of for model laws or guiding principles. Moreover, the weak binding nature of standards (in comparison to treaties or laws) and their foreign origin could undermine the prospects of them being applied. For proposals similar to “recommended standards” see: Franco, *supra* note 30.

²¹² For a Latin American analysis of the politics surrounding law reform initiatives: Alejandro M Garro, “The OAS-sponsored Model Law on Secured Transactions: Gestation and Implementation” (2010) 25 *Unif L Rev* 391.

²¹³ Macdonald, “Model Law”, *supra* note 28 at 425.

²¹⁴ Boodman, *supra* note 29 (for an analysis of the concepts of harmonization and of legal harmonization as well as the relevance and/or appropriateness of using such a legal reform technique in a given case).

good or bad depending on the context. He formulates a case-based methodology to determine whether harmonization is a valuable and worthwhile law reform technique in a particular situation.²¹⁵ Lessons can be drawn from this methodology for the issues under study.

Boodman suggests that one first must determine whether legal harmonization should be privileged as a reform technique in the selected area of the law. Second, one must determine whether harmonization models are available in the selected area of the law.

He considers four arguments often presented as objective/abstract advantages of harmonization: the economic one (e.g. harmonization will attract investment and help inject dynamism into markets because it will lead to lower investment costs. This argument has been put forward by many tenants of the OHADA regime.²¹⁶ Boodman rebuts the strength of this argument on the basis that legal costs saved due to harmonised laws represent an only minuscule portion and constitute one-time costs. Savings are thus not sufficient to constitute a market obstacle for potential investors.²¹⁷

In the particular case of the OHADA reform, no comprehensive study has been carried out to date on the impact (if any) of OHADA law on economic development in the region or on companies' decisions to invest and carry out business in OHADA member States. However, the empirical research I conducted in Benin tends to support Boodman's argument.

Indeed, while most ERSUMA (OHADA) agents and lawyers whom I informally met in Benin in May/June 2010 and semi-formally interviewed in June/July 2011 maintained that OHADA has made lawyers' lives easier by establishing a uniform system of rules, they were not prepared to assert that it has effectively contributed to injecting dynamism into their region's economy. Similarly, Me Sohaing Neim Sylvestre Brazza, a Cameroonian commercial litigation lawyer whom I interviewed in Douala, Cameroon in July 2011, responded as follows to my enquiry

²¹⁵ *Ibid* at 715.

²¹⁶ Mouloul, *supra* note 95.

²¹⁷ Boodman, *supra* note 29 at 712-18.

about the changes brought about by OHADA since the adoption of the first Uniform Acts over a decade ago:

“En principe l’objectif était de redynamiser les affaires mais le véritable problème c’est que les praticiens qui sont des procéduriens [sic].(...) Il aurait fallu trouver un système (...) qui écarte toute procédure devant les juridictions étatiques.(...)”

(...) moi je vois pas de changement ce que je suis en train de dire justement c’est que, le seul changement c’est qu’on sait que partout où on se retrouve on a la même loi qui s’applique. C’est le seul changement. Mais maintenant je dis au niveau de la pratique, les praticiens, ils en ont fait encore des procédures. Vous voyez un peu? Et c’est ça le danger, c’était là le danger...”²¹⁸

Another argument in favour of harmonization as “abstract good” is the certainty argument. The third is the national (or regional) unity harmonization is meant to bring. These can be dismissed on the basis of the unpredictability of politics. Recent events in Côte d’Ivoire have proven this to be true for the OHADA regime and region.

A fourth commonly claimed advantage of harmonization is that it brings upon modernization of laws.²¹⁹ However, modernization of laws is not the prerogative of harmonization and can accordingly not be presented as an advantage of the legal harmonization.

In light of the above, harmonization (and/or unification) does not appear, at least to date, as legal reform technique that is particularly well adapted to the needs of OHADA States, and in particular Benin.

Same could be said about model laws, which according to Macdonald, are actually useful in a an only very limited number of cases namely: i) in a relatively new area of the law; ii) where the actors want to create an international regulatory system; or iii) where the model law aims at responding to a specific situation.²²⁰

A legislative guide could present the flexibility that clinical legal pluralism calls for. However, this flexibility needs to be balanced against other characteristics of

²¹⁸ Interview conducted with Me Sohaing Neim Sylvestre Brazza, Douala (Cameroon), June/July 2011.

Diverging views expressed in: Claire Moore Dickerson, “Harmonizing Business Laws in Africa: OHADA Calls the Tune” (2005) 44:17 Colum J Transnat’l L 17 (Columbia University).

²¹⁹ For an academic preliminary positive assessment of the OHADA regime claiming the benefits of harmonization as a modernization technique see: *Ibid.*

²²⁰ Macdonald, “Model Law”, *supra* note 28.

such an instrument.²²¹ Legislative guides such as the UNCITRAL Guide on secured transactions may have little appeal for least-developed countries which do not have the resources to adapt the guide's principles into their national law and/or whose legal systems and economies may be so different from Western ones that the principles listed in the guide will be of little if any relevance and use for them. As for developing countries such as Benin, the problem of the resources remains. Moreover, in the specific case of UNCITRAL's Legislative Guide on Secured Transactions and OHADA's Uniform Act on Secured Transactions, the former may appear as competing with the latter, whose first draft predates that of the Guide.

In light of the above analysis and a legislative guide does appear as the conventional law reform technique most adapted to Benin and other OHADA States' needs, this research project would favour a more sui generis law reform method. The following questions could be used as starting points for elaborating this method:

“(1) Why do we think law reform needs to be textual? Why chirographic? (2) Why do we imagine that legislation is the ideal type of legal chirographism? Why a statute rather than international conventions, judicial judgements, treatises, practice manuals, cautionary tales, and so on? (3) Why do we think that law reform needs to be exclusively the product of the political state? Why do we believe that multiple constitutive (or epistemic) communities lack the capacity to develop better law?”²²²

C. Specific clinical legal pluralist solutions

Regarding specifically identified dichotomies, subsection 1 considers the recent rewriting of the Uniform Act on Secured Transactions and some of its maladapted legal transplants. It sets out proposals for preventing and/or remedying to the problems they pose. Subsection 2 discusses the persisting opposition between the

²²¹ See *Ibid*; Cohen, *supra* note 28; Riffard, *supra* note 28; Röver, *supra* note 28 (for arguments in favour and against the technique of model laws to be used in addition to or in comparison with legislative guides. In the particular case of UNCITRAL's Legislative Guide on Secured Transactions, the authors argues against disbursing further resources for drafting a model law on the basis of the Guide.)

²²² Macdonald, “Model Law”, *supra* note 28 at 421. See also: Law Commission of Canada, Strategic Agenda (Ottawa: Supply and Services Canada, 1998). One element this reform method could make use of is signing. Indeed, songs, signing and music are very commonly used in Africa as education tools, political campaign tools, for leisure, etc.

formal and the informal (in law and economics). It suggests that abandoning such a divide could help settle the ambivalent relationship between citizens and the State in Benin by rearranging the dynamics between the multiple normative orders in the Beninese society.

1. The French legal transplants of the *Revised Uniform Act on Secured Transactions*

Like all other Uniform Acts in their respective areas, the *Revised Uniform Act on Secured Transactions* unifies formal secured transactions law in the OHADA region and applies directly and without modification into all soon-to-be seventeen OHADA member States.

Moreover, the previous version of the revised Act was enacted in 1997 and was modeled on pre-2006 reformed French secured transactions law. During its short lived life, the now replaced Act of 1997 failed to respond to most of OHADA's objectives of legislative modernisation and economic development in the West and Central Africa region. Notwithstanding this failure, the drafters of the *Revised Uniform Act on Secured Transactions* once again modeled it on French secured transactions law, this time post-2006.

Also, one of the key features of the new Act, which features were highlighted by the drafters, is the inclusion of at least two secured transactions institutions (the "agent de sûreté" and the "propriété sûreté") that are foreign to current formal and informal business practices in the OHADA region.

A critical legal pluralist analysis of the above three points suggests the following. First, as discussed above, the techniques of harmonization and/or 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, in light of the failure of the now replaced French modeled Uniform Act on secured transactions, one could have considered rewriting the revised version 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 in charge of the amendment project was male dominated and was composed of France trained jurists most of whom live and work in universities, international organisations and big law firms in Paris. Such a group could not reflect the idea of the self—here presumably at the very least the Central and Western Africa based citizen—as a site of normativity and inter-normativity for Central and Western Africa. Moreover, while the group of expert (the drafters) does and can constitute a normative order, such order appears remarkably remote from the West and Central African selves.

