

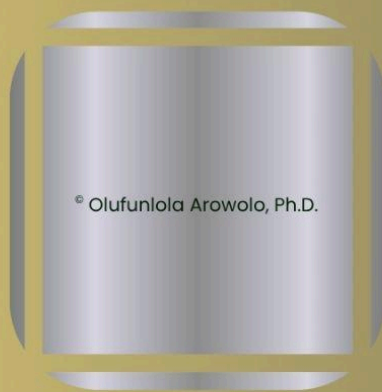
*Working Paper*



**THE ROLE OF PRIVATE AND  
PUBLIC SECTOR  
LEGISLATION IN SUB-  
SAHARAN DEVELOPMENT**

WAEMU and CEMAC  
Common Currency Zones

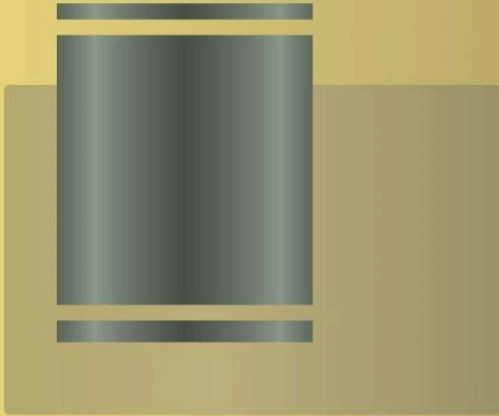
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# CONTENTS

Abstract	5
Introduction	5
Towards Macroeconomic Convergence: Regional Currency and Monetary Unions in Africa	6
CFA Franc Zone: Institutional Background	7
Legislative Deficiencies and Remedies: WAEMU	8
Legislative Deficiencies and Remedies: CEMAC	10
Regional Integration: Addressing Legislative Deficiencies and Reform with Binding Acts	11
Devaluation Reform	11
Free trade zone policy implementation: Lessons from Senegal	13
Towards a Cohesive Legal System	15
Legal theory according to Holmes and Savigny	17
References	19



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## **Abstract**

This study evaluates the role of regional policymaking in stabilizing economic and financial indicators in the Franc Zone, via internal legislative frameworks —the Organization for the Harmonization of Business Law in Africa [Organisation pour l'Harmonisation en Afrique du Droit des Affaires] or OHADA — and via external design, particularly the World Bank Comprehensive Development Framework [CDF]). This study concludes with a brief assessment of the legal framework within the CFA Franc Zone based on conceptions of law, as envisioned by both Savigny and Holmes.

## **Introduction**

No nation, in the history of civilization, has become an economic success based on donations from wealthy counterparts (Moyo 2009). This statement underscores the main charge brought against development assistance (aid) by Pan-African development scholars (Amin 1976; Arowolo 2019; Moyo 2009; Mwenda 2007; Ogbu, 2014; Okolie 1995; Onimade 1985). The aid alternative is a proposed shift towards private sector investment, as the only path forward. However, for private sector investments to achieve their technical purpose of economic development, the target business environment must have a functioning legislative framework that supports business activity on all fronts — competition, taxation, insurance, protection of property rights, contract laws, etc..

Gulde and Tsangarides (2008) point out that in recent years, not only has there been renewed interest in Africa, but the Continent has seen improvements in domestic policies, along with rising commodity prices. Because countries on the Continent differ in culture, legal traditions, economic and structural policies, and in their definitions of property rights — absent a comprehensive legal framework — macroeconomics and development activities can get complicated very fast, especially within the regional monetary zones on the Continent. This brings to the fore the role of the World Bank's Comprehensive Development Framework (CDF).

In 1994, during a World Bank-sponsored Seminar on the Resumption of Private Sector Growth in Africa, a cohort of African businessmen and corporate leaders found consensus concerning the interconnectedness between law and private sector development. Several key reform areas were identified, and of chief concern were a unique set of issues constraining private sector business activities, including: the lack of a coherent set of rules; advanced warning (both for the public and private sector) before a new set of rules are implemented; transparency in the application of law; and, enforceability (in an evenhanded, efficient, and expeditious manner) via appropriate judicial systems (Ofosu-Amaah, 2000, p. 1).

