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RESEARCH ARTICLE

The Trap of Path Dependence: A Case Study of OHADA

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Abstract
The Organization for the Harmonization of Business Law in Africa (OHADA) was developed to introduce simple, up-to-date business laws in its member states. It has various goals, including harmonizing business laws, attracting foreign investment in its member states and promoting broader economic integration across Africa. At its initial development stage, OHADA chose a path dependence route, which positively impacted the achievement of some of its initial goals. While OHADA has been widely praised for its efficient business laws, its commitment to path dependence is likely to create a trap for the organization, hindering its further progress. This article analyses the unification of law in African former colonies from the critical perspective of path dependence theory. It examines how OHADA's legal choices have impacted its various objectives at different stages of its development. Ultimately, the article proposes that OHADA amend its legal framework to achieve its broader aspirations.

Keywords: African law; legal evolution; legal pluralism; lock-in; OHADA; path dependence

Introduction

The modern legal world comprises two primary legal systems: common and civil law. While many countries share similar economic and social values, the operation of their legal systems and their approaches to regulating social issues vary significantly, depending on each country's legal heritage.[1] The development of law is a lengthy process, with each step contributing to the formation of legal norms and traditions.[2] The theory of legal evolution examines how law changes over time;[3] based on legal analysis, the evolutionary theory can "predict" future developments in law and the events that may trigger changes.

Path dependence theory is closely related to the theory of legal evolution, which posits that past legal decisions will inevitably influence future legal choices.[4] According to this theory, a country or an international organization with supranational power is bound by its previous legal decisions. Before

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1 P Legrand "European legal systems are not converging" (1996) 45 *The International and Comparative Law Quarterly* 52 at 55–56.

2 The term "legal norm" in the context of this article encompasses legal policies, regulations and rules in the business fields of OHADA member states, as well as the supranational uniform laws of OHADA. There is a distinction between "lock-in" and path dependence in both national and regional contexts. This article will focus on path dependence and lock-ins in the context of the regional organization OHADA, primarily discussing how evolutionary theory, path dependence theory and lock-ins influence the development of OHADA's norms, which are regional supranational laws.

3 G MacCormack "Historical jurisprudence" (1985) 5 *Legal Studies* 251 at 313–15.

4 J Bell "Path dependence and legal development" (2013) 87 *Tulane Law Review* 787 at 788.

colonization, French-speaking African countries developed their own customary and religious laws.[5] By transplanting colonial laws, French colonial powers altered the legal order of African countries, shaping their legal paths. The impact of French civil law in the former colonies depends on the adherence to French legal culture and the prevalence of local customs and traditions.[6] In North Africa, for example, French civil law is mixed with Islamic law and has become deeply embedded in modern legislation.[7]

Compared to the theory of legal evolution, path dependence theory provides insights into why certain laws developed in the manner they did. This theory connects to the concept of "lock-ins", the theory of which examines why certain approaches persist in being preferred, even when they are no longer the most effective or appropriate solutions to social issues.[8] Lock-in theory explores the reasons behind irrational legal choices and economically disadvantageous decisions, and helps explain why following path dependence may create a lock-in effect, leading to a series of decisions that cause regression rather than progress.

Legal pluralism refers to the coexistence of multilayered legal systems that encompass both state formal laws and laws derived from custom, tradition and religion.[9] This concept is often linked to colonization and postcolonial African countries.[10] Colonial powers in Africa aimed to suppress and marginalize customary and traditional laws;[11] instead, colonial laws primarily focused on governance and economic matters.[12] Over time, colonial authorities began to incorporate some customary and religious laws to address local issues.[13] Therefore colonization led to the emergence of multilayered legal systems, with various legal frameworks coexisting in the former colonies.[14] These multilayered systems are still present in those countries.[15]

This article examines how legal evolution and path dependence theories influence the future legal choices of the Organization for the Harmonization of Business Law in Africa (OHADA) and its member states. OHADA was selected as a case study due to its unique background in adopting international instruments, such as its Uniform Act Organizing Securities, which is based on the United Nations Commission on International Trade Law's Model Law on Secured Transactions.[16] Additionally, OHADA distinguishes itself from other African regional organizations by successfully harmonizing business laws among its member states; it has been highly praised for the rapid

5 AN Allott "Towards the unification of laws in Africa" (1965) 14 *The International and Comparative Law Quarterly* 366 at 368.

6 G Mousourakis *Comparative Law and Legal Traditions: Historical and Contemporary Perspectives* (2019, Springer) at 240.

7 Ibid. The term "Islamic law" in this article is used as a general term, which includes sharia law. The major difference between Islamic and sharia law is in their implementation.

8 WB Arthur "Positive feedbacks in the economy" (1990) 262 *Scientific American* 92 at 92; PA David "Clio and the economics of QWERTY" (1985) 75 *The American Economic Review* 332 at 332–37; Bell "Path dependence and legal development", above at note 4 at 794.

9 BZ Tamanaha "The rule of law and legal pluralism in development" (School of Law Legal Studies research paper series, Washington University in St Louis, 1 July 2011) at 8.

10 L Benton *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (2009, Cambridge University Press) at 127–66.

11 A Dieng "ADR in sub-Saharan African countries" in A Ingen-Housz (ed) *ADR in Business: Practice and Issues across Countries and Cultures* (2011, Kluwer Law International) 611 at 613.

12 W Mommsen and JA de Moor *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia* (1992, Berg Publishers) at 1–30.

13 Tamanaha "The rule of law and legal pluralism in development", above at note 9 at 8.

14 BZ Tamanaha "Understanding legal pluralism: Past to present, local to global" (St John's Legal Studies research paper 07-0080, 3 September 2007) at 385.

15 G Woodman "Legal pluralism and the search for justice" (1996) 20 *Journal of African Law* 152 at 152–53.

16 Uniform Act Organizing Securities, adopted 15 December 2010; UNCITRAL Model Law on Secured Transactions, adopted 1 July 2016.

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and successful implementation of business laws.[17] This article aims to explore different angles of regional harmonization in the light of path dependence and how it can affect further development of OHADA.

The primary objective of this analysis is to determine whether following the path dependence route has led to positive outcomes and the fulfilment of OHADA's main goals, or if it has created a trap that has confined OHADA within the French legal framework. The analysis will focus on various of OHADA's objectives, particularly its efforts to facilitate economic development, attract new member states and further harmonize business laws across Africa.[18] The first part of the article will introduce OHADA and its laws, followed by a discussion of the theory of legal evolution and its aims. I will then explore path dependence theory and analyse the concept of "lock-in" in connection with OHADA's legal decisions. Finally, I will assess whether overcoming path dependence is necessary for OHADA and will explore potential solutions to this challenge.