The team of drafters could have included a larger number of African jurists trained in Africa, of diverse backgrounds and more balanced proportion of men and women. 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.

2. The formal/informal opposition

As a second and last example of solutions to specific discrepancies, this section looks at the problem of the formal/informal dichotomy. Widespread use of such a 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 demarks and traces the boundaries between the State and most of its subjects. A change of words and of discourse in the law, by government representatives, academics,²²³ businesspeople and the community that would reflect a more pluralist approach and cease to make dual oppositions between citizens and the other may contribute to end the divide between the State and non-State, the formal and the informal.

²²³ See for example: Dickerson, “OHADA on the Ground”, *supra* note 184 (Dickerson defines the informal sector in a manner that perpetuates the formal/informal opposition: “a locale where formal law does not penetrate (...”).

The following arguments also support abandoning the formal/informal duality of i) it is not accurate²²⁴ (and accordingly the relevance of the dichotomy itself can be questioned); ii) it promotes segregation between groups of society; iii) it perpetuates a positivistic image law as the monopoly of the State and the 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.

Conclusion

This thesis has explored aspects of the interplay between commercial law reform, local culture and informal business in Benin, from the perspective women entrepreneurs. To do so, it adopted a methodology, tagged clinical legal pluralist, infused with Sachs' teachings on the importance of taking a contextual outlook of problems in order to reach adequate diagnosis, Trebilcock', Daniels' and Macdonald's practical critical legal pluralist guidelines for law reform, critical legal pluralists' belief in citizens as irreducible norm generators, de Sousa Santos' exhibition of the dynamics between multilayered normative orders in Africa and de Soto's strategy for identification of socio-economic "extra-legal" arrangements.

The theoretical and empirical analysis carried out in accordance with such methodology tends to confirm the hypothesis underlying this project that law reformers in third-world countries fail to adequately factor in existing realities (including civil, political, economic, social, historical, environmental and cultural ones) of these countries and balance them against the need to promote societal and individual well-being. As a result, law reform projects fail to contribute efficiently and effectively to development.

The need for development jurists and crafters of law reform to be informed about the history and to be attentive to socio-cultural realities of citizens of country(ies) where legal reform is taking place is twofold. First, such relevant

²²⁴ Meagher, *supra* note 93 (deconstructing the alleged myth that informal commerce in West Africa is independent from formal economy).

knowledge and consideration induce awareness of the particular background, characteristics and challenges faced by the host countries' citizens. This awareness is particularly important in a development context since badly tailored reform efforts can more easily, directly and negatively affect lives.²²⁵ Secondly, attention to a host country's historic, social and cultural specificities contributes to jurists and reformers taking cognizance of their personal biases and/or presumptions on the *raison d'être* and use of legal structures in their own jurisdiction and be critical about automatic transplants into foreign systems.

Moreover, from a "clinical" point of view, the contextual exam appears as a necessary step to identify problems (or symptoms) that need to be remedied and to understand their sometimes complex underlying and interconnected causes. From a critical legal pluralist standpoint, looking at people's background and social and cultural characteristics is at the core of understanding the nature of the norms that they create.

Bearing this in mind, this thesis looked at the evolution and basic assumptions of national and regional (OHADA) business law regimes from the colonial era to present in Benin and showed the complex relationship between historical, social and cultural specificities of people and their commercial practices as well as at the continuing influence that former colonizing powers have to date on this relationship. This analysis was infused with findings from empirical research conducted with women and men entrepreneurs, jurists and academics in Benin in 2009, 2010 and 2011.

Both the theoretical and empirical investigations conducted in support of this research have shed light on some of the dichotomies that exist between OHADA

²²⁵ 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, *supra* note 11) constitute one of many 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, "Entrepreneurship", *supra* note 19.

formal laws and on-the-ground practices. This thesis made suggestions on the types of remedies that could contribute to rendering this relationship happier and healthier. Indeed, it is predictable that the absence of identity or at least of correspondence between on-the-ground practices and formal law will result in the Acts being inefficient and their rules non-adhered to by local citizens: unless legislation confirms what is already happening in practice, people will not submit to it.

APPENDIX A

Unsigned copy of Isabelle Deschamps' 2011 Application for Ethics Approval for Human Subject Research



Applicable Research

Ethics Board

REB-I REB-II

REB-III

Application for Ethics Approval for Human Subject Research

(please refer to the Application Guidelines

[www.mcgill.ca/research/researchers/compliance/human/] before completing this form)

Project Title: Commercial Law Reform in Africa: a Means of Socio-economic Development, But for Whom? Perspective of Women Entrepreneurs

Principal Investigator: Isabelle Deschamps **Dept:** Institute of Comparative Law, Faculty of Law

Phone #: 514 663 7521

Email: isabelle.deschamps2@mail.mcgill.ca

(a McGill email MUST be

provided)

Status: Faculty Law

Postdoctoral Fellow

Other

(specify) _____

Ph.D. Student

Master's Student

Undergraduate

Type of Research: Faculty Research

Thesis

Honours Thesis _____ **Independent Study**
Project _____
Course Assignment (specify course name and #) _____
Other (specify) _____

Faculty Supervisor (if PI is a student): Prof. Roderick A Macdonald
Email: Roderick.macdonald@mcgill.ca

Co- Investigators/Other Researchers (list name/status/affiliation): N/A

List all funding sources for this project and project titles (if different from the above). Indicate the Principal Investigator of the award if not yourself.

Awarded: The Graduate Travel Award: \$3,600

Pending: N/A

Principal Investigator Statement: I will ensure that this project is conducted in accordance with the policies and procedures governing the ethical conduct of research involving human participants at McGill University. I allow release of my nominative information as required by these policies and procedures.

Principal Investigator Signature: _____ **Date:**

Faculty Supervisor Statement: I have read and approved this project and affirm that it has received the appropriate academic approval. I will ensure that the student investigator is aware of the applicable policies and procedures governing the ethical

conduct of human subject research at McGill University and I agree to provide all necessary supervision to the student. I allow release of my nominative information as required by these policies and procedures.

Faculty Supervisor Signature: _____ **Date:**

Respond directly on this form below each question. Do not delete the text under the question. Do not omit or reorder any questions. Answer every part of each section. Forms with incomplete sections will be returned.

1. Purpose of the Research

Describe the proposed project and its objectives, including the research questions to be investigated (one page maximum).

The purpose of my research project is to investigate the interactions between OHADA (Organization for Harmonization of Business Law in Africa) formal commercial law reform, on-the-ground business practices, and socio-cultural and economic status of women entrepreneurs in the Republic of Benin and Cameroon.

My research methodology is founded on what I have designated a “clinical legal pluralist” approach to law and development. It draws from the works of Jeffrey Sachs, Roderick A Macdonald, Boaventura de Sousa Santos and Hernando de Soto. It calls for: i) any legal reform work to be attentive to and not underestimate the historical, political, social, cultural, economic, institutional and geographical context of the host country; ii) the adoption of a multifaceted approach to legal reform aimed at identifying the legal practices and conditions in the host country and not taking them for granted; iii) a differential diagnosis of problems so that the reform project mirrors and serves local modes; iv) legal reform proposals that recognize the individual’s (as opposed to the State’s) central role as norm creator as well as the multiple sometimes competing normative orders from within and outside the State.

My research hypotheses are: 1- that current French modeled commercial national and regional laws in West and Central Africa are not sufficiently attentive to local modes and realities to effectively and efficiently promote human and economic development in the region; 2- that women entrepreneurs in West and Central Africa structure their business practices according to a normative regime that they have elaborated and that often stands in sharp contrast to the official law that is found in national and regional legislation like OHADA statutes.

My research objectives are: (1) to draw socio-cultural and economic profiles of women entrepreneurs in Benin and Cameroun; (2) to map women's business practices in Benin and Cameroon; (3) to see how socio-cultural and economic realities model women's business practices in Benin and Cameroon; (4) to see whether formal (OHADA) commercial law has any bearing on how indigenous women entrepreneurs conduct their affairs in Benin and Cameroon; (5) to further identify dichotomies between formal OHADA law and on-the-ground normative practices. The point is not to assess how effectively multinationals are using formal law, but to focus on small and medium businesses.