At a separate Forum —attended by African ministers; private sector participants; representatives of the United Nations Development Programme’s Regional Bureau for Africa; the United Nations Industrial Development Organization; and, members of the African Business Round Table— consensus was reached on the need to establish a clear and coherent legislation concerning the issue areas identified at the Seminar on the Resumption of Private Sector Growth in Africa (Ofosu-Amaah, 2000, p. 2).

Ofosu-Amaah (2000) posits that, ideally, a legal framework within a society should mirror its cultural, sociopolitical, and economic mores. Posner’s (1998) main argument concerning the creation of legal frameworks for economic development is that, for a nation in the throes of modernization, economic prosperity will thrive on a modest legal infrastructure (at the very least) centered on the protection of property and contract rights. Posner cites empirical evidence (Posner 1997; Barro 1991; Scully 1988) in support of the notion or the idea that a symbiosis exists between rule of law and a nation’s wealth or its rate of economic growth. Thus, the necessary legal reforms required to create a well-functioning legal infrastructure will depend on the adoption of a system of relatively precise legal rules (Posner, 1998).

Central to the issue of law and its application to the development context is the question of how law is both created and enforced. According to Posner (2000) the modern economic theory of law offers greater insight into the law of possession than either Holmes or Savigny. However, in Holmes' conception of legal theory, there are precepts that can be considered early antecedents of the modern theory of law (Posner, 2000). Holmes believed that it is a mistake to codify national laws because, from his perspective, codification inhibits and misrepresents the natural procession/growth of law. However, in terms of enforcement, this perspective might be rather difficult to support, particularly as nations converge through regional alliances for the sake of macroeconomic convergence.

### **Towards Macroeconomic Convergence: Regional Currency and Monetary Unions in Africa**

There are two currency unions in Africa: The Central African Economic and Monetary Community (CEMAC)<sup>1</sup> and the West African Economic and Monetary Union (WAEMU)<sup>2</sup>. Together both zones are referred to as the CFA Franc Zone (also, Franc Zone). The main goal of both unions is to strengthen regional macroeconomic convergence, particularly financial indicators, through unified/common central banking policy.

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<sup>1</sup> There are six states in CEMAC: Gabon, Cameroon, the Central African Republic (CAR), Chad, the Republic of the Congo and Equatorial Guinea.

<sup>2</sup> The members of the WAEMU (also known by its French acronym, UEMOA) are: Benin, Burkina Faso, Cote d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo.

Both zones have the own regional currency — the Western CFA<sup>3</sup> Franc is the legal tender in WAEMU, and the Central CFA Franc is the CEMAC currency — with an equivalent exchange rate across both regions. Both currencies are pegged to the Euro.

Beyond the above-mentioned currency unions, there is one monetary zone — the rand monetary area (Southern African Development Community [SADC])<sup>4</sup>. Several of the countries in the zone peg their currency to the South African rand and will also accept the rand within their borders as legal tender, but there is no common central bank and no common monetary policy (Gulde, 2008). The common monetary system in the Franc Zone has been in place for over 60 years since independence, and the level of the currency peg has remained pretty stable, changing only once in January 1994 (Gulde, 2008). The exchange rate system in the Franc Zone and the rand monetary area have been credited with helping their associated economic zones lower inflation and promote overall macroeconomic stability for many years – more so than other nations in the sub-Sahara (Gulde & Tsangarides, 2008).

However, with the increasing rate of financial globalization (cross-border financial flows/individual county linkages to international capital markets); volatility in oil and oil derivatives; commodity pricing structures; and, regional security issues (Gulde & Tsangarides, 2008), sub-Saharan currency unions and monetary areas must pay closer attention to fluctuations in the international market that could have prolonged effects on long-term macroeconomic convergence. The World Bank developed a Comprehensive Development Framework (CDF) in the quest to combat poverty in developing nations by raising living standards and closing the gap between *haves* and *have nots* (Ofosu-Amaah, 2000).

