Reforming Business-Related Laws to Promote Private Sector Development

The World Bank Experience in Africa

W. Paatii Ofosu–Amaah
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At the threshold of the Third Millennium, looking backward, we can count great progress achieved in raising living standards around the globe; yet, looking forward, we see the gap between the have and have nots increasing. To combat this challenge, the World Bank has mounted a “war against poverty” by using, inter alia, its recently adopted Comprehensive Development Framework. Central to this Framework are law and justice systems, in recognition of the pivotal role that law plays in promoting economic prosperity and poverty alleviation.

The challenge of raising living standards is most accentuated in Africa. Despite the wealth of natural and human resources, too many people in Africa remain poor, without having reaped the economic benefits of globalization. This timely study, written by W. Paatii Ofosu-Amaah, Chief Counsel for the Africa Region at the World Bank, provides a comprehensive review of World Bank-supported activities in the context of countries with rich legal traditions. More important, the lessons of experience identified and discussed in this study should be taken into account as we move to strengthen and solidify this area of World Bank work in the 21st century. This study by Mr. Ofosu-Amaah provides key lessons for the future of the peoples of Africa.

Ko-Yung Tung
Vice President and General Counsel
The importance of an appropriate legal framework reflecting the cultural, sociopolitical, and economic circumstances of a country is now widely considered to be an important element in the development process. The latest recognition of this link may be found in the Comprehensive Development Framework adopted by the World Bank, where the second pillar 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.

This study, which reviews the World Bank's experience in legal reform in a continent with a rich legal heritage, both indigenous and inherited, is timely especially because of the rapid expansion of World Bank-assisted work in this area, in Africa and in other parts of the world. The African experience reviewed in this connection provides lessons of relevance for the World Bank and member countries in other regions.

This study is especially interesting for me since, as Chief Counsel for the Africa Division in the Legal Department in the 1980s, I was privileged to manage the Legal Department's response to requests from several countries, especially in the context of adjustment lending. It is gratifying to note that legal reform has become commonplace in World Bank operations in Africa and that there are planned or ongoing operations in more than 21 countries.

This study, written by my successor as Chief Counsel, provides an interesting historical perspective, which demonstrates the rich legal traditions in the region and the need, therefore, for the World Bank to be acutely conscious of them and to plan its programs of assistance taking into account the sociopolitical, economic, and cultural milieu in each country in which it is called upon to assist. More important, to be sustainable, every effort should be made to ensure that the governments of the countries concerned are committed to the reform programs, which should ideally be home-grown. Many of the other issues raised in the study, such as coordination of activities within a country and of donors, in general, and the role of local lawyers and foreign consultants should
be given systematic attention in the design and implementation of World Bank–supported legal reform programs. In short, this study provides important lessons of experience that must be taken into account in the design and implementation of legal reform programs, not only in Africa but worldwide.

Andres Rigo
Acting Vice President and General Counsel
(May 1998–November 1999)
I am deeply grateful to my colleagues in the Africa Division of the Legal Department of the World Bank, who work on the countries referred to in this study and who provided me with information, suggestions, criticisms, and comments in the course of writing this study. I should like to mention, in particular, Messrs./Mmes. Adu, Al Habsy, Awunyo, Cissé, Mpooy-Kamulayi, Uprety, and Rinceanu, who read earlier drafts and gave useful comments. I should also like to thank Mr. Sherif Omar Hassan, who read an earlier draft and encouraged me to publish it. I was especially touched by the insightful comments of Professors Ann and Robert Seidman of Boston University on an earlier draft of the study. Finally, I appreciate very much the help of my Assistant, Ms. Susan Saint-Rossy, who typed and proofread several drafts of the study, and my colleagues in the Legal Department Law Library (Mmes. Linda Thompson, Laura Lalime-Mowry, and Vivien Richardson) who obtained numerous publications for me during my research for the study. Needless to say, the views expressed in this study and any errors, omissions, and misstatements made are mine and mine alone.
Chapter 1

Introduction

The importance of an appropriate legal and regulatory framework for development and, in particular, for private sector commercial activities, is no longer in question on the African continent. Private sector activity has also been considered critical to African economic development since the mid-1990s and more so at the beginning of the twenty-first century. To that end, the role of the legal and regulatory framework for this endeavor has been the subject of discussions in a number of gatherings of African officials, its private sector, and civil society.

One of the many meetings where the importance of legal reform was tabled include a World Bank