My research questions derive from the above four research objectives. They include the following:

- Objective (1): a) How many children do women entrepreneurs have? b) What, if any, type of spousal union are they in? c) What formal education did they receive, if any? d) Which ethnic group do they pertain to or identify with, if any? e) Which religion(s) do they adhere to, if any?
- Objectives (2) and (4): a) Is the business registered and does it generally comply with statutory law? b) What is the size of the business (peddler, stall, market stall, shop/ small, medium, large) c) What are the business' activities (retail sale, wholesale, manufacturing, baked goods, food products, services, furniture, household goods, hairdressing, sewing, crafts etc.) d) What are the business' sources of financing? e) Where are the products and materials necessary for business activities sourced from? f) What networks and associations is the women entrepreneur part of, if any? g) What formal and informal taxes does the business pay to local formal or informal authorities and associations?
- Objective (3): a) How do maternity, spousal unions, literacy or illiteracy, ethnic origin and religion impact women entrepreneurs' business activities? b) What arrangements do women entrepreneurs make to their business practices to deal with the challenges and/or norms, if any, which derive from their socio-cultural and economic status?
- Objective (5): In addition to examples I have already inventoried in the course of my research, what are other examples of incongruities between socio-cultural realities and economic practices on the one hand and OHADA laws on the other? (Both subjects in the research and local jurists that I intend to meet with will assist me in answering this specific objective.)

What is the expected value or benefits of the research?

This research seeks to add to the existing documentation generated by the debate on the relationship between law and socio-economic development in States whose formal law is derived from that of their former colonizing power. Its significance lies in the

focus of female entrepreneurs of small and medium sized businesses – a type of commercial activity that has not been the object of empirical investigation. The research will provide specific and detailed examples of dichotomies between formal OHADA rules and on-the-ground female business practices. This can assist jurists in the prospective drafting of amendments to existing OHADA legislation.

More importantly, by highlighting gaps between official rules and informal commercial modes, the research aims to show the need to critically reassess the OHADA regime and its positivist (and neo-colonialist) approach to formal state law making.

By painting a picture of on-the-ground business practices and of women entrepreneurs' socio-cultural profiles, the research aims to develop awareness amongst jurists and others involved in legal reform in developing countries, and in particular in Benin and Cameroon, of the need to be attentive to such elements in their work.

This research is also an opportunity to test and apply critical legal pluralist theories to field research in law and development.

How do you anticipate disseminating the results (e.g. thesis, presentations, internet, film, publications)?

I will disseminate the results of my research in my LLM thesis and (following further empirical investigation refined through this initial exploration) my DCL dissertation, in papers in scholarly and other journals (e.g. Gender and Development), and through academic and professional presentations at conferences and workshops. I also intend to present the results of my research on a blog I am currently creating.

2. Recruitment of Participants/Location of Research

Describe the participant population and the approximate number of participants needed.

My research will be predominantly qualitative. I will interview:

- a) local women entrepreneurs* working predominantly in small and medium businesses (street peddlers, street stall vendors, market vendors, small and medium store owners and/or service providers). I aim to recruit fifteen (15) women entrepreneurs participants per country, equally divided between the following three age groups: approximately²²⁶ 18 to 25 years old; approximately 26 to 45 years old; approximately 46 years old and over.
- b) in more limited numbers, local men entrepreneurs* working in small and medium business. I aim to interview two (2) per country.

* By “entrepreneurs”, I mean women and men carrying out, alone or with other persons, a semi-organized or “organized economic activity, whether or not it is commercial in nature, consisting of producing, administering or alienating property, or providing a service” (This definition is taken from article 1525(3) of Civil Code of Québec, but it captures the idea of entrepreneurship that I will be using in delimiting my field study).

I also aim to speak to the following persons in order to obtain information and professional opinions about the OHADA regime and application of Uniform Acts:

- c) female and male local lawyers and university professors with an expertise in commercial law. I aim to speak to three (3) commercial law jurists per country.
- d) representatives of the Chambre de Commerce et de l’Industrie du Bénin and of the Chambre de Commerce, de l’Industrie, des Mines et de l’Artisanat du Cameroun. I aim to speak to one to two per Chamber.
- e) representatives of the OHADA École Régionale Supérieure de la Magistrature in Porto-Novo and of the OHADA Secrétariat Permanent in Yaoundé. I aim to speak to one to two representatives per institution.

Describe how and from where they will be recruited. Attach a copy of any advertisement, letter, flier, brochure or oral script to be used to solicit potential participants (including information to be sent to third parties).

I will use three methods to identify and recruit the participants: e-mail, direct contact and snowball sampling. Regarding:

²²⁶ Approximation will be inevitable in certain cases since many people in rural areas in Benin do not hold birth certificates or hold ones that are inaccurate by reference to Western scientific age-calculation methods.

- a) Women entrepreneurs: I already have six key informants in Benin who will assist me in compiling my sample: Cyriaque Laleye, Afric' Mutualité - Cotonou; Chymène Ayadokoun, ERSUMA (École Régionale Supérieure de la Magistrature) – Porto-Novo; Ingrid and Théophile Hounhouedo, Centre de Santé La Vie Nouvelle – Cotonou (Ladji), Germain Fidegnon, IT technician - Glo Yekon village, Gloria Hessou, Student – Cotonou (Dantokpa). I will ask each of them by e-mail, Skype and/or in person to facilitate contact with three women entrepreneurs (template e-mail attached). I envisage having two key informants in Cameroon: Frédérique Youmbi Fasseu (Cameroonian student at Université de Montréal) and Jean Roméo Ngamo Kamptchouang (Painter). I will ask each of them to facilitate contact with three to eight women entrepreneurs (template e-mail attached). I will then ask these women to facilitate contact with five other women entrepreneurs.
- b) Men entrepreneurs: I have one key informant and potential participant in Benin (Cyrille Boris Paterné Djakpo). I will ask him to participate in my research by e-mail and Skype and will ask him to facilitate contact with two other male entrepreneurs. I will ask (by e-mail and Skype) one of my Cameroonian key informants to facilitate contact with two men entrepreneurs in Cameroon (template e-mail attached).

I will use similar methods to request meetings with jurists, members of chambers of commerce and of OHADA institutions. Regarding:

- c) Commercial law jurists: I have already identified the three jurists I want to speak to in Benin (including Joseph Djogbénou, Lawyer – Cotonou; Olga Anasside, Lawyer – Cotonou) and one in Cameroon (Lionel Black Yondo, World Bank). I will contact them by e-mail and in person (sample e-mail attached).
- d) Chambers of commerce: I will contact representatives by e-mail and by phone.
- e) OHADA institutions: I am already communicating with one key contact at ERSUMA (Léonard Olory-Togbé) (see sample e-mail attached) and will contact other representatives by e-mail and in person.

Describe the setting in which the research will take place.

The research will take place in cities and villages in two countries: 1) the Republic of Benin (cities: Cotonou (proposed areas: Ladji, Aïmlonfidé, Dantokpa, Ganhi, Fidjrossé) and Porto-Novo; village: Glo Yekon) and 2) Cameroon (cities: Douala and Yaoundé; proposed villages: Bangoua or Badoufam).

Specific setting of interviews will be left for the participant to decide. Regarding women and men entrepreneurs, I will generally approach them at their usual place of business (e.g. market, etc.) but they may prefer to hold the interview in their household, a “cafeteria” or “buvette”, a coffee shop, etc. To facilitate a free and open discussion, I will conduct the interviews wherever they choose.

I will visit jurists at their offices in law firms, universities or other and visit chambers of commerce and OHADA institutions to meet with their representatives.

Describe any compensation subjects may receive for participating.

No compensation will be provided to the participants for taking part in my research.

3. Other Approvals

When doing research with various distinct groups of participants (e.g. school children, cultural groups, institutionalized people, other countries), organizational/community/governmental permission is sometimes needed. If applicable, how will this be obtained? Include copies of any documentation to be sent.

N/A

4. Methodology/Procedures

Provide a sequential description of the methods and procedures to be followed to obtain data. Describe all methods that will be used (e.g. fieldwork, surveys, interviews, focus groups, standardized testing, video/audio taping). Attach copies of questionnaires or draft interview guides, as appropriate.

1- Between now and 19 June 2011, I will send initial e-mails to key informants, those participants whom I have already identified and local jurists, OHADA and chambers of commerce agents to schedule meetings to take place 1) between 20 June and 5 July in Benin, and 2) between 6 and 20 July in Cameroon.

2- On site, I will use the following methods to obtain data:

- a) Fieldwork: I will observe the physical appearance and take photos of: a) stalls, shops, markets and other places of business of women (and to a more limited extent men) entrepreneurs in rural and urban Benin and Cameroon; b) the demographic landscape of these places; c) products on offer; and d) other visible manifestations of women entrepreneurs' socio-cultural and economic profile and business practices.
- b) Interviews: I will informally discuss and conduct semi-formal interviews with participants. Interviews will take place in French or English. When the participant is not comfortable with either one of these languages, one of my key informants will act as translator of the local language. The core questions I will ask subjects are set out in section "1. Purpose of the research" above. I also attach a detailed outline of questions for men and women entrepreneurs.
- c) Meetings: I will organize meetings with jurists, chamber of commerce representatives and OHADA employees. For information, I attach outlines of my intended questions for jurists, chamber of commerce employees and for OHADA institutions' representatives.
- d) Audiotaping: Subject to participant's written consent, I will tape my semi-formal interviews.