Crucial to the success of this framework are the laws and established justice systems set up by countries needing assistance with reforming their legal frameworks. The challenge of raising living standards in Africa — wherein despite the abundance of natural and human resources, the poor in Africa are yet to reap the benefits — is further complicated by extant legal framework in the Franc Zone.

### **CFA Franc Zone: Institutional Background**

CEMAC and WAEMU originated during the colonial era — although both zones were French colonies, each has a separate treaty with France, its own currency, and its own central bank (Gulde, 2008).

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<sup>3</sup> Acronym for Communauté financière d'Afrique ("Financial Community of Africa").

<sup>4</sup> Consists of 15 of the southernmost countries in Africa, which came together in the 1980s to form the Southern African Development Community (SADC) for the sake of trade integration and macroeconomic convergence.

The constitutions enacted during independence made provisions for the legal framework designed during the colonial era to remain enforceable until replaced/removed/found to be in contravention of constitutional provisions (Ofosu-Amaah, 2000, pp. 5-6). Biannual economic policy meetings usually have CEMAC and WAEMU representatives seated opposite the representative from France, however, each union has autonomy in deciding what policy is implemented (Gulde, 2008). The characteristic institutional framework of both unions are as follows: (1) a fixed currency pegged to the euro, (2) convertibility guaranteed by the French Treasury, and (3) a system of legal, institutional, and policy obligations crafted to secure the currency peg (Gulde, 2008, p. 5).

In the Franc Zone, World Bank involvement in legal reform has been overshadowed by the OHADA framework, which was adopted via signed treatise in October 1993. Part of the treaty specifies the need for further economic integration through the establishment of a business law framework. The main objective of the treaty is stated as follows: “to harmonize business laws through the preparation and adoption of common, simple, and modern rules by uniform acts (“actes uniformes”) well suited to their economic situation, the establishment of appropriate judicial procedures within the judiciary, and the encouragement of the use of arbitration as a viable dispute settlement mechanism for contractual disputes” (Traité Relatif, Titre 1, supra, n. 101). Under the treaty, “business law” specifies rules regarding “company law, the legal status of trades, labor law, bankruptcy and receivership, arbitration law, accounting law, and sales and transport law” (Ofosu-Amaah, 2000, p. 44).

### **Legislative Deficiencies and Remedies: WAEMU**

Sy (2006) identifies issue areas associated with financial integration with the West African Economic and Monetary Union. Among the myriad issues identified, Sy explains that seamless integration of new reform and extant laws will require eliminating cross-border restriction of financial operations by the firms of countries operating under the same regional integration agreement in the Franc Zone (Sy, 2006, p. 3). Further, Galindo et al. (2000) explain that the harmonization of regulations, taxation structures, and common rules to be abided by within the union is crucial to convergence. Sy (2006) also identifies the need to protect investors/depositors via appropriate sector-defined regulations.

Furthermore, Sy explains that, concerning liquidity and asset capitalization of common banks, regulations must also be established to ensure that insurance companies can use treasury bills to cover any public or private sector obligations they may have (2006, p. 13). Gulde (2008) and Sy (2006, pp. 15-16) outline several initiatives put in place to promote regional financial integration within WAEMU.

Following is a brief summary of said initiatives, per Gulde (2008) and Sy (2006, pp. 15-16):