The Organization for the Harmonization of Business Law in Africa (OHADA)

In the postcolonial period in Africa, former French colonies faced the legacy of colonial law, which did not adequately reflect the needs of local businesses.[19] An economic crisis, a lack of investments and the unreliability of law and judicial decisions exacerbated the situation.[20] In response, new postcolonial business laws were implemented in OHADA countries to encourage domestic public investments over foreign ones.[21] The primary rationale of this approach was to regain economic independence from former colonizers and Western donors.[22] However, these countries struggled to attract investments at the national level, resulting in a continued dependence on foreign loans, grants and donations; therefore former colonies remained reliant on their colonizers and Western investments, to a significant extent.[23]

Before the establishment of OHADA, laws in French-speaking African countries were primarily based on outdated colonial legal frameworks that did not adequately address modern commercial issues.[24] Additionally, the application, scope and interpretation of these laws were often questionable. This lack of harmonization among business laws in OHADA member states led to contradictions, creating legal uncertainty and confusion for practitioners attempting to navigate these norms, while in French-speaking African countries, the absence of specialized commercial courts led to inadequate application of business law, and judges often lacked the necessary legal expertise to determine which laws should apply to specific economic activities.[25] In Cameroon, for example, judges have often referred to outdated laws from England and France, despite these laws having been repealed.[26]

17 B Fagbayibo, 'Towards the harmonisation of law in Africa: Is OHADA the way to go?' (2009) 42 *The Comparative and International Law Journal of Southern Africa* 309 at 312.

18 Treaty on the Harmonization of Business Law in Africa, adopted 17 October 2008, entered into force 15 December 2010, preamble and art 53.

19 ND Leno "The Organisation for the Harmonisation of Business Law in Africa (OHADA) system: Overview of some benefits and problem areas" (2018) 2 *International Journal of Advanced Research and Publications* 106 at 106.

20 OHADA "History of OHADA" (2025), available at: <https://www.ohada.org/en/history-of-ohada/> (last accessed 8 October 2025).

21 A Akinsanya "Host government responses to foreign economic control: The experiences of selected African countries" (1981) 34 *International and Comparative Law Quarterly* 770 at 771.

22 S Picciotto "International business and global development" in S Adelman and A Paliwala (eds) *Law and Crisis in the Third World* (1993, Hans Zell Publishers) 152.

23 Akinsanya "Host government responses", above at note 21 at 773–74.

24 CM Fombad "Some reflections on the prospects for the harmonisation of international business laws in Africa: OHADA and beyond" (2013) 59 *Africa Today* 51 at 54.

25 R Beauchard and MJV Kodo "Can OHADA increase legal certainty in Africa?" (World Bank Justice and Development working paper series, 2011) at 6.

26 Ibid.

Additionally, there has been a lack of specialized legislation to govern business-related activities, such as secured transactions, which are essential for economic growth and development.[27]

The diversity and inaccessibility of laws further contributed to legal uncertainty and unpredictability in these countries, and as a result, foreign businesses became hesitant to invest in the economies of French-speaking African countries.[28] Even before the colonial period, the customary and religious laws in French-speaking Africa were diverse and uncodified.[29] Each African country has multiple ethnic groups, each with its own system of customary and religious laws, which makes it difficult to harmonize laws, including commercial laws.[30] The legacy of colonialism further complicated the situation, as African countries were colonized by different powers, each introducing different legal systems.[31] After the end of colonization, many African countries, including OHADA member states, modified their colonial laws and incorporated provisions from various legal traditions and systems.[32] Consequently, it was almost impossible to harmonize such laws under a single framework and establish a unified commercial zone.

To address these issues, former French African colonies agreed that establishing a unified, transnational legal framework would enhance their economic development and promote cross-border commerce and investment.[33] As a result, a new intergovernmental organization with supranational power, OHADA, was established.[34] The Treaty on the Harmonization of Business Law in Africa (the OHADA Treaty) grants OHADA the authority to draft and enact laws in the business field; this in turn can facilitate the economic development of its member states and attract investment.[35] OHADA establishes a unique legal framework for international business that offers coherent modern rules to its member states.[36] It has developed its legal norms – "uniform acts", which are mandatory for all member states, even when they conflict with national legislation.[37]

To date, OHADA includes seventeen countries: Guinea-Bissau, Senegal, the Central African Republic, Mali, the Comoros, Burkina Faso, Benin, Niger, Côte d'Ivoire, Cameroon, Togo, Chad, the Republic of the Congo, Gabon, Equatorial Guinea, Guinea and the Democratic Republic of the Congo.[38] Except for Cameroon, Equatorial Guinea and Guinea-Bissau, all OHADA member states are French-speaking. All the member states follow civil law legal traditions, except for Cameroon, which has a legal system that incorporates English common law and French civil law.[39]

27 Ibid.

28 I Deschamps "Assessing the Organisation pour l'harmonisation en Afrique du droit des affaires' contributions to poverty reduction in Africa: A grounded outlook" (2013) 6 *The Law and Development Review* 111 at 116.

29 G Bamodu "Transnational law, unification and harmonisation of international commercial law in Africa" (1994) 38 *Journal of African Law* 125 at 125.

30 CN Okeke "African law in comparative law: Does comparativism have worth?" (2011) 16 *Roger Williams University Law Review* 1 at 7.

31 R Simo "Law and development à l'Africaine: Evidence from the OHADA's harmonisation process" (2014) 20 *African Yearbook of International Law* 321 at 331.

32 Bamodu "Transnational law, unification and harmonisation", above at note 29 at 128.

33 R Beauchard "OHADA nears the twenty-year mark: An assessment" (2013) 2 *World Bank Legal Review* 323 at 324.

34 Taking into consideration its mandate and supranational power, OHADA itself is by nature an intergovernmental organization. Furthermore, it unites its members by their legal and traditional background, rather than by their regional location; therefore it is debatable whether it is a regional organization, which could be a topic for another article. For better clarification and understanding considering OHADA's mandate, it will be regarded as an intergovernmental organization in this article.

35 Treaty on the Harmonization of Business Law in Africa, above at note 18, preamble.

36 Beauchard "OHADA nears the twenty-year mark", above at note 33 at 326.

37 Beauchard and Kodo "Can OHADA increase legal certainty", above at note 25 at 7; Treaty on the Harmonization of Business Law in Africa, above at note 18, art 10.

38 OHADA "History of OHADA", above at note 20.

39 B Martor et al *Business Law in Africa: OHADA and the Harmonization Process* (2nd ed, 2007, GMB Publishing) at 2; EMK Dissake "The legal system and language policy of Cameroon" in EMK Dissake (ed) *Language and Legal Proceedings: Analysing Courtroom Discourse in Cameroon* (2021, Palgrave Macmillan) 9; N Enonchong "The harmonisation of business law in Africa: Is Article 42 of the OHADA Treaty a problem?" (2007) 51 *Journal of African Law* 95 at 117–21.