- e) Videotaping: This will only be used to a limited extent in the course of in my fieldwork observation, and will only be done with written consent of interviewee.
- f) Photos: I will use this in my fieldwork observations and will also take photos of the participants who agree to this in writing.

3- Upon my return in August 2011 I will tabulate the results of my interviews. Results from my research in Benin will be used in part in support of my LLM thesis to be submitted in August 2011. All results will also be used in support of my DCL research and thesis.

5. Potential Harms and Risk

a) Describe any known or foreseeable harms, if any, that the participants or others might be subject to during or as a result of the research. Harms may be psychological, physical, emotional, social, legal, economic, or political.

This is a research project involving minimal risk, given the definition in the Ethics guidelines. The research is not “on” human subjects but rather on their realities and practices. The nature of the information gathered is not political or controversial *per se* and is largely public.

b) In light of the above assessment of potential harms, indicate whether you view the risks as acceptable given the value or benefits of the research.

N/A

c) Outline the steps that may be taken to reduce or eliminate these risks.

N/A

d) If deception is used, justify the use of the deception and indicate how participants will be debriefed or justify why they will not be debriefed.

N/A

6. Privacy and Confidentiality

Describe the degree to which the anonymity of participants and the confidentiality of data will be assured and the specific methods to be used for this, both during the research and in the release of findings.

Each man and woman entrepreneur interviewed will be given a pseudonym. I will organize the data obtained in a table listing socio-cultural and economic characteristics of participants using their pseudonym. The whole of the data will be presented in the aggregate. Any reference to participant’s specific situation in my theses or other publications will be made by reference to their pseudonym.

As for jurists, OHADA agents and chamber of commerce employees, I will ask them to specifically consent in writing to being identified on the consent form.

Describe the use of data coding systems and how and where data will be stored. Describe any potential use of the data by others.

Some interviews will be recorded and others typed in my personal computer. Audio recordings, short videos and photos will be saved on my personal computer.

Who will have access to identifiable data?

My supervisor and I are the only ones who will have access to identifiable data of subjects. (Jurists, OHADA agents and chamber of commerce employees who will have consented to being identified on the consent I will ask them to sign will however be identified in my research reports, theses and articles).

What will happen to the identifiable data after the study is finished?

I will store it in my computer and on disk until I finish my DCL, in three to four years, and then erase it.

Indicate if there are any conditions under which privacy or confidentiality cannot be guaranteed (e.g. focus groups), or, if confidentiality is not an issue in this research, explain why.

As indicated above, interviews with subjects will take place either in their place of business or at another place of their choice. It is possible that one of my key informants, children, employees and/or a translator be present during the interview. The level of privacy of the interview will be left for the participant to decide.

7. Informed Consent Process

Describe the oral and/or written procedures that will be followed to obtain informed consent from the participants. Attach all consent documents, including information sheets and scripts for oral consents.

A consent form will be distributed to literate, French or English-speaking subjects before starting the interview for them to read and sign (see models attached). I will also give a copy of the consent form to key informants by e-mail for their information.

If written consent will not be obtained, justification must be provided.

In the countries I will be visiting (as elsewhere in Africa), oral tradition is strong. This is especially true in rural and/or impoverished urban areas where illiteracy and other cultural elements make people reluctant and/or suspicious toward written forms and formalities. In such circumstances, I will explain the need to obtain enlightened consent to subjects, the relevant key informants and the translator (if any). After

ensuring myself of the subject's understanding of the need to obtain explicit consent by reading and/or referring to my written consent form, I will ask key informants and/or translators to sign the consent form on behalf of subjects.

8. Other Concerns

a) Indicate if participants are a captive population (e.g. prisoners, residents in a center) or are in any kind of conflict of interest relationship with the researcher such as being students, clients, patients or family members. If so, explain how you will ensure that participants do not feel pressure to participate or perceive that they may be penalized for choosing not to participate.

N/A

b) Comment on any other potential ethical concerns that may arise during the course of the research.

N/A

APPENDIX B

**Isabelle Deschamps' 2011 Questionnaires for Human Subjects Research
(approved by McGill University's Research and Ethics Board)**

Réforme du droit commercial en Afrique: un outil de développement économique, mais pour qui? Perspective des femmes entrepreneurs

Plan de Questions no.1 – Femmes entrepreneurs

Profil socioculturel et économique

1. Pouvez-vous me raconter votre parcours?
2. D'où venez-vous? (village, ville)
3. De quelle tribu venez-vous? Quelle est votre origine ethnique?
4. Êtes-vous allée à l'école? Si oui, jusqu'en quelle année? Quel est le dernier diplôme que vous avez reçu?
5. Savez-vous lire et écrire?
6. Avez-vous des enfants?
7. Combien d'enfants avez-vous?
8. Quel âge ont-ils?
9. En voulez-vous d'autres?
10. Vos enfants vous aident-ils avec l'entreprise?
11. Souhaitez-vous qu'ils prennent la relève?
12. Êtes-vous mariée? Votre époux a-t-il d'autres femmes?
13. Votre mari joue-t-il un rôle dans votre entreprise? Si oui, lequel?
14. Appartenez-vous à une religion? Si oui, laquelle?

Profil de l'entreprise et cartographie des pratiques de commerce

15. Votre entreprise est-elle enregistrée? Si oui, où? Depuis quand?
16. Payez-vous une patente? Une licence?
17. Payez-vous une taxe locale ou de quartier?
18. Quelles sont les formalités que vous devez remplir pour vous conformer à la loi?
19. Pouvez-vous me décrire votre commerce?
20. Le commerce dans lequel nous sommes est-il votre seul commerce?
21. Quels produits vendez-vous?

22. D'où viennent vos produits / les matériaux et l'équipement nécessaires pour votre entreprise? Comment vous fournissez-vous? Où allez-vous chercher vos produits/les matériaux et l'équipement nécessaire pour votre entreprise?
23. Où, comment et qui vous a appris votre métier, votre art?
24. Avez-vous des employés? Avec qui travaillez-vous?
25. Comment avez-vous financé votre entreprise (famille (au Bénin/Cameroun et à l'étranger), amis, banque, tontine, héritage, subvention non-gouvernementale, économies sur salaires)?
26. Faites-vous partie d'une tontine?
27. Utilisez-vous la tontine journalière?
28. Avez-vous un compte bancaire?
29. Qui s'occupe de votre comptabilité?
30. Avez-vous déjà fourni une garantie (équipement, magasin, autre) pour obtenir du financement?
31. Faites-vous partie d'une association, d'un groupe ou réseau commercial (au marché ou ailleurs)? Êtes-vous membre d'une chambre de commerce?
32. Quelle est la place de la religion dans vos affaires? Influence-t-elle vos pratiques de commerce? Vous permet-elle ou vous empêche-t-elle de mener certaines de vos activités?
33. Qui s'occupe de vos enfants lorsque vous travaillez?
34. Quelles difficultés confrontez-vous dans le cadre de vos activités commerciales?
35. Avez-vous déjà eu des disputes avec des fournisseurs, autres commerçants ou clients? Si oui, comment les avez-vous réglées?
36. Quels sont vos objectifs et plans pour votre commerce?

OHADA

37. Connaissez-vous l'OHADA? Si oui, que connaissez-vous de l'OHADA?

Plan de Questions no.2 – Hommes entrepreneurs

Profil socioculturel et économique

1. Pouvez-vous me raconter votre parcours?
2. D'où venez-vous? (village, ville)
3. De quelle tribu venez-vous? Quelle est votre origine ethnique?
4. Êtes-vous allée à l'école? Si oui, jusqu'en quelle année? Quel est le dernier diplôme que vous avez reçu?
5. Savez-vous lire et écrire?
6. Avez-vous des enfants?
7. Combien d'enfants avez-vous?
8. Quel âge ont-ils?
9. En voulez-vous d'autres?
10. Vos enfants vous aident-ils avec l'entreprise?

11. Souhaitez-vous qu'ils prennent la relève?
12. Êtes-vous marié? Combien de femmes avez-vous?
13. Votre femme joue-t-elle un rôle dans votre entreprise? Si oui, lequel?
14. Appartenez-vous à une religion? Si oui, laquelle?