- Single currency (Western CFA Franc) specified in 1962 WAEMU treaty. The treaty highlights the need for a monetary union with a single currency, as well as the need for a regional central bank.
- The regional central bank (Banque Centrale des Etats de l'Afrique de l'Ouest—BCEAO), established in 1972, is responsible for overseeing monetary policy (in both WAEMU and CEMAC). Within WAEMU, there are no capital controls (transaction taxes or other capital market regulations concerning the flow of capital into and out of the capital accounts of individual countries).
- Single banking commission (Commission Bancaire de l'UMOA) established in 1990 to reinforce provisions for regional banking. The Governor of the BCEAO is also the president of the Commission. The Commission is managed by an appointed Secretary General.
- There are no cross-border restrictions on banking and other financial services, with the exception of financial insurance services.
- For WAEMU residents, or for property located in a WAEMU country, insurance contracts can only be undertaken with those entities that have been approved for insurance-related transactions/activities in the WAEMU member country. Post consultation with the Insurance Control Commission, permission may be granted to such an entity —permission is issued by the minister responsible for insurance grants.
- Concerning savings and credit institutions within the union, the 1995 PARMEC law (Projet d'Appui à la Réglementation sur les Mutuelles d'Epargne et de Crédit) established the basis for a regulatory framework for cooperative financial institutions in the region. In 1994, the BCEAO introduced a microfinance monitoring system (Decentralized Financial Systems (DFS) monograph).
- The regional securities commission (Conseil Régional de l' Epargne Publique et de Marchés Financiers— CREPMF) oversees bond and stock trading and fund management (SICAV). The regional capital market has both a common interbank market and a single market (Bourse Régionale des Valeurs Mobilières—BRVM) both of which are supervised by SICAV. Also, since 1996, pension funds are managed by a regional body, Conférence Interafricaine de la Prévoyance Sociale—CIPRES.
- At the Inter-African Conference on Insurance Markets (Conference Interafricaine du Marché des Assurances—CIMA) in 1992, a treaty was signed to regulate regional insurance companies. The treaty includes all African Franc zone countries and is managed by a single regional authority (Commission Régionale de Contrôle des Assurances—CRCA). Provisions are also made for a regional reinsurance company (CICA-RE).

- Regarding accounting standards for financial institutions, modernization initiatives were enacted to bring accounting standards up to par with international standards. Similarly, at the corporate level, accounting standards have been unified within the West African Accounting System (Système Comptable Ouest Africain—SYSCOA). Additionally, BCEAO maintains a balance sheet center (centrale des bilans), which includes the balance sheet information of debtor firms.
- A reform of the tort/court settlement payment mechanism is underway in the form of a regional real time gross settlement (RTGS) system and an interbank settlement system. BCEAO manages a centralized database tracking unpaid checks (centrale des incidents de paiement).
- A regional institution (Banque Régionale de Solidarité), in association with regional institutional shareholders, has been created to supervise microfinance activities. The opening of Banque Régionale de Solidarité branches has been planned for member countries.

#### **Legislative Deficiencies and Remedies: CEMAC**

Martijn and Tsangarides (2007) outline the trade reform arrangements meant to support development activities in the CEMAC region. The main issue areas identified were: i) the need for renewed political commitment to regional integration policymaking; ii) improving compliance measures within the customs union, including limiting tariff exemptions, phasing out surcharges, reinforcing methods of determining products' country of origin, and strengthening customs union administrative policy; iii) tariff reduction; iv) trade liberalization; and, v) improvement of transportation sector policy to ameliorate infrastructural access between union member countries (p.1). CEMAC customs unions were also noted as having implementation issues related to red tape, customs administration inefficiencies (including import misclassification), and battling corruption (p. 6).

In 1994, the CEMAC customs union was created, as a first step towards regional integration and regional policy effectiveness (Martijn and Tsangarides, 2007). CEMAC replaced UDEAC (Union Douanière des Etats d'Afrique Centrale), which was created in 1964, but was found to be largely ineffective in terms of policy implementation.

In 1994, CEMAC introduced three major reforms to be enforced region-wide: (i) a common external tariff (CET), (ii) the gradual removal of tariffs on intra-regional trade (completed in 1998), (iii) the integration of indirect taxation structures (using a VAT system, which went into effect in 1999); and (iv) the replacement of quantitative import barriers with the use of temporary import surcharges (to be phased out by 2000) (Martijn and Tsangarides, p. 3, 2007).

Other reforms in the works, as outlined by Martijn and Tsangarides, include:

- Trade liberalization policy (a move supported by the IMF) based on the reduction of CET rates.
- Economic Partnership Agreement (EPA) with the EU, as a further trade liberalization attempt between both zones.
- Transition from using standardized reference prices to transaction-based valuation.

Beyond the identified issue areas and proposed structural reform agendas within both zones, the growing need for structural parallelism in both regions, inspired the creation of a regional commercial legal framework, OHADA, which was established in 1996, to handle legislation, the associated implementation procedures, and institutional support network for both WAEMU and CEMAC zones.