The idea of harmonizing business laws in French-speaking African countries was initially discussed in 1963; the political elites largely supported the idea of establishing a legal framework to foster economic growth.[40] The creation of OHADA was also influenced by the economic policies of the free market, which were designed for developing countries. This approach received support from international organizations such as the World Bank Group and the International Monetary Fund, collectively known as the Washington Consensus.[41] The French government also significantly supported the development of OHADA.[42] Additionally, the initial drafts of the OHADA Treaty and OHADA laws were prepared by French legal practitioners, with lawyers from OHADA member states only permitted to provide comments on these drafts.[43]

Research by Kalm indicates that some OHADA laws are literal copies of similar French laws.[44] Thus the Uniform Act on General Commercial Law introduced the *statut de l'entreprenant* (status of entrepreneur), which is based on the French auto-entrepreneur or micro-entrepreneur regime.[45] This status allows individuals to engage in specific businesses through a simple declaration, eliminating the need for a lengthy registration process.[46] Additionally, the provisions related to surety bonds in the Uniform Act Organizing Securities are similar to a French law.[47] The introduction of surety bonds enables a guarantor to fulfil the debtor's contractual obligations if the debtor fails to do so, without informing the creditor.[48] This raises concerns that the development of OHADA was driven by how business legislation in developed countries should function to promote economic growth, rather than focusing on the needs of African states.[49]

Legal evolution and legal development

Legal evolution examines how legal doctrine develops over time and across various legal systems.[50] Its primary objective is to examine and explain changes in the law and the legal system, with a specific focus on the structure of legal development and the factors that influence the advancement of the law.[51] In essence, legal evolution emphasizes the stable elements within specific legal systems and the influences that drive changes within them.[52] It also considers the past as a means to understand how legal systems are structured in the present.[53] Rather than concentrating on specific legal provisions or judicial decisions, legal evolution focuses on the development of an entire legal system or

40 B Walsh "In search of success: Case studies in justice sector development in sub-Saharan Africa" (World Bank Group report, 2001) at 43; Martor et al *Business Law in Africa*, id at 5.

41 M Naim "Fads and fashion in economic reforms: Washington Consensus or Washington confusion?" (2000) 118 *Foreign Policy* 85 at 85–86.

42 G Kalm "Building legal certainty through international law: OHADA law in Cameroon" (Buffett Center for International and Comparative Studies working paper series 11-005, October 2011) at 10–11.

43 Fombad "Some reflections", above at note 24 at 67.

44 Kalm "Building legal certainty", above at note 42 at 12–13.

45 Uniform Act on General Commercial Law (adopted 15 December 2010) at Title II; International Finance Corporation, OHADA Permanent Secretariat "An impact assessment of OHADA reforms: Uniform Acts on commercial, company, secured transactions, and insolvency" (IFC OHADA Investment Climate Program (2007–2017), 2018) at 22.

46 Uniform Act on General Commercial Law, id, art 30.

47 Uniform Act Organizing Securities, above at note 16, cap 1; Civil Code 1804 (France), book IV, title 1.

48 Id, art 3.

49 D Rodrik "After neoliberalism, what?" (paper presented at Alternative to Neoliberalism Conference, Washington DC, 23–24 May 2002) at 1, available at: <https://cemi.ehess.fr/docannexe/file/2787/rodrik2002.pdf> (last accessed 12 March 2026).

50 AC Hutchinson and S Archer "Of bulldogs and Soapy Sams: The common law and evolutionary theory" (2001) 54 *Current Legal Problems* 19 at 31.

51 MacCormack "Historical jurisprudence", above at note 3 at 313–15; RW Gordon "Critical legal histories" (1984) 36 *Stanford Law Review* 57 at 103.

52 MJ Festa "Applying a usable past: The use of history in law" (2008) 38 *Seton Hall Law Review* 479 at 484.

53 SF Deakin "Evolution for our time: A theory of legal memetics" (2002) 55 *Current Legal Problems* 1 at 35.

its components.[54] Therefore it examines the chronological process of how legal concepts are formed through the creation of legal norms and judicial decisions.[55] Hence the central theme of the theory is legal change and the process of law reform.[56]

The legal evolutionary theory serves a predictive function: by analysing past changes, it can explain and predict the structure and development of future laws.[57] Legal evolution can forecast how laws may evolve in different legal systems by examining the creation and development of specific legal rules and frameworks.[58] The theory illustrates how the need for economic development has shaped the formation of OHADA and its laws; however, it does not provide insights into how future challenges will be addressed in OHADA member states or the direction in which the law will evolve. Nonetheless, the predictive aspect of legal evolutionary theory suggests that the demand for economic changes and a lack of investment will further influence the development of OHADA laws.

According to modern evolutionary theory, the most efficient rules emerge from competition and evolution.[59] According to Roe, rules that endure through a lengthy development process are efficient because those that are inefficient do not survive the evolutionary process.[60] Deakin provides a complement to this notion: it is not only the best laws that survive but rather those that can best adapt to the socio-economic environment.[61] Legal development is guided by moral norms and principles that legislators should adhere to, driving both the law and society in a positive direction, regardless of economic or political advantages.[62] By adhering to these normative patterns, legislators shape the law in a particular way, regardless of the predictions of legal evolution.[63] As a result, it is challenging to determine which specific directions will be deemed socially crucial at any given time, making it difficult to predict how laws will develop.

Despite its advantages, legal evolutionary theory has certain drawbacks: it does not provide tools and mechanisms for addressing future legal changes, and it lacks a functional aspect, which is required for law reform to be effective.[64] The predictions and explanations offered by legal evolutionary theory lack a normative basis, only indicating the probability of legal development, without providing clear guidance or justification for the evolution of laws.[65] While the theory can predict that economic growth will influence the further development of OHADA laws, it cannot determine the specific trajectory or form that this development will take: a new Uniform Act, amendments of the existing Uniform Acts or development of a new form of law.

54 SF Deakin "The contract of employment: A study in legal evolution" (2001) 11 *Historical Studies in Industrial Relations* 1 at 29–33; SF Deakin and F Wilkinson *The Law of the Labour Market: Industrialisation, Employment, and Legal Evolution* (2005, Oxford University Press) at 31.

55 M Zamboni "From evolutionary theory and law to a legal evolutionary theory" (2008) 9 *German Law Journal* 515 at 523.

56 G Teubner "Introduction to autopoietic law" in G Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (1987, De Gruyter) 1 at 7–9; JM Smits "The harmonisation of private law in Europe: Some insights from evolutionary theory" (2002) 31 *Georgia Journal of International and Comparative Law* 79 at 81.

57 Hutchinson and Archer "Of bulldogs and Soapy Sams", above at note 50 at 30.

58 OD Jones "Time-shifted rationality and the law of law's leverage: Behavioral economics meets behavioral biology" (2001) 95 *Northwestern University Law Review* 1141 at 1194–95.

59 WM Landes and RA Posner *The Economic Structure of Tort Law* (1987, Harvard University) at 147–50.

60 MJ Roe "Chaos and evolution in law and economics" (1996) 109 *Harvard Law Review* 641 at 641–42.

61 Deakin "Evolution for our time", above at note 53 at 25.

62 HLA Hart *The Concept of Law* (2nd ed, 1961, Oxford University Press) at 132–37.

63 B Ackerman "Revolution on a human scale" (1999) 108 *Yale Law Journal* 2279 at 2294–95.

64 Zamboni "From evolutionary theory and law", above at note 55 at 527; JH Beckstrom *Evolutionary Jurisprudence: Prospects and Limitations on the Use of Modern Darwinism throughout the Legal Process* (1989, Urbana) at 28–41.

65 J Dewey *Theory of Valuation* (1939, University of Chicago Press) at 51–52; RS Summers "Judge Richard Posner's jurisprudence" (1991) 89 *Michigan Law Review* 1302 at 1304–305.