Profil de l'entreprise et cartographie des pratiques de commerce

15. Votre entreprise est-elle enregistrée? Si oui, où? Depuis quand?
16. Payez-vous une patente? Une licence?
17. Payez-vous une taxe locale ou de quartier?
18. Quelles sont les formalités que vous devez remplir pour vous conformer à la loi?
19. Pouvez-vous me décrire votre commerce?
20. Le commerce dans lequel nous sommes est-il votre seul commerce?
21. Quels produits vendez-vous?
22. D'où viennent vos produits / les matériaux et l'équipement nécessaires pour votre entreprise? Comment vous fournissez-vous? Où allez-vous chercher vos produits/les matériaux et l'équipement nécessaire pour votre entreprise?
23. Où, comment et qui vous a appris votre métier, votre art?
24. Avez-vous des employés? Avec qui travaillez-vous?
25. Comment avez-vous financé votre entreprise (famille (au Bénin/Cameroun et à l'étranger), amis, banque, tontine, héritage, subvention non-gouvernementale, économies sur salaires)?
26. Faites-vous partie d'une tontine?
27. Utilisez-vous la tontine journalière?
28. Avez-vous un compte bancaire?
29. Qui s'occupe de votre comptabilité?
30. Avez-vous déjà fourni une garantie (équipement, magasin, autre) pour obtenir du financement?
31. Faites-vous partie d'une association, d'un groupe ou réseau commercial (au marché ou ailleurs)? Êtes-vous membre d'une chambre de commerce?
32. Quelle est la place de la religion dans vos affaires? Influence-t-elle vos pratiques de commerce? Vous permet-elle ou vous empêche-t-elle de mener certaines de vos activités?
33. Qui s'occupe de vos enfants lorsque vous travaillez?
34. Quelles difficultés rencontrez-vous dans le cadre de vos activités commerciales?
35. Avez-vous déjà eu des disputes avec des fournisseurs, autres commerçants ou clients? Si oui, lesquelles et comment les avez-vous réglées?
36. Quels sont vos objectifs et plans pour votre commerce?

OHADA

37. Connaissez-vous l'OHADA? Si oui, que connaissez-vous de l'OHADA?

Plan de Questions no.3 – Juristes (Avocats et Professeurs)

Pratique

1. Pouvez-vous me décrire brièvement votre pratique (type de clients (femmes, hommes, PME, multinationales, locaux et internationaux), litige versus matière non-contentieuses, types de dossiers)?
2. Dans le cadre de votre pratique, êtes-vous porté à utiliser le droit OHADA?
3. Si oui, quels Actes utilisez-vous le plus souvent?
4. Avez-vous noté des difficultés d'application des Actes par rapport aux pratiques locales?
5. Que pensez-vous des nouveaux Actes?
6. Êtes-vous en mesure de comparer l'ancien et le nouveau régime?
7. Où avez-vous fait vos études en droit?
8. Avez-vous parfois, fréquemment recours à la coutume ou à des règles de commerce informelles pour régler les litiges de vos clients ou conclure des transactions?
9. Quels sont selon vous les plus grandes avancées (ou succès) et les principales obstacles (difficultés) du droit OHADA?
10. Pouvez-vous m'indiquer dans un ordre de grandeur, qui sont selon votre expérience, les principaux bénéficiaires du droit OHADA?
11. Voir page 9 du guide introductif OHADA : que pensez-vous de l'énoncé sur les difficultés des systèmes de justices et en quoi la situation a-t-elle changé (ou non) avec les nouvelles règles OHADA?

Plan de Questions no.4 – Employés OHADA

1. Pouvez-vous me décrire brièvement ce que vous faites à l'ERSUMA/au Secrétariat/le travail du Secrétariat?
2. Qui sont les principaux bailleurs de fonds actuels de l'OHADA?
3. Y a-t-il des groupes de pressions ou des lobbys qui exercent des activités avec l'OHADA?
4. Êtes-vous au courant de consultations avec le public qui ont été tenues par l'OHADA ou l'une de ses institutions dans le cadre de la rédaction des Actes Uniformes? Si oui lesquels et quand?
5. Dans quels domaine(s) du droit OHADA êtes-vous le plus impliqué?
6. Avez-vous noté des difficultés d'application des Actes par rapport aux pratiques locales?
7. Que pensez-vous des nouveaux Actes?
8. Êtes-vous en mesure de comparer l'ancien et le nouveau régime?
9. Quelles sont selon les perspectives d'avenir du régime OHADA?
10. Quels sont selon vous les plus grandes avancées (ou succès) et les principales obstacles (difficultés) du droit OHADA?
11. Je comprends qu'actuellement l'organisation travaille à la rédaction d'Actes Uniformes sur le droit du travail, le droit des contrats et le droit de la

- consommation. Êtes-vous impliqué dans ces travaux ou êtes-vous en mesure de m'indiquer comment et par qui se font ces travaux?
12. Êtes-vous au courant d'autres Actes Uniformes en cours de préparation? Si oui, lesquels et qui est chargé de leur rédaction?
 13. Qui sont les principaux partenaires de l'OHADA (États, organisations) du point de vue politique, matériel et financier?
 14. Pouvez-vous m'indiquer dans un ordre de grandeur, qui sont selon votre expérience, les principaux bénéficiaires du droit OHADA?
 15. ERSUMA : Pouvez-vous m'indiquer environ combien d'activités de formation est-ce que l'ERSUMA a organisé au cours des deux dernières années? Quel était le public cible et le public présent?

Plan de Questions no.5 – Employés Chambres de commerce

1. Pouvez-vous me décrire brièvement ce que vous faites à la Chambre et ce que la Chambre fait au Bénin/Cameroun?
2. Qui sont vos membres? (compagnies locales, PME, grosses entreprises, étrangères, locales)
3. Y a-t-il des groupes de pressions ou des lobbys qui exercent des activités auprès ou avec vous? Si oui, lesquels? Quels sont les dossiers principaux?
4. J'imagine que vous connaissez l'OHADA? Êtes-vous en mesure de m'indiquer si le régime a selon vous, été bénéfique ou n'a pas d'effet pour vos membres?
5. Êtes-vous en mesure de comparer l'ancien et le nouveau régime?
6. Quelles sont selon les perspectives d'avenir du régime OHADA du point de vue de la Chambre? De ses membres?
7. Quels sont selon vous les plus grandes avancées (ou succès) et les principales obstacles (difficultés) du droit OHADA?
8. Pouvez-vous m'indiquer dans un ordre de grandeur, qui sont selon votre expérience, les principaux bénéficiaires du droit OHADA?

APPENDIX C

Isabelle Deschamps' 2011 Project Description and Consent Forms (Approved by McGill University's Research and Ethics Board and signed by Subjects interviewed)



Institut de Droit Comparé, Faculté de Droit
3644, rue Peel
Montréal, Qc
Canada H3A 1N9

Isabelle Deschamps
Candidate au LLM
Tél. (+1) 514 663 7521
Télééc. (+1) 514 528 7697
Isabelle.deschamps2@mail.mcgill.ca

“Réforme du droit commercial en Afrique : un outil de développement socioéconomique, mais pour qui ? Perspective des femmes commerçantes”

- Description du Projet de Recherche et Consentement -

Description du projet de recherche

1) Titre du projet

“Réforme du droit commercial en Afrique : un outil de développement socioéconomique, mais pour qui ? Perspective des femmes commerçantes”

2) Chercheure et Superviseur

Recherche menée par : Isabelle Deschamps, Candidate au LLM
Institut de Droit Comparé – Université McGill
Courriel : isabelle.deschamps2@mail.mcgill.ca
Tél. : (+1) 514 663 7521

Sous la supervision du: Professeur Roderick A. Macdonald
Faculté de Droit – Université McGill
Courriel : roderick.macdonald@mcgill.ca
Tél. : (+1) 514 398 8914

3) Description et Objectifs de recherche

Cette recherche vise à explorer la relation entre la réforme du droit commercial entreprise par l'OHADA, les pratiques d'affaires informelles et le statu socioculturel et économique des femmes commerçantes au Bénin et au Cameroun.

Plus particulièrement, les objectifs de recherche sont de : (1) peindre le profil socioculturel et économique de femmes entrepreneures au Bénin et au Cameroun; (2) définir les pratiques de commerce des femmes entrepreneurs au Bénin et au Cameroun; (3) déterminer comment les réalités socioculturelles et économiques influencent les pratiques de commerce des femmes au Bénin et au Cameroun; (4) déterminer si le droit commercial formel (OHADA) a un impact sur la façon dont les femmes commerçantes exercent leurs activités au Bénin et au Cameroun; (5) identifier les dichotomies pouvant exister entre le droit formel OHADA et les règles informelles suivies ou créées par les commerçants et commerçantes locaux.