### **Regional Integration: Addressing Legislative Deficiencies and Reform with Binding Acts**

In practice, WAEMU and CEMAC experience a degree of structural parallelism between institutional and operational features because of supervisory arrangements within the two unions, and also because of the implementation and enforcement of regional monetary and financial policies (Gulde, 2008). The OHADA Treaty specifies procedures that must be followed before a uniform act can be adopted as law (Ofosu-Amaah, 2000, p. 44).

The adoption of a new act requires at least two-thirds voting unanimity amongst state representatives of the OHADA Council of Ministers (Ofosu-Amaah, 2000, p. 44). Once the new act is ratified by a two-thirds unanimous vote, the act becomes one of general application in the states and is legally binding, in its entirety, without the need for the enactment of legislature in any of the member states; also, no additional domestic legislation is required (Ofosu-Amaah, 2000, p. 44). New uniform acts usually become effective 90 days following their adoption, with a 30-day window for contesting the act upon publication in the OHADA Official Journal (Ofosu-Amaah, 2000, p. 44). Also important is the Treaty mandate specifying that new uniform acts be published in the official newspapers of the member-states or by any other public announcement method (Ofosu-Amaah, 2000, p. 44).

### **Devaluation Reform**

In 1994, both the Western CFA Franc and the Central CFA Franc were simultaneously devalued by 50%, for the first time in almost 60 years (Gulde, 2008). The goal was to promote exports within the Franc Zone because the countries in the regional currency alliance were heavily indebted. The expectation was that, as import prices rose, the price of domestic goods would decrease, prompting higher export levels to meet the simultaneous expectation of a rise in external demand.

Although the devaluation was expected to make export pricing more competitive, the domestic challenge became the reality that food and fuel import prices were increasing. When the devaluation process was initiated, the then-Minister of Finance for Cameroon, Essimi Menye, was quoted as having said: "As I am talking to you now, I, as minister of finance, I don't know where this rumor started. I only learnt about it on the Internet," ... "How come the CFA franc will be devalued and I, Minister of Finance of Cameroon, am not aware? I can assure you there will be no such thing. Our economies are doing very well. And nobody can impose it (a devaluation)" (Cameroon Postline, 2011, para. 3-4).

Gary K. Busch, an international trade unionist, academic, businessman and political consultant, placed the blame for the disastrous devaluation squarely at the feet of France, expressing that the French economy fell short in terms of managing the long-term debt structure, and the use of French reserves (which became the buoy for the failing Euro and the several bailouts that took place within the Eurozone) (Cameroon Postline, 2011, para. 4). Busch also criticized Francophone African leaders for being complicit with the plan, in what he terms a "paradigm of neo-colonial enterprise" (Cameroon Postline, 2011, para. 4).

Critics of the measure saw it as less of a move to protect the economies of the CFA-Zone and more of a rush to both save the crashing French economy and rescue the Euro, when the weight of saving the Euro became too heavy for Germany to continue to bear alone (Cameroon Postline, 2011, para. 11). After the devaluation of the currency in both zones in 1994, both unions saw the need to strengthen real and financial integration between member states (Gulde, 2008). Efforts to reform the monetary unions in both zones began soon after the devaluation, with the goal of providing structural support for long-term sustainability objectives through laws and institutions modeled after those of the European Union (EU) (Gulde, 2008; Ofosu-Amaah, 2000; Gulde & Tsangarides, 2008).

The major elements specified in the reform were as follows: i) a consensus on macroeconomic convergence criteria for the coordination of macroeconomic policies, and ii) the abolition of trade restrictions within each union, plus the creation of regional common markets, to be carried out in phases (Gulde, 2008, p.5).

To facilitate the new macroeconomic convergence policies, both unions agreed to supplement their central banks with new institutional provisions that would support the transitional integration by creating an economic commission in the WAEMU zone and an economic secretariat in the CEMAC zone (Gulde, 2008, p.5).