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Path dependence and lock-in

Path dependence theory

Path dependence theory posits that legal norms and order are shaped by historical developments and the paths that have been chosen over time.[66] It recognizes that earlier legal developments influence later advancement, establishing a narrow trajectory for the law.[67] Unlike the evolutionary theory, which focuses on growth and change, path dependence emphasizes how a historical chain of events influences the development of legal frameworks. Some social science scholars argue that once a particular path is chosen, it may lead to resistance to innovation and entrenchment in outdated practices.[68] In the legal context, path dependence often predetermines future policy choices due to the manner in which previous legal norms were established and the process by which legislation was adopted.[69] Once a legal system and institutions are in place, the chosen path tends to be followed rigidly, and from this point, changing the course of laws or the legal system becomes quite challenging.[70] Path dependence theory emphasizes the inflexibility of legal institutions and law-makers, highlighting their inability to adapt quickly to new societal changes. Significant changes in the legal system typically occur only when it becomes evident that the existing framework is unable to address emerging legal issues.[71] In the OHADA context, the inability of individual countries to tackle economic challenges and attract investments has led to the establishment of an intergovernmental organization with supranational power.

Path dependence theory differs from legal evolutionary theory in that it suggests that legal provisions are shaped by specific circumstances, which may not provide the freedom to choose the most efficient rules.[72] Past events and socio-economic environments shape the desired path and can eliminate options that may have been beneficial but no longer align with current circumstances; therefore existing laws may not effectively address the current socio-economic circumstances, as they often carry features inherited from past adaptations.[73] Thus the evolution of legal rules is not simply a process of selecting the most efficient but instead involves choosing the best option from the limited available choices.

For instance, colonizers imposed their own legal traditions and norms through transplants into their African colonies; in OHADA countries, French civil law was integrated into legal systems. Following the end of colonization, the drastic economic conditions and legal uncertainty in the African region meant that when OHADA was established, it was not necessarily the best course of action for member states to adopt the French legal tradition. However, to foster quicker legal development and reforms that would facilitate economic growth and attract foreign investments, choosing French civil law became the most viable option given the constraints of the moment; it was the only available option for OHADA member states that enabled them to develop laws that would be positively received by domestic businesses and facilitate swift implementation. Consequently, the options available to the member states were limited, and path dependence influenced subsequent legal development in these countries.

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66 OA Hathaway "Path dependence in the law: The course and pattern of legal change in a common law system" (2003) 86 *Iowa Law Review* 101 at 103–104.

67 WH Sewell "Three temporalities: Toward an eventful sociology" in TJ McDonald (ed) *The Historic Turn in the Human Sciences* (1996, University of Michigan Press) at 262–63.

68 FG Sourgens "The virtue of path dependence in the law" (2016) 56 *Santa Clara Law Review* 303 at 305.

69 Hathaway "Path dependence in the law", above at note 66 at 105.

70 Ibid.

71 Ibid.

72 Id at 138.

73 Deakin "Evolution for our time", above at note 53 at 25.

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OHADA's choice to base its legal development on the civil law tradition may not provide favourable conditions for long-term economic development and growth.[74] According to the theory of legal origin, common law fosters the growth of a private economy, creates better economic conditions for businesses and encourages investments, more than a civil law tradition does.[75] French civil law tends to offer less favourable conditions and weaker investment protection for businesses.[76] Nevertheless, OHADA countries opted to adhere to their colonial legal origins, as it was the only logical option available to them. This decision may not have been the most rational approach for attracting foreign investment and enhancing business laws.[77] If the options had not been limited at the time OHADA was created, it would have been possible to explore different approaches; for instance, harmonization could have been achieved through soft laws by adopting a mixed approach that combines elements of French civil law and customary laws at the domestic level.

The evolution of law necessitates a period of adjustment, during which inefficient rules can undermine more efficient ones.[78] Legal institutions and legislatures tend to respond slowly to changes in the social environment, resulting in a time lag between these changes and the development of new rules to address them; therefore there is often a gap or imbalance between the social environment and the corresponding legal rules.[79] The legal field is known for its slow response to change and its strong adherence to tradition.[80] When laws are maintained solely because they have been in place for a long time and are highly regarded within the legal tradition, there is an increased risk of outdated and irrational laws persisting.[81] Traditionally, law plays a protective role by safeguarding the stability of legal systems and order; it prevents legal norms from being swayed by temporary and insignificant changes in the social environment.[82] While the tendency to adhere to traditions could be viewed as a trap of path dependence, it also serves as a barrier against inconsistent rules that may contradict existing laws. To address new social changes, it is logical to create new laws that fit within the current legal framework rather than the entire system being radically altered, and in cases where there are no laws to address evolving socio-economic developments, legislators and the judiciary typically resort to analogies with existing laws to create solutions.[83] Consequently, the new legal norms that emerge can become constrained by the chosen path and tradition.

OHADA traditionally follows a hard law approach in its Uniform Acts, which require unconditional compliance from its member states.[84] The success of its framework can be attributed to its strong commitment to traditional law-making practices. This adherence to path dependence has likely contributed to the rapid development of OHADA and the robust compliance with its norms among member states. On the other hand, this rigidity may be seen as a weakness, as it can hinder new members from joining OHADA; a potential candidate country must relinquish certain aspects of its autonomy to comply with these strict norms.[85] One alternative is harmonization through soft law. Soft law approaches offer flexibility, allowing states to adapt provisions of law to their unique

74 R La Porta, F Lopez-de-Silanes and A Shleifer "Economic consequences of legal origin" (2008) 46 *Journal of Economic Literature* 285.

75 PG Mahoney "The common law and economic growth: Hayek might be right" (2001) 30 *Journal of Legal Studies* 503.

76 CM Dickerson "Harmonising business laws in Africa: OHADA calls the tune" (2005) 44 *Columbia Journal of Transnational Law* 17 at 22.

77 Simo "Law and development", above at note 31 at 329.

78 JG March and JP Olsen *Rediscovering Institutions: Organisational Basis of Politics* (1989, The Free Press) at 55.

79 Hathaway "Path dependence in the law", above at note 66 at 140.

80 M Krygier "Law as tradition" (1986) 5 *Law and Philosophy* 237 at 248.

81 OW Holmes "The path of the law" in OW Holmes (ed) *Collected Legal Papers* (1920, Harcourt, Brace and Howe) at 187–94.

82 Hathaway "Path dependence in the law", above at note 66 at 140.

83 Bell "Path dependence and legal development", above at note 4 at 792.

84 Treaty on the Harmonization of Business Law in Africa, above at note 18, art 10.

85 S Gopalan "Transitional commercial law: The way forward" (2003) 18 *American University International Law Review* 803 at 814–15.