4) Participation à la recherche

Je vous demande de m'accorder une à deux entrevues d'environ une heure afin que je vous pose des questions liées aux objectifs de recherche décrits si haut. Le lieu de l'entrevue est à votre choix.

5) Enregistrement audio, vidéo et photos

Si vous y consentez, j'enregistrerai l'entrevue à l'aide d'un appareil audio. Seuls mon superviseur le Prof. R.A. Macdonald et moi-même aurons accès direct à ces enregistrements. Ils seront utilisés strictement au soutien de mes travaux de maîtrise et de doctorat, de la rédaction d'articles académiques et de la présentation de conférence.

Si vous le voulez, je prendrai une ou deux photos ou prendrai un court enregistrement vidéo de vous et de son environnement de travail. Ces photos et vidéos constitueront d'une part des souvenirs de rencontre et d'autres part, sujet à votre consentement, pourront être utilisés dans le cadre de présentation en classe, à des conférences ou incluses en annexe dans l'une ou l'autre de mes thèse de maîtrise et de doctorat.

6) Confidentialité

Vous serez désignés par un pseudonyme dans mes thèses, publications et conférences afin de maintenir la confidentialité de vos noms et prénoms. Toute référence directe à votre témoignage le sera via ce pseudonyme.

Sous réserve de l'utilisation prévue au point 14 ci-haut, tout enregistrement audio, vidéo ou photographique de l'entrevue ainsi que toutes notes ou transcriptions y afférentes (incluant ce formulaire signé) seront enregistrés dans mon ordinateur personnel lequel est muni d'un mot de passe ou seront conservés dans un tiroir à loquet.

7) Participation volontaire

La participation à ce projet de recherche est sur base volontaire et sans compensation. Dans l'éventualité où vous souhaitez mettre fin à une entrevue ou ne désiriez plus participer au projet, je vous prie de m'en aviser rapidement. Selon vos instructions, toute information écrite, audio, vidéo ou photographique récoltée à votre sujet pourra être détruite.

8) Diffusion des résultats de recherche

J'utiliserai l'information récoltée dans le cadre de cette recherche au soutien de ma thèse de maîtrise et de mes travaux de doctorat. Il est également possible que je réfère à l'information dans des articles académiques, des conférences ou des présentations en classe.

9) Consentements

Je comprends l'information énoncée ci-haut et je consens à participer _____
(initiales)

Je consens à ce que l'entrevue soit enregistrée sur équipement audio _____
(initiales)

Je consens à ce que certains extraits vidéo soient filmés _____ (initiales)

Je consens à ce que des photos soient prises de moi-même et de mon environnement de travail et/ou du lieu de l'entrevue _____ (initiales)

Je consens à ce que tout enregistrement audio _____ ou vidéo _____ effectué, ou photographie _____ prise dans le cadre de mon entrevue soient utilisés dans des articles ou présentations y afférentes _____ (initiales)

_____	_____	

Nom du participant (lettres moulées)	Date	Signature du participant

_____	_____	

Chercheur	Date	Signature de la chercheur

Pour toute question, commentaires ou préoccupation concernant vos droits à titre de participant(e) au présent projet de recherche, veuillez contacter l'Officier à l'Éthique et à la Recherche de McGill au (+1) 514 398 6831 ou à lynda.mcneil@mcgill.ca.



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(initiales)

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Je consens à être identifié(e) dans les travaux de recherche et/ou articles et présentations y afférentes _____ (initiales)

Je consens à ce que tout enregistrement audio _____ ou vidéo _____ effectué, ou photographie _____ prise dans le cadre de mon entrevue soient utilisés dans des articles ou présentations y afférentes _____ (initiales)

Nom du participant (lettres moulées)

Date

Signature du participant

____ Isabelle Deschamps _____

Chercheure

Date

Signature de la chercheure

Pour toute question, commentaires ou préoccupation concernant vos droits à titre de participant(e) au présent projet de recherche, veuillez contacter l'Officier à l'Éthique et à la Recherche de McGill au (+1) 514 398 6831 ou à lynda.mcneil@mcgill.ca.

APPENDIX D

**Socio-Cultural Profiles of Women Entrepreneurs in Benin:
Tabulated Summary of Data Collected from Sixteen (16) Women between 19 June
and 5 July 2011**

<u>Pseudonym</u>	<u>Age</u> *	<u>Occupation</u>	<u>Ethnic Origin</u>	<u>Child- ren</u>	<u>Spousal Status</u>	<u>Education & Literacy****</u>	<u>Faith</u>
1. Augustine	61	Merchant	Fon	2 girls	Widow (Monogamous)	Yes. (Primary; Secondary; Midwife training)	N/A**
2. Bernadette	30	a) Seller	Dendi	1 boy	Common Law spouse	Yes. (Primary; secondary; Technical training; university)	N/A
		b) Tourist Agent (own company);					
		c) Guesthouse (co-owner);					
		d) Importer					
3. Clarisse	55	Merchant	Fon- Adja	6 (3 girls, 3 boys) 2 still at home	N/A	Yes. Limited literacy. (Primary: CE1) Learned to trade while working with merchant mother from age 15.	N/A
4. Divine	38	a) Juice Producer and Wholesaler	N/A	2 boys	Married.	Yes. (Primary, Secondary: Seconde) (Dressmaking training)	N/A
		b) Dressmaker					

5.Estelle (Gilberte)	43	Merchant (Also full-time Accountant-Company manager)	Fon	1 girl	Married (Polygamous traditional (not recognised by the State))	Yes. (Primary; Secondary: 3e; Technical education-accounting and; university: business law)	Catholic and traditional (non-vooodoo)
6.Florence	+/- 40	Merchant (producer/seller)	Fon	3 (2 girls 1 boy)	Married (Monogamous)	Yes. (Primary; Secondary: 4e; Hairdressing training)	Catholic (Shop closed on Sunday)
7.Gloria	+/- 35	Buyer-Seller	Fon	1 boy	Divorced	Yes. On-the-ground learning of current activity.	N/A
8.Hermine	+/- 55	Merchant	Tofin	7 children	Married (Polygamous)	No. Learned to trade with mother.	Catholic
9.Isabelle	+/- 55	Merchant	Togolese	2 children (1 girl and 1 boy)	Married (Monogamous)	Yes (Primary; secondary: unfinished; Hairdresser training) Literate	Catholic
10.Jacqueline	28	Merchant	Fon	3 boys	Married	Yes. (Primary; Secondary: 4e) [Trade taught by mother; started helping mother at 10 years old; full-time at 16]	N/A
11. Kemi	42	Merchant	Fon	3 (1 girl; 2 boys)	Married	Yes. (Primary; secondary) Sister and	Catholic (Does not work on

						niece initiated her to market sale	Sundays)
12. Lydia	32	Merchant	Fon	3 (1 boy;	Separated (Polygamous ; traditional marriage) [Now caring for children by her own means]	Yes. (Primary; secondary: 3e; secretary diploma) Learned to trade with mother and sister. [Husband required that she stop secretarial work because of stigma affecting secretaries]	Catholic and traditional
13. Monique	36	Merchant	Fon	4 (2 girls, 2 boys)	Married	Yes. (Primary: CE2) Grandmother and niece taught her trade.	Christian (Baptist, Assemblée de Dieu)
14. Nadège	56	Merchant	Fon	3 (2 boys, 1 girl)	Married (monogamous)	Yes. (Primary; secondary; university) Learned trade with grandmother	N/A
15. Odile	47	Merchant	Fon	2 (1 girl and 1 boy)	Married (monogamous)	Yes. (Primary; secondary)	Christian [Went on to pray for at least 30 min after interview]
16. Prisca	33	Merchant	Fon	3 (2 boys; 1 girl)	Married	No. Learned trade with her aunt. Started going to Dantokpa at	Catholic

						3 years old.	
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* Information regarding age is provided for general reference only and should not be held to necessarily reflect Western age calculations.

** The use of “N/A” refers to questions that were either not asked or not answered.

***** The school system in Benin consists of the following:

- Primary school: kindergarten, CIL, CI, CP, CE1, CE2, CM1, CM2.
- Secondary school: 6e, 5e, 4e, 3e, seconde, première, terminale. BEPC exam (Brevet d'étude du premier cycle du second degré).
- University.