According to Gulde (2008), other common institutions, such as a regional court of law and a parliament; and, common policies, for example, competition policies, were also planned for. However, some of these institutions and policies are waiting to be enacted both within the unions and in the member countries, mostly because common institutions (other than the central banks and their administrative agencies) are customarily financed via surcharges placed on external tariffs (Gulde, 2008). Since many countries in the region either do not collect or earmark funds for the regional institutional plans, the piecemeal approach to reform usually falls by the wayside (Gulde, 2008). As such the outcome of the 1994 reform has mostly been a mixture of success and shortcomings.

Common institutions often fall short of their technical objectives because of insufficient funding mechanisms. Beyond the common banking shortcomings, there still remains several physical obstacles to integration in both unions—chief among them is that there are not enough intra-country transportation links within the zones; and, in spite of the free trade policies enacted within both zones, there are still too many non-trade barriers (Gulde, 2008).

In recent years, both unions have renewed commitment to integration efforts — with financial support from the international donor community; both zones have also drawn up regional economic plans. With a combined pledge amount of more than 10% of the regional GDP coming from the member countries themselves, bilateral donors, the EU, and the World Bank, the renewed efforts towards reform stand a better chance of actually being implemented, and providing the infrastructural and institutional requirements needed for successful regional macroeconomic integration (Gulde, 2008; Ofosu-Amaah, 2000).

#### **Free trade zone policy implementation: Lessons from Senegal**

Senegal has one of the most comprehensive legal systems in the West African region, which can serve as a “lessons learned” template for other countries in the union (Ofosu-Amaah, 2000). However, there are some holes in the laws affecting the Senegalese business community that need re-visiting, “as well as laws that need to be adapted, simplified, and revised” (Ofosu-Amaah, 2000, p. 39).

Within the framework of the Private Sector Adjustment and Competitiveness Credit, the government of Senegal worked to enact legislation that would not only remedy and simplify its free trade zone agreements, but also make it more transparent concerning the procedures and benefits related to the agreement.

“The government agreed also to enact legislation to revise and simplify procedures for the temporary import regime for inputs applicable to the production of goods for export, and more generally, to review and improve rules and procedures which apply to export and import activities within its territory” (Ofosu-Amaah, 2000, p. 39).

During the different adjustment phases of the Private Sector Capacity Building Project, mentioned above, the Government also planned for a broad range of studies to be carried out. Additionally, a broad range of studies, reviews, workshops, and seminars were carried out to ensure the policy and regulatory frameworks being implemented were conducive to competition, competitiveness, and the development of new and existing private enterprises (Ofosu-Amaah, 2000, p. 39). Further, plans were made for the Chamber of Commerce to be modernized (Ofosu-Amaah, 2000). Studies and reviews of legislation managing the establishment, registration, and day-to-day functionality of commercial and business enterprises were used to reinforce and enhance the processing and administrative capabilities of the judicial sector (Ofosu-Amaah, 2000).

To reinforce the objective of the legal reform, the Private Sector Capacity Building Project also organized for the re-training for staff members of the relevant institutions, refresher courses for judges, mainly on the subject of commercial law (Ofosu-Amaah, 2000, p. 40). Additionally, provisions were made for word and data processing, filing equipment, books, and journals all in anticipation of the needs of the identified departments undergoing reform (Ofosu-Amaah, 2000, p. 40).

Further, prior to the beginning of the project, the Government created a Working Group, which included administrators from the institutions needing reform; private formal and informal sector representatives; as well as private legal practitioners, to assist in identifying the main areas wherein the legal business activity framework needed reform (Ofosu-Amaah, 2000). The Working Group identified several areas of legal framework of business activity needing reform, including dispute settlement, dissemination of information on administrative procedures, and consolidation and harmonization of the business laws (Ofosu-Amaah, 2000, p. 40).

To oversee coordination of this project, the Private Sector Capacity Building Project (a Legal Reform Committee) — composed of civil society and private sector members — was also established, and chaired by the Minister of Justice (Ofosu-Amaah, 2000, p. 40). The Legal Reform Committee, in tandem with the objectives of the Private Sector Capacity Building Project has, amongst other things, been monitoring the implementation of and developing new ideas for the several amendments made to the provisions for a wide-range of business-related laws specified by the Project.