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legal background and traditions.[86] Such a soft law approach is currently favoured by the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Commission on International Trade Law.[87] This can serve as an example for OHADA in shaping its approach to law reform: a soft law approach can help avoid the political process associated with drafting hard law instruments, and it may also help bridge the gap between civil and common law systems.[88]

Lock-in at different stages of development

Path dependence can inevitably lead to a trap known as lock-in. This term has been adopted in economic literature to describe situations where organizations or countries make incorrect choices, even when it is clear that these choices are irrational, as they are dictated by historical development.[89] The concept of lock-in examines why previous decisions can lead an organization or country to become locked into a specific development path.[90] Economic efficiency drives the development of modern countries and international organizations; this explains the rising costs associated with overcoming lock-ins when creating new laws. At a certain point, the expense of breaking free from an established path and overcoming lock-ins can become extremely high, potentially leading to unpredictable outcomes.[91] For instance, in the common law part of Cameroon, the effort to implement OHADA's laws has been met with resistance from common law practitioners, who find civil law concepts to be inapplicable and inconsistent with common law principles.[92]

In the literature on economic theory, path dependence and lock-in theories are often viewed negatively; however, this is not always the case.[93] To determine whether a specific case represents a trap of path dependence or a positive development, a wide range of factors should be considered. Since OHADA focuses exclusively on business regulation and investment, it is essential to assess the effectiveness of its legal reforms by evaluating economic development and the legal environment.[94] International organizations such as the World Bank Group, along with legal practitioners, highly value the economic performance and growth of OHADA member states.[95] The impact of OHADA laws on the economic development of its member states, as well as its role in granting access to finance for domestic businesses, is considered positive and sufficient. For example, from 2009 to 2015, OHADA member states experienced a real income growth of 3.7 per cent, although this is still lower than the average in sub-Saharan Africa, indicating a potential for further development.[96] The implementation of the OHADA Uniform Act Organizing Securities in 2011 resulted in USD 3.82

86 JA Esrella Faria "Future directions of legal harmonisation and law reform: Stormy seas or prosperous voyage?" (2009) 14 *Uniform Law Review* 5 at 12.

87 HD Gabriel "The use of soft law in the creation of legal norms in international commercial law: How successful has it been?" (2019) 40 *Michigan Journal of International Law* 413 at 427–32.

88 Id at 419.

89 SJ Liebowitz and SE Margolis "Path dependence, lock-in, and history" (1995) 11 *Journal of Law, Economics and Organisation* 205 at 208.

90 R Martin and P Sunley "Path dependence and regional economic evolution" (2006) 6 *Journal of Economic Geography* 395 at 405–406.

91 M Levi "A model, a method, and a map: Rational choice in comparative and historical analysis" in MI Lichbach and AS Zuckerman (eds) *Comparative Politics: Rationality, Culture, and Structure* (1997, Cambridge University Press) 28.

92 EE Clotilde "The reception of OHADA law in anglophone Cameroon: Appraisal and proposals" (2023) 28 *Uniform Law Review* 1 at 3.

93 JE Goldstein et al "Unlocking 'lock-in' and path dependency: A review across disciplines and socio-environmental contexts" (2023) 161 *World Development* 1 at 2.

94 Treaty on the Harmonization of Business Law in Africa, above at note 18, preamble.

95 International Finance Corporation "An impact assessment of OHADA reforms", above at note 45 at 22; Banque Internationale pour la Reconstruction et le Développement "Doing business dans les etats membres de l'OHADA 2017" (Comparaison des réglementations s'appliquant aux entreprises locales dans 17 etats membres et a travers le monde, 2017) at 31.

96 Id at 2.

billion in credit extended to domestic businesses across seven OHADA member states within five years.[97]

To evaluate whether path dependence and lock-ins negatively impact stakeholders, it is essential to examine the "costs and burdens for different actors" within a specific context.[98] This assessment should consider both macro and micro levels, as the benefits for one group (domestic businesses) may result in adverse outcomes for another (international investors); lock-ins can be advantageous at certain moments and within specific contexts.[99] In the case of OHADA, the interests of various stakeholders, including OHADA itself, government entities, private businesses, legal practitioners and international private actors, should be evaluated. One of OHADA's aspirations is to harmonize business rules across the African continent.[100] Several countries from the sub-Saharan region, including Madagascar, Mauritania, Mauritius, Ethiopia, Djibouti, Rwanda, Burundi, Cape Verde and São Tomé and Príncipe, have expressed interest in joining OHADA and adopting its laws, two of which, Ghana and Nigeria, are common law countries.[101] However, these countries have not initiated further action to commence the negotiation process. Striving for further harmonization of commercial laws across Africa while simultaneously adhering to French civil law could be considered a continuation of path dependence and lock-in for OHADA.

Explicitly focusing on French civil law can be viewed as a positive lock-in for OHADA at the moment: by aligning legislative efforts around civil law, it became easier to consolidate these efforts. The beneficial impact of following path dependence on macro and micro levels has led to increased investment for domestic businesses and enhanced financing on the global level. The International Finance Corporation's Impact Assessment of OHADA Reforms indicated that from 2007 to 2017, OHADA reforms had a significant impact on the business sector, facilitating access to finance for businesses from its member states.[102] At the country level, it is estimated that in Togo, for example, domestic credit to domestic businesses increased by USD 729.10 million due to the implementation of OHADA reforms; however, in some countries, such as Côte d'Ivoire, OHADA reforms did not significantly impact domestic business credit.[103] The lack of significant impact in Côte d'Ivoire can be attributed to an episode of local conflict (2010–11); following the conflict period, the country's domestic credit level began to improve from 2013.[104] Therefore lock-ins and following path dependence can aid in the establishment and effective implementation of legal policies and rules during the early stage of development.[105] Although initially OHADA experienced significant success due to its adherence to path dependence and lock-ins, further development and expansion raise concerns about whether this may create a trap in the future. This is particularly relevant given OHADA's aspirations to further harmonize business laws across Africa and attract members from the African Union.[106] Even though some legal scholars believe that OHADA can adapt its Uniform Acts to suit the common law background of African countries, it may encounter several challenges.[107]

97 International Finance Corporation "OHADA reforms show significant impact on private sector development" (30 January 2019), available at: <https://www.ifc.org/en/pressroom/2019/ohada-reforms-show-significant-impact-on-private-sector-development-ifc-and-world-bank-find> (last accessed 8 October 2025).

98 Goldstein et al "Unlocking 'lock-in' and path dependency", above at note 93 at 12.

99 Id at 13.

100 Treaty on the Harmonization of Business Law in Africa, above at note 18, preamble.

101 S Mancuso "The new African law: Beyond the difference between common law and civil law" (2008) 14 *Annual Survey of International and Comparative Law* 39 at 40; Beauchard "OHADA nears the twenty-year mark", above at note 33 at 18.

102 International Finance Corporation "An impact assessment of OHADA reforms", above at note 45 at 64.

103 Id at 33.

104 Id at 36–37.

105 L Yona, B Cashore and OJ Schmitz "Integrating policy and ecology systems to achieve path dependent climate solutions" (2019) 98 *Environmental Science and Policy* 54 at 55.

106 Treaty on the Harmonization of Business Law in Africa, above at note 18, art 53.

107 Mancuso "The new African law", above at note 101 at 53.

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While OHADA recognizes four official working languages – French, English, Spanish and Portuguese – the French language is prioritized.[108] This lock-in to the French legal background and tradition may pose a challenge in attracting non-French-speaking countries. For example, Cameroon has two official languages, English and French, but the priority given to the French version of the OHADA Uniform Acts has created a constitutional issue at the domestic level, as it violates the rights of the English-speaking population.[109] Consequently, there has been a lack of acceptance of the OHADA Uniform Acts in the English-speaking provinces of Cameroon.[110] If OHADA aims to harmonize commercial laws across Africa, the predominance of the French language should be removed, and equal authority should be granted to different translations of the Uniform Acts.[111] These should adhere to the principle of equal authenticity, similar to the standards followed by legal translators at the United Nations and the World Trade Organization.[112] Overcoming this lock-in could help OHADA attract new member states and create cooperation on the continental level.