APPENDIX E-1

Map of Women's Businesses and Commercial Practices in Benin—Tabulated Summary of Data Collected from Sixteen (16) Women Entrepreneurs in Benin from 19 June to 5 July 2011

<u>Pseudonym</u>	<u>Fiscal Charges Paid</u>	<u>Other Costs</u>	<u>Book-keeping and Accounting</u>	<u>Holds Inventory</u>	<u>Family members in business</u>	<u>Childcare during business hours</u>
1. Augustine	a) Patent or market selling permit	Rent; Customs clearance; Tax on imported products; Incentive to customs' agent	No.	No (lack of time)	Sister: (salaried vendor)	1 housemaid
	b) N/A	N/A	N/A	No.	None.	
	c) No tax or charge		No.	N/A		
	d) No tax or charge		N/A	N/A	Daughter (unsalaried)	
2. Bernadette	a) City hall selling permit	Rent	N/A	Yes.	None.	Housemaid
	b) Patent (Tax paid to Finance ministry); workers social benefits	Rent; Electricity; Water; Salaries	Yes (Has accountant)	Yes.	None.	
	c) N/A	N/A		N/A	Spouse (co-owner)	
	d) N/A	N/A		N/A	Spouse (business partner)	
3. Clarisse	Patent Tax City hall permit	Rent	Yes (herself)		1 daughter now in same trade as her;	N/A

					Currently training another of her daughters; No son meant to follow her steps because this is a female industry	
4.Divine	City hall permit	Electricity	N/A	N/A	Spouse (business partner; co-owner)	N/A
5.Estelle	None.	Electricity	Yes (herself)	Yes.	None.	Sister; daughter helps when at home
6.Florence	City hall selling permit; Tax	Electricity Water Rent	Yes (herself)	Yes.	None.	Closed hair salon in Cotonou and opened shop in Calavi to care for children. Housemaid
7.Gloria			Yes (herself and accounting firm)	Yes.	None.	Herself (flexible schedule)
8.Hermine	None.	N/A	No.	No.	Eldest daughter (sells fish with her)	On her back and takes them with her.
9.Isabelle	City hall sale permit	Customs clearance; Tax on imported products;	N/A	N/A	N/A	N/A
10.Jacqueline	Tax Market	Rent	Only at year-end	Only at year-end.	Expenses shared	1 housemaid

	Penalties (Sogema)				with sister (Lydia) Children not to take over business because all male (and market sale to be done by women)	
11. Kemi	Patent [No tax to be paid yet because only recent registration]		Yes (herself)	Yes (herself)	[Does not want children to help before BAC] Nephew assists	Housemaid (niece)
12. Lydia	Tax Market selling permit/ Penalty	Rent	No [All calculations in her head]	No	Expenses shared with sister (Jacqueline) [Son not to help with her business because is male]	Cousin takes care of them
13. Monique	Patent	Rent Storage charge Security guard Electricity Water	Yes (has accountant)	Yes	N/A	Salaried maid
14. Nadège	None yet (has not been identified by State agents yet)	Electricity Fixed costs for setting up home	Yes (herself)	Yes	None.	Housemaids

		store				
15.Odile	Tax Market tax [Says that union and association lobbied and taxes were decreased] Patent (Sogema, yearly) Market tax (Sogema, monthly)	Security Guard fees	Yes (herself or helper (sister))	N/A	Children and husband sometimes help during their holiday and during busy periods	Housemaids
16.Prisca	Tax	Rent			No wish that children pursue her business	Sister

APPENDIX E-2

Map of Women's Business and Commercial Practices in Benin—Tabulated Summary of Data Collected from Sixteen (16) Women Entrepreneurs in Benin from 19 June to 5 July 2011 (*Continued*)

<u>Pseudonym</u>	<u>Registered(R) or Non-registered Business (NR)</u>	<u>Type and size of business</u>	<u>Products</u>	<u>Product Sourcing</u>	<u>Business Location</u>
1. Augustine	NR (except for a failed one-shot purchase)	Retail Sale (1 market shop; 2 market storage rooms) Small business (2 full-time unsalaried helpers (maids); 2 occasional unsalaried helpers; 1 salaried helper (sister))	Miscellaneous household goods*** Origin: varied.	Lagos, Nigeria (Bought products, cleared them through customs and transported them herself) Sourcing every 1 to 3 days.	Dantokpa market, Cotonou
	NR	Retail Sale (home shop and home storage) Small business (no assistance)	Wood Origin: Benin	Home delivery Sourced on demand.	Cotonou
	NR	Retail Sale (Home shop and home storage) Very small business (1 unsalaried helper (maid))	Miscellaneous household goods* Origins: varied.	Dantokpa Market, Cotonou. Sourced from left-over Dantokpa market shop products	Cotonou
	NR	Retail Sale (peddling and home storage) Small business (2 unsalaried	Loincloths Origin: mostly China	Dantokpa Market, Cotonou. Sourced every 1 to 4	Cotonou

		helpers (maids))		days.	
2. Bernadette	NR	Food and phone services (Stall) Small business (1 salaried employee)	Food and phone products (Sandwiches) Origin: Homemade and varied.	Market Sourced Daily	Cotonou
	R	Services Medium business (NGAE) (+- 50 occasional contractors)	Tourism in Benin	Internet and international on-site marketing	St-Michel neighbourhood, Cotonou
	To be R	Wholesale and Retail Sale Medium business (<i>prospective</i>)	Food products (Juice) Origin: Portugal	Portugal To be sourced (<i>prospective business</i>)	Cotonou
	To be R	Services Small business (1 salaried employee)	Tourist Accommodation	Lomé, Togo	Lomé, Togo
3. Clarisse	R	Wholesale and Retail Sale (2 market shops) Small business (1 salaried employee)	Loincloth Origin: China	Importers and wholesalers (Indian, European) located in Cotonou	Cotonou, Dantokpa market and Misebo market
4. Divine	NR	Wholesale (home production, home storage and home sale). Small business (1 salaried employee and 1 unsalaried helper (maid))	Food products (Lemon and Hibiscus Juice; Ice)	Dantokpa market Sourced every one to three months.	Cotonou, Ladjì

	NR	Sowing (home production and sale) Small business (no assistance)	Clothes Origin: homemade		
5.Estelle	NR	Retail Sale (home production and home sale) Very small business (1 unsalaried helper (sister))	Food products (Lollypops and ice cream)	Market	Cotonou
6.Florence	NR	Retail Sale (one shop) Small business (no assistance)	Hair and beauty products Loincloths Origin: Mostly Côte d'Ivoire and Nigeria. Some loincloths from China.	Dantokpa Market	Calavi
7.Gloria	R	Services and Wholesale on demand Small business, NGAE (1 to 3 occasional contractors)	Furniture Origin: West Africa	Nigeria, Togo, Burkina Faso, Ghana, Benin. Sourced on demand.	Cotonou
8.Hermine	NR	Retail Sale (home and market sale) Small business (occasional unsalaried helper (daughters))	Food products (Fish) Miscellaneous household products* ** Origin:	Husband's catches and/or fish purchased on neighbouring lake (fish) Dantokpa market (miscellane	Aïmlonfidé And Dantokpa market (Cotonou)

			Benin and other.	ous) Sourced daily.	
9. Isabelle	R (loincloth) NR (other textiles and accessories)	Retail Sale (peddling and home storage) Small business (no assistance)	Textile products and accessories (Shoes, clothing, loincloth, accessories, hair products)	Lomé, Togo; Lagos, Nigeria (Buys goods, clears them through customs and transports them herself or uses driver services) Sourced approximately bi-monthly	Cotonou including at Dantokpa market
	NR (baked goods)	Food services (home production and home sale) Small business (1 to 2 unsalaried helpers (maids))	Prepared foods Origin of ingredients: Benin and other	Dantokpa market Sourced daily	Cotonou
10. Jacqueline	NR	Retail Sale (small market shop) Small business (co-runs with sister)	Foods products (pasta, etc.) Origin: Italy, Côte d'Ivoire, other	Dantokpa market	Dantokpa market, Cotonou
11. Kemi	R (since beginning 2011)	Retail Sale (small market shop, also storage shop) Small business: 1 salaried helper and	Loincloth Origin: China, UK, Côte d'Ivoire	Cotonou Wholesalers Sourced every 3 months	Cotonou, Misebo market

		occasional helpers (nephews)			
12. Lydia	NR	Retail Sale (small market stall) Small business (co-runs with sister)	Food products (candy) Origin: Lomé, Togo; Ghana; China.	Dantokpa market wholesalers Sourced every 5 days	Cotonou, Dantokpa market
13. Monique	R	Wholesale (market boutique-shop and storage store) Medium business (3 salaried employees)	Loincloth	N/A	Cotonou, Misebo market
14. Nadège	NR	Retail Sale (home boutique and home storage) Small business (no assistance)	Miscellaneous household products	Wholesalers in Dantokpa market	Calavi
	N/A	Retail Sale Small business (no assistance)	Loincloth	Dantokpa market Sourced every 3 months	
15. Odile	NR but in course of formalising [Explains that used to be suspicious of formalising because of heavy fiscal burden but following lobbies of her association, she believes this burden has diminished and is now keen to	Retail and Wholesale (market boutique shop and storage room) Medium business (4 unsalaried helpers (maids) [aged 10 to 15]	School furniture; Loincloth, Beverages , liquidated products (for low season)	Lebanese wholesalers in Cotonou; Lagos, Nigeria; Lomé, Togo; Ghana (no taxes in these countries) Sourced regularly [collects goods herself or uses driver	Cotonou, Dantokpa market

	formalise to access Chamber of Commerce Networks]			or teams up with others to buy wholesale]	
16.Prisca	R	Retail Sale (small market shop and storage shop) Small business (no assistance – lacks funds)	Loincloth Origin: China, Côte d'Ivoire	Associates with other merchants to order and pay for textile containers.	Cotonou, Misebo market