The Legal Reform Committee is also expected to work hand-in-hand with the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA).

### **Towards a Cohesive Legal System**

Posner (1998) differentiates between a well-functioning legal system with precise laws versus a more open-ended approach that can be substituted for a more cohesive legal system. Posner's position on the benefits of law expenditure is that a virtuous cycle (that creates a positive feedback loop) may arise in which initially modest expenditures on law reform increase the rate of economic growth, which then, in turn will generate resources that will enable more ambitious legal reforms to be undertaken in the future. The author mentions that the growing number of conferences on legal reform, and other recent judicial reform initiatives (See Ofofu-Amaah, 2000), highlight the growing awareness that the failure of governments in poor countries to provide the basic framework for a capitalist economy may be an important factor in keeping poor countries poor.

Posner's claim that markets are usually more robust than some market-failure specialists believe is based on the notion that the strength of a market depends on how well the market environment protects legal rights, especially property and contractual rights.

As such, a legal machinery geared towards protecting property and contractual rights, will consist of competent, ethical, and well-paid professional judges who administer rules that are well designed for the promotion of commercial activity (Posner, 1998).

Ofofu-Amaah (2000, p. 3) echoes this perspective in stating that: "high priority should be given to a thorough reform of the legal system, including enhancing the local capacity to draft laws, providing support for the redrafting of legal codes, improving the judiciary, the capacity of State Attorneys and private lawyers, and the capacity of legal and judicial training institutions". Posner (1998) believes that for legal reform to be effective, judges must be insulated from interference by the legislative and executive branches of government. Further, Posner explains that judges operate against a background of formal rules and practices already established in society — such as ethical accounting standards, bureaus of vital statistics, and public registries of land titles and security interests.

Furthermore, judge's decrees should be dependably enforced by sheriffs, bailiffs, police, or other functionaries (again, these functionaries must all be competent, ethical, and well paid otherwise the system will likely implode) (Posner, 1998).

Based on the preceding, a comprehensive legal reform would necessitate ensuring that vital bureaus of importance to the work of the judges/court system — which enable the judiciary to resolve factual issues relating to legal disputes with reasonable accuracy and at a reasonable financial cost to the disputants — must be maintained in tandem with the court system and incorporated into the overall legal code spelling out both the law and the approach to legal reform. Bearing in mind the highly diffuse nature of issue areas that need to be identified and the corresponding social institutions that need to be functional before the lawmaking process can be of any effect, Ofosu-Amaah (2000) further points out that a “piecemeal” approach to legal reform is not likely to yield the desired result, mainly because when an entire legal system is in disarray, it is little benefit to the overall reform agenda if only a limited number of/specific issue areas are reformed in isolation — for example, reforming banking laws without re-visiting and addressing the inadequacies in general law enforcement practices.

In addition, implementing modern banking laws will be of little effect if the lawyers, judges, courts, and other legal entities charged with enforcing the new laws do not have the capacity to affect the necessary changes and enforce the law (Ofosu-Amaah, 2000). This realization is exemplified in the Declaration made by the Minister of the CFA Franc Zone, issued in April 1997, emphasizing the need to ensure legal and judicial protection of economic activity in the Franc Zone through a harmonized codification of law —within the framework of OHADA— to improve the operation of regional judicial systems and fight corruption (Ofosu-Amaah, 2000, p. 3).

The World Bank necessitated the creation of a cohesive legal system via the Comprehensive Development Framework (CDF), in recognition of the important link between an appropriate, cohesive legal framework and the process of development. The CDF is also meant to provide financial support for extant legal frameworks, like OHADA, in terms of implementing those agenda reform items that may be too costly to be shouldered by the regional members. The second pillar of the CDF “underscores the fact that no equitable development is possible without, among other things, an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws, and other elements of a comprehensive legal system” (Ofosu-Amaah, 2000, p. vii).

Important to the success of CDF implementation, currently being undertaken in 21 countries in Africa, is the need to both recognize and incorporate the varied mix of sociopolitical, economic, and cultural elements present on the Continent.