It is questionable whether the OHADA legal framework can effectively address the needs of African common law countries. For OHADA to meet these needs, there should be a political willingness to modify its framework and move beyond its historical limitations.[113] There was a potential indication of a shift towards a different model when the organization collaborated with UNIDROIT to draft the Uniform Act on Contract Law. This Uniform Act is based on the UNIDROIT Principles of International Commercial Contracts, which is a blended international solution that incorporates key concepts from both civil and common law.[114] The implementation of this new Uniform Act would be a step for OHADA to overcome its path dependence, attract African countries from the common law tradition and harmonize business laws across Africa. However, the enactment of the Uniform Act on Contract Law has faced several challenges.[115] One of these was resistance from legal practitioners, which arose because the Uniform Act closely followed French civil law, with some amendments that may contradict the domestic contract law of member states.[116] Such an approach was adopted in response to several challenges encountered by the drafters of the Act, including an underdeveloped legal culture and low literacy levels within local communities in OHADA member states.[117] Additionally, there were challenges in reconciling local traditions related to contract law.[118] The drafters aimed to unify various unique African traditions related to contract law; these are trusted by local communities, as transplanted colonial laws are viewed as insufficient.[119] For example, the concept of a contract in Africa differs significantly from that in civil and common law, as it incorporates multiple elements that those systems tend to deem insignificant.[120]

108 Treaty on the Harmonization of Business Law in Africa, above at note 18, art 42.

109 Enonchong "The harmonisation of business law in Africa", above at note 39 at 99.

110 Id at 111.

111 Fagbayibo "Towards the harmonisation of laws in Africa", above at note 17 at 318.

112 FP Ramos "International and supranational law in translation: From multilingual lawmaking to adjudication" (2014) 20 *The Translator* 313 at 313–14.

113 Ibid.

114 UNIDROIT "UNIDROIT Principles of International Commercial Contracts" (adopted 2016); SK Date-Bah "The UNIDROIT Principles of International Commercial Contracts and the harmonisation of the principles of commercial contracts in West and Central Africa" (2004) 2 *Uniform Law Review* 269 at 270–71; CM Dickerson "OHADA's proposed Uniform Act on Contract Law" (2011) 13 *European Journal of Law Reform* 462 at 470.

115 M Fontaine "Law harmonisation and local specificities – a case study: OHADA and the law of contracts" (2013) 18 *Uniform Law Review* 50 at 50–51.

116 FO Etoundi "Les principes d'UNIDROIT et la sécurité juridique des transactions commerciales dans l'avant-projet d'Acte Uniforme OHADA sur le Droit des Contrats" (2005) 10 *Uniform Law Review* 683 at 692.

117 Fontaine "Law harmonisation and local specificities", above at note 115 at 53.

118 Id at 54.

119 Id at 53.

120 Id at 57.

OHADA and free-trade initiatives in Africa

The African Continental Free Trade Area (AfCFTA) is a free-trade zone established by the African Union; its primary purpose is to establish a unified trade area that enhances regional trade.[121] All member states of OHADA are signatories to the AfCFTA; consequently, both organizations share similar goals in reducing hurdles for cross-border transactions and creating a harmonized business environment.[122] However, the two frameworks differ significantly: the AfCFTA does not possess supranational authority and does not establish an intergovernmental organization. Instead, it provides only an institutional framework for the implementation of legal norms.[123] Additionally, the AfCFTA framework does not regulate trade with third parties outside Africa or with non-signatory states.[124] In comparison to OHADA, progress in the AfCFTA's efforts to eliminate tariff barriers has been slower.[125] Among the major challenges faced by the AfCFTA are gaps in implementation and compliance mechanisms, which are largely dependent on the political will of individual states.[126]

The implementation of the AfCFTA agreement requires regulatory reforms at the national level and adjustments to existing national trade policies. Phase I of this implementation focuses on facilitating the free trade of goods and services, as well as establishing a dispute settlement mechanism.[127] This requires amendments to the national laws of OHADA member states within the OHADA framework. OHADA's laws can serve as valuable tools for implementing AfCFTA regulations at Phase I, meaning that individual states may only need incremental changes to their legislation.[128] However, Phase II, which addresses investment, competition and intellectual property rights, may require more significant revisions of the existing legislation of member states.[129]

In cases where the AfCFTA agreement conflicts with other regional frameworks, the AfCFTA agreement takes precedence.[130] However, there is an exception for instances of a higher level of integration: AfCFTA member states should honour their commitment to deeper integration with other intergovernmental organizations of which they are signatories.[131] Given the supremacy of OHADA laws, these laws supersede the AfCFTA regulations implemented by member states. This rigidity can cause asymmetry and uncertainty for investors within the AfCFTA trade area, as they have to navigate complex regional norms. Additionally, it places OHADA member states at a disadvantage within the AfCFTA trade zone, leading investors to prefer jurisdictions within AfCFTA that have fewer conflicting legal norms, to minimize potential legal risks.

Legal change and legal pluralism

Legal pluralism

According to Tamanaha, developing legal systems often feature undifferentiated and entrenched legal institutions, a lack of financial resources and training, and scattered legal knowledge, with a

121 Agreement Establishing the African Continental Free Trade Area, adopted 21 March 2018, entered into force 30 May 2019, art 3.

122 African Union "List of countries which have signed, ratified / acceded to the African Continental Free Trade Area", adopted 21 March 2018, entered into force 30 May 2019.

123 Agreement Establishing the African Continental Free Trade Area, above at note 121, arts 9–13.

124 Agreement Establishing the African Continental Free Trade Area, Protocol on Trade in Goods, adopted 21 March 2018, entered into force 30 May 2019, art 4(2).

125 YA Debrah et al "The African Continental Free Trade (AfCFTA): Taking stock and looking ahead for international business research" (2024) 30 *Journal of International Management* 1 at 13.

126 UN Economic Commission for Africa "AfCFTA: What you need to know" (UN Economic Commission for Africa, Addis Ababa, 2024) at 12–22.

127 Id at 9–10.

128 Id at 17.

129 Agreement Establishing the African Continental Free Trade Area, above at note 121, art 7.

130 Id, art 19(1).

131 Id, art 19(2).

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significant degree of expertise being imported. Local communities may view formal law as unstructured, inefficient, incompetent, expensive and corrupt, and often serving the interests of elites rather than addressing broader societal needs. When the legal system is perceived as inadequate and unable to meet the needs of the local population, locals tend to avoid using official means to resolve their issues.[132] In Africa, over 80 per cent of cases are settled through non-state systems, such as traditional or customary legal practices.[133] The system of customary laws is mainly ethnic, accepted as law on local levels within specific ethnic communities.[134] Consequently, customary laws in Africa can vary significantly, even within the same country, let alone across a regional bloc of countries such as OHADA.

In former French-speaking African countries, customary courts were abolished in the 1960s; each country incorporated certain customary rules into its state legislation, enabling state courts to apply these principles.[135] However, during and after colonization, the state legal frameworks in these former colonies were insufficient and did not adequately address the socio-economic circumstances of the population.[136] As a result, state law provides a general framework for addressing issues related to economic activities and government affairs, while in contrast, customary law continues to cater to the local needs of the population.[137] Therefore most former colonies, including OHADA countries, have developed complex legal systems that involve the interaction and coexistence of laws introduced by the colonizers and local non-state laws.[138] The diversity of customary laws and the inability to address local specificities related to contract law are among the reasons why OHADA has not adopted the Uniform Act on Contract Law.[139] The wide variety of local traditions even within a single country makes it impossible to unify these approaches under one framework, which ultimately hinders the goal of harmonizing the law.[140]

From the standpoint of governments and intergovernmental organizations aiming to unify the legal framework, such legal pluralism is often seen as a flaw in the legal system; however, for the local population, this pluralism represents a solution to the shortcomings of unified laws that fail to meet their needs.[141] The effective functioning of a legal system requires support from the socio-economic, cultural and political spheres of society, but if the local population perceives the legal system as dysfunctional and ineffective, it may turn to customary laws and traditions, which can help rebuild public trust.[142] In contrast, international organizations and the global community tend to focus their efforts on supporting state legal institutions, often only briefly acknowledging the role of customary and traditional laws.[143] Globalization and regional cooperation have led to a new level of legal pluralism: international legal pluralism.[144] The development of law by international organizations such as OHADA introduces additional complexities, because regional and international laws can sometimes

132 Tamanaha "The rule of law and legal pluralism in development", above at note 9 at 3–4.

133 LH Piron "Time to learn, time to act in Africa" in T Carothers (ed) *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006, Brookings Institution Press) 275 at 291.

134 M Ndulo "African customary law, customs, and women's rights" (2011) 18 *Indiana Journal of Global Legal Studies* 87 at 88.

135 Dieng "ADR in sub-Saharan African countries", above at note 11 at 614.

136 BZ Tamanaha *A General Jurisprudence of Law and Society* (2001, Oxford University Press), chap 5.

137 Tamanaha "Understanding legal pluralism", above at note 14 at 384.

138 D Berkowitz, K Pistor and JF Richard "The transplant effect" (2003) 51 *The American Journal of Comparative Law* 163 at 175–77.

139 Fontaine "Law harmonisation and local specificities", above at note 115 at 60–62.

140 Id at 62–63.

141 Tamanaha "Understanding legal pluralism", above at note 14 at 385.

142 Tamanaha "The rule of law and legal pluralism in development", above at note 9 at 4.

143 Uniting our strengths: Enhancing United Nations support for the rule of law, UN doc A/61/636-S/2006/980; The rule of law and transitional justice in conflict and post-conflict societies, UN doc S/2004/616.

144 WW Burke-White "International legal pluralism" (2004) 25 *Michigan Journal of International Law* 963 at 969–70.

contradict each other and conflict with the legal frameworks of the member states of these regional bodies.[145] This situation adds an extra layer of complexity to the legal order.

One of the primary reasons for the development of international organizations such as OHADA was the pursuit of economic benefits, which can be somewhat linked to the motives behind colonization.[146] Local communities might perceive the establishment of appropriate rules for economic development as another way to impose a Western order, and many Western development projects aimed at promoting economic growth and at reforming laws operate under the assumption that developing countries will follow the same legal development pattern as Western countries.[147] Using law as a tool of economic development has resulted in a further advancement of legal pluralism.[148] However, developing countries have their own unique patterns of advancement, influenced by factors such as colonization and legal pluralism, which create obstacles for the unification of laws. Legal pluralism in these countries should not necessarily be viewed as a barrier to a unification of law, but rather as a legal reality that should be accommodated and addressed. This perspective can also be considered as an opportunity for developing countries to create their own approaches to law reform, enabling them to move beyond their colonial heritage. Legal pluralism can lead to positive economic outcomes, as it may help businesses avoid issues associated with corruption and inefficiency in the formal legal system.[149] Former laws that, to some extent, recognize or embody customary and religious laws have benefits, including addressing the needs of the local population and increasing the recognition and acceptance of these former laws.[150]

Recommendation on reform

Legal change can occur in two significant ways: through law reform, which works proactively, and through judicial influence, which works retrospectively.[151] Law reform is closely tied to the process of legal transplantation. Most legal systems have experienced some degree of this; it involves adopting legal concepts or rules from other jurisdictions.[152] Legal systems tend to favour legal transplants or internal transfers within the system, instead of developing new laws to address emerging socio-economic issues.[153] This approach helps legal systems to maintain order and preserve the consistency of law.

Throughout its development, law often exhibits an element of inheritance, in which old concepts are replicated across various legislations over time.[154] During this replication process, some alterations of the original concepts are inevitable; such changes occur because legislators must adapt existing concepts to evolving socio-economic conditions, so that the new rules fit into the existing framework. As a result, the content of legislation can change significantly while the core conceptual element remains intact.[155] An example is Roman law, which has influenced legislation in countries with civil law systems and continues to play a significant role, albeit with some adaptations. For example, the classification of property as movable or immovable is deeply ingrained in the legislation of many countries and is a crucial factor in determining property ownership in civil and

145 Tamanaha "Understanding legal pluralism" at note 14 at 386–87.
146 Tamanaha "The rule of law and legal pluralism in development", above at note 9 at 13.
147 Id at 20.
148 Id at 14.
149 Id at 16.
150 Id at 12.
151 SR Munzer "Retroactive law" (1977) 6 *The Journal of Legal Studies* 373 at 376–78.
152 G Teubner "Legal irritants: Good faith in British law, or how unifying law ends up in new divergences" (1998) 61 *Modern Law Review* 11 at 16.
153 Ibid.
154 Deakin "Evolution for our time", above at note 53 at 22.
155 Ibid.

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common law. The French Civil Code, for instance, includes provisions regarding the pledge of movable and immovable property.[156] OHADA laws also follow this approach: provisions related to the pledge of movable tangible property (professional equipment and motor vehicles) are discussed in one section of the Uniform Act Organizing Securities, whereas provisions concerning the pledge of immovable property are addressed separately, under the mortgage section.[157]

The principle of inheritance plays a crucial role in shaping laws, where new legal rules are grounded in the foundational principles of older concepts.[158] Legal inheritance fosters an environment of imitation, where interpretations are often derived from existing norms rather than being developed from scratch.[159] When the legal rules are selected for adoption, they are influenced by various interest groups and legal procedures, and rules that are not accepted or do not fit into the process are excluded from consideration. This selective approach enables legal systems to address the socio-economic needs and perspectives of society.[160] As a result, a connection is formed between the legal system and the socio-economic environment, allowing them to evolve in a mutually beneficial manner.[161]

Complex law reforms often occur during abnormal times, such as economic and political crises, wartime conditions or significant political shifts.[162] During periods of stability, such reforms are often deemed unsuccessful, but even in post-war societies that face an urgent need for reform, complex legal changes frequently do not succeed.[163] Consequently, overcoming path dependence requires implementing gradual, piecemeal reforms in a time-sensitive manner.[164] These changes can reflect local traditions and cultural practices that help reduce the switching costs associated with path dependence.[165] For instance, reforms grounded in community-based alternative practices and the traditional rule of law, despite facing challenges in implementation, have demonstrated significant benefits when introduced gradually.[166]

In the field of business law, instead of incentivizing drastic changes, it may be better to provide more flexible solutions that may be a first step out of path dependence.[167] At the regional level, a general framework of formal law can be developed, complemented by localized strategies for implementation at the country level.[168] General regional laws, when supplemented by local business traditions, will be more appealing to local communities because they will demonstrate clear economic benefits.[169] OHADA can adopt this approach to overcome path dependence, where the OHADA

156 Civil Code 1804, above at note 47, book IV, title 2 and subtitle 3.

157 Uniform Act Organizing Securities, above at note 16, title 2, cap 4, sec 4 and title 3, cap 6.

158 Deakin "Evolution for our time", above at note 53 at 22.

159 JM Smits "Is law a parasite? An evolutionary explanation of differences among legal traditions" (2011) 7 *Review of Law & Economics* 791 at 797.

160 Deakin "Evolution for our time", above at note 53 at 23.

161 Ibid.

162 M Prado and M Trebilcock "Path dependence, development, and the dynamics of institutional reform" (2009) 59 *University of Toronto Law Journal* 341 at 367.

163 Ibid; M Ottaway "Promoting democracy after conflict: The difficult choices" (2003) 4 *International Studies Perspectives* 314 at 316–18.

164 Prado and Trebilcock "Path dependence, development, and the dynamics of institutional reform", above at note 162 at 368.

165 G Aldashev, JP Platteau and Z Wahhaj "Legal reform in the presence of a living custom: An economic approach" (27 December 2011) *Proceedings of the National Academy of Sciences* 21320.

166 Prado and Trebilcock "Path dependence, development, and the dynamics of institutional reform", above at note 162 at 372.

167 Roe "Chaos and evolution in law and economics", above at note 60 at 665–66.

168 Prado and Trebilcock "Path dependence, development, and the dynamics of institutional reform", above at note 162 at 373; SW Mukand and D Rodrik "In search of the holy grail: Policy convergence, experimentation, and economic performance" (2005) 95 *American Economic Review* 374 at 374–75.

169 Prado and Trebilcock "Path dependence, development, and the dynamics of institutional reform", above at note 162 at 374.

Uniform Acts can establish fundamental principles that can be complemented at the domestic level by laws based on customary and traditional practices.

In response to the challenges posed by multilayered systems, there has been a rise in what are known as "reflexive laws".[170] These are designed to address the shortcomings of transnational economic laws in meeting the needs of micro, small and medium-sized enterprises that operate across borders.[171] Reflexive laws are linked to the democratization of law, deregulation and elements of pluralist self-regulation, and strive to balance between descriptive and prescriptive aspects of law, thereby minimizing the burden of direct regulation.[172] This said, the complexity of reflexive laws can also present distinct challenges, for example when it comes to implementation. An example of this from private international law is the concept of soft law: soft laws allow individual states to adopt them to their unique legal and socio-economic backgrounds.[173] Their complexity emanates from their flexibility, and their lack of binding force can create their uneven implementation and enforcement at the national level.[174] Therefore law reform based on a soft law approach should be thoroughly planned by OHADA, with particular attention paid to implementation at the national level.

A soft law approach for OHADA can help avoid the adverse or ambiguous outcomes often associated with traditional, top-down unification.[175] Moreover, this approach can serve as a step for OHADA to overcome path dependence, and the general provisions of soft laws can be supplemented at the domestic level with local customary laws. This strategy will enable OHADA to move away from a completely pro-Western approach and reduce the switching costs associated with deviation from the chosen path. Additionally, the introduction of soft law can assist OHADA in achieving its aspiration of harmonizing law across Africa, allowing common law African countries to adapt the law to their local contexts.

Conclusion

The theory of legal evolution illuminates how a sequence of specific events influences the development of law and provides predictions about how these events may shape the evolution of legal norms. It also offers insights into why OHADA and its laws align with the French civil law tradition in the postcolonial era. However, the predictive aspect of the theory helps make only general assumptions and lacks normative elements. As a result, while it can forecast that demand for economic integration will drive a further development of law in OHADA countries, it cannot specifically predict or assess the emergence of particular laws or their forms.

The path dependence theory provides tools to analyse how past legal choices and decisions influence the future development of law and legal institutions and can help make further assumptions about the trajectory of OHADA's development. Specifically, it can predict the emergence of specific laws and the direction of law reform. Although path dependence is often discussed in a negative context in academic literature, each case should be evaluated on its own merits. In the initial stages of developing legal norms, adhering to a path dependence approach can facilitate implementation of the law; however, such an approach may later obstruct further legal advancement of

170 Tamanaha "The rule of law and legal pluralism in development", above at note 9 at 3.

171 V Gessner "Globalisation and legal certainty" in V Gessner and AC Budak (eds) *Emerging Legal Certainty: Empirical Studies on the Globalisation of Law* (1998, Dartmouth Publishing) 445.

172 G Teubner *Law as an Autopoietic System* (1993, Blackwell) at 68; SE Gaines "Reflexive law as a legal paradigm for sustainable development" (2002) 10 *Buffalo Environmental Law Journal* 1 at 7.

173 GP Calliess "Reflexive transnational law: The privatisation of civil law and civilisation of private law" (2002) 23 *Zeitschrift für Rechtssoziologie* 185 at 188–89.

174 AT Guzman and TL Meyer "International soft law" (2010) 2 *Journal of Legal Analysis* 171 at 183–84; D De Carolis "Some features of the harmonisation of the international trade law in the third millennium" (2015) 15 *Uniform Law Review* 37 at 61.

175 Prado and Trebilcock "Path dependence, development, and the dynamics of institutional reform", above at note 162 at 374.

OHADA. Consequently, following the path dependence trajectory at different stages of OHADA's development could be either a trap or a success.

Path dependence theory closely connects with the term "lock-in", which refers to irrational decisions made at a given moment due to adherence to a chosen path. Lock-ins can trap countries and international organizations in a cycle of path dependence; once a particular path is selected, it becomes difficult and risky to deviate from it and overcome these lock-ins. In the modern world, economic development can make it nearly impossible to escape from the path dependence trap and break the cycle of lock-ins.

OHADA follows the path of French civil law, a legal tradition that was initially imposed on its member states by colonial powers. In the postcolonial era, OHADA member states chose to continue along this legal path, recognizing that it would facilitate the rapid development of a transnational legal framework and promote economic integration. This initial decision to adopt the path dependence route was a logical choice and was arguably beneficial, as it allowed the organization to establish a unified legal framework among countries with a similar legal background. Consequently, it helped OHADA to achieve its primary goal of improving the business environment in its member states, harmonizing commercial laws and attracting foreign investment.

In its later development, OHADA's path dependence may hinder its aspiration to harmonize business law across Africa further; overcoming this path dependence is essential for its future growth and the achievement of its objectives. OHADA should adopt a more flexible approach to its legal development: introducing legal norms in the form of soft law, such as a model law, could help attract new member states from non-French-speaking countries. Such flexibility would enable both new and existing members to tailor laws to their domestic context. This is particularly relevant for former colonies, including OHADA countries, where existing legislation operates within the framework of both non-state laws (such as local traditions and customary and religious laws) and laws imposed by colonial powers. Such an approach will enable OHADA to move away from the Western legal order, which is deemed by local communities to be limited, and accommodate non-state laws developed by local populations on the domestic level.

Competing interests. None

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