*** The term « Miscellaneous » is used to translate the word « Divers » a term established among the businesswomen interviewed in support of this thesis. Selling « divers » or « miscellaneous » products thus refers to the sale of a variety of small everyday use products (often non-perishable) such as soap, hygienic paper, milk powder and other dry foods, rice, sodabi (alcohol), etc.

SOGEMA: Société de gestion des marchés autonomes à Cotonou

APPENDIX E-3

Map of Women's Business and Commercial Practices in Benin—Tabulated Summary of Data Collected from Sixteen (16) Women Entrepreneurs in Benin from 19 June to 5 July 2011 (*Continued*)

<u>Pseudonym</u>	<u>Bank Account</u>	<u>Sources of Financing</u>	<u>Associations</u>
1. Augustine	No	Family (husband) Tontines (monthly/10 female family members –monthly/ larger, mixed) Benefits derived from sale of wood State widow pension	None.
2. Bernadette	Yes	Family (father, spouse) Savings from previous small economic activities; Bank (Loans; Other financing; secured by her land title) [Interested in microcredit; no tontine because unable to save to pay tontine]	Not currently but interested in joining Beninese women entrepreneurs association
3. Clarisse	Yes	Family (mother) Credit purchases (reimburses within 4 weeks) [Attempted to borrow from bank but could not provide land title as warranty – the process of registering property to obtain title (2M FCFA)] No tontine.	None.
4. Divine	N/A	Credit purchases. Tontine (mixed; weekly; 5000 FCFA; 42 members; not within neighbourhood)	None.
5. Estelle	N/A	Savings from student scholarship. [No tontine]	None.

6.Florence	Yes	Own savings from previous economic activities (earned while working as hairdresser for 1 year in parents' home). Family (husband) 2 Tontines (Daily, 2000FCFA, monthly collection. Daily, 500FCFA, yearly collection) [Used Micro-credit (500,000 loan secured by title on parts of husband's car) for past economic activity]	None.
7.Gloria	Yes	Bank (loans; credit margins). Tontine (mainly for personal purposes).	None.
8.Hermine	No	Credit purchases Personal Savings Tontines (daily, weekly, monthly) Microcredit (30,000 FCFA, 50,000 FCFA)	None.
9.Isabelle	Yes (but empty)	Family (husband) Tontine (monthly, 23 members, 25,000 FCFA) Micro-credit (75,000 FCFA)	Yes. Association des artisans pour le bien-être économique et social (economic mutual assistance and support to political parties)
10.Jacqueline	N/A	Family (husband) Own savings from previous small economic activity Tontine (daily, 500 FCFA, collects year-end) (business and personal purposes)	None.
11. Kemi	Yes	Own savings Credit purchased Tontine (monthly, 200 FCFA)	None. [Links market associations with prostitution, adultery, lies]
12. Lydia	No.	Own savings from previous small economic activities	None.

		3 Tontines (daily: 3000 FCFA collects month-end; 1000 FCFA; 500 FCFA)	
13.Monique	Yes.	Own savings. Family (niece) Bank (loans; land title and proof of funds required as security; personal security) Credit purchase (of containers of cloth/textile) (reimburses within one to two months) No longer in tontine.	N/A
14.Nadège	Yes but has now closed commercial account. Has personal account.	Salary and own savings from previous employment and economic activities Tontine (monthly, 50,000 FCFA, 10 members)	None.
15.Odile	Yes	Own savings from previous economic activities Micro-credit (PAPME): condition: land title/living permit Tontine (2 monthly/30 members, 5 daily, weekly) Wishes to obtain bank loan once formalised [Insists on importance of good financial and personal relations with financing structures; has her “tontiniers”]	Market Union (international union: Street Weet)[developed her network and awareness to her rights]. Market women association (for sourcing products and other) [Strong social function; as well as lobbying]
16.Prisca	Yes	Family (aunt) 2 Tontines (Monthly, female, 20 members, monthly collection, 100,000 FCFA and 200, 000 FCFA) [Not able to provide land title to bank to obtain loan]	None.

APPENDIX E-4

Map of Women's Business and Commercial Practices in Benin—Tabulated Summary of Data Collected from Sixteen (16) Women Entrepreneurs in Benin from 19 June to 5 July 2011 (*Continued*)

<u>Pseudonym</u>	<u>Litigation and Disputes</u>	<u>Main business difficulties</u>	<u>Business objectives</u>	<u>OHADA awareness</u>
1. Augustine	Voodoo spells; harsh relations with competitors in market	Product sourcing in Nigeria (customs clearance)	Pursue Wood and Loincloth sale. Stop miscellaneous household products product sale. Hopes that children will help more.	No
2. Bernadette	No.	Tourism: rainy season paralyzes her business. Tourism: Strong Competition for business, clients. Needs access to government agencies.	Develop connections within State apparatus to ensure clients and business in tourism company. Develop juice and guesthouse businesses.	Yes. (During studies; OHADA forms to be filled for registering business)
3. Clarisse	None.	Increased competition over past years and decreased sales. Lacks cash flow to purchase wholesale. Heavy fiscal costs (tax, city hall permit, patent)	Daughters to take over business. Open third boutique-shop.	No.
4. Divine	No.	Lacks help in dressmaking activities. Rainy season paralyzes juice sales.	Wants to expand juice sale business	No.
5. Estelle	Small problems with children who do not pay the full (small) price of products.	Increased competition in recent 3 years. Rainy season paralyzes ice cream and lollypop sales but electricity	Expansion and diversification of products	Yes (during university studies)

		(freezer) costs remain.		
6.Florence	None.	Product price fluctuations; Rising prices	Expand.	No.
7.Gloria	N/A	Accessing public sector clients (need to develop network and connections)	Expand public sector clients.	N/A
8.Hermine	Informal arguments between women competing to purchase fish from fishermen coming back from lake.	Impossibility to predict sales	In God's hands.	No.
9.Isabelle	None.	Access to capital. Collecting payment from clients requiring credit sale.	Obtain capital to be able to sell products in Abuja, Nigeria.	No.
10.Jacqueline	Informal arguments with clients about prices.	Access to cash flow to buy more products. Clients not reimbursing Credit sales	Sell elsewhere than in market (in city or from her home); And/or work for NGO	No.
11. Kemi	None. Informal discussions with clients buying with credit.	Low sales; lack of clients. Rent too high. Strong competition, in particular from foreigners (Chinese and Indian)	Expand to new products	None.
12. Lydia	Clients often steal products and this leads to disputes.	Credit sales (sometimes even a pack of gum) not reimbursed [some reimburse and some don't] Many Products get wasted because of heat. Clients stealing products.	Expand.	None
13.Monique	N/A	Access to capital. Heavy and multiple	In God's hands. [After interview,	No

		bank loan conditions Heavy tax burden Market has been slow over past 3 years.	interviewee went on to pray with female colleagues for better business; interviewee was fasting for this]	
14.Nadège	N/A	Credit sales (loincloth only)	N/A	Slight (heard name when worked for PNUD)
15.Odile	None.	Large cash flow necessary for wholesale savings Slow market (past 10 years) [too many products, too little money!]	Wishes to open up home store and secure funds for her retirement. Eventually leave Dantokpa	No.
16.Prisca	None	Slow market (past 3 years) Difficult to compete with wholesalers – lacks capital to wholesale purchase	Expand.	None.

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