Further, if the CDF implementation is to be sustainable, then there must be long-term commitment (as comprehensive development is a long-term process), and the CDF must be enforceable by the governments of the target countries.

### **Legal theory according to Holmes and Savigny**

This study began with a consideration of the concept of law as proposed by Holmes and Savigny. Savigny and Holmes present contrasting views on law, especially from the conceptual aspect of legal theory. Savigny's key opposition to the codification of law would not hold for the regional framework in both West and Central Africa because of the need to specify basic legal expectations concerning torts, contracts, commercial codes, financial policy, fiscal policy, free trade agreements, agency, ...the list goes on.

Holmes' belief that the law develops from a natural procession/ sequencing of events makes sense, considering the initial OHADA framework and subsequent reforms made to the framework as time elapsed and lessons were learned, particularly after the 1994 devaluation, which destabilized both unions for a while. According to Holmes, policy evolves from process evolution: "The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past. The old form receives new content, and in time even the form modifies itself to fit the meaning which it has received" (as cited in Posner, 2000, p. 543).

Although Savigny's conception of law as a natural procession of social life may ring true in the legislative and reform processes evolving with CEMAC and WAEMU activities, Savigny's resistance to codification would find little support in the spaghetti bowl of CEMAC and WAEMU transactions and negotiations. According to Savigny, law is not self-containing: "The motley world of legal forms... does not evolve in virtue of deliberate natural reflection or reasoned considerations of utility, it springs rather from the common conviction of the people, from the like feeling of inner necessity which excludes all thought of fortuitous and arbitrary origin" (as cited in Kutner, 1972, p. 286). In other words, Savigny believed that law is a part of the complex nature of the human experience and the character of society and that law is not a "phenomena of collected verbal formulae in some universal body of ideal of 'natural' propositions" (Kutner, 1972, p. 283).

Savigny's perspective that law simultaneously emerges from custom, and is a set of deliberate and arbitrary decisions finds support within the framework of OHADA and other deliberations outlined in the body of this study.

Savigny believed that each state must decide on its own whether or not there is need for codification. Savigny also believed that no amount of legislation or state involvement could produce a stable code of law if what he termed the “political element” (popular consciousness) was not mature. To ignore the immature state of the “political element” is to: “inevitably attract all attention to itself, away from the real source of the law, so that the latter, left in darkness and obscurity, [would] derive no assistance from the moral energies of the nation, by which alone it [could] attain a satisfactory state” (as cited in Kutner, 1972, p. 287).

The remedy suggested by Savigny is a continuous process of mastery, which can be likened to the many stages of reform being undertaken in both the WAEMU and CEMAC common currency zones.

Holmes (2009, p.36) believed in free competition: “Why is a man at liberty to set up a business which he knows will ruin his neighborhood? It is because the public good is supposed to be best subserved by free competition”. This fits into the WAEMU and CEMAC development of a competition policy that supports competition in the free trade area as an integral part of regional, multilateral, and bilateral trade negotiations and agreements. The practical aspect of the reform process undertaken within the framework of the Private Sector Adjustment and Competitiveness Credit<sup>5</sup> — involving broad ranging studies, workshops, and seminars to ensure the policy and regulatory frameworks being implemented were conducive to competition, competitiveness, and the development of new and existing private enterprises — can be likened to Holmes’ view on how law evolves: “The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price” (Holmes, 2009, p.36).

Overall, although the CFA franc arrangement has strong political support, the region remains vulnerable not only to internal shocks, due to strict operating policy, but also to external shocks, especially those emanating from the Euro Zone. Continued circumspection of the legal framework might provide some market flexibility, and commitments to reform agendas may, to some extent, help absorb market shocks, in terms of legislating preparedness policies.

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<sup>5</sup> See Section on page 14-16 of this study: Free trade zone policy implementation: Lessons from Senegal

However, macroeconomic convergence under a unified umbrella is as complex as it is expensive—a comprehensive framework that is both rigid enough to safeguard property rights and flexible enough to incorporate occasional reform can provide a safety net for regional economic and financial integration systems like WAEMU and CEMAC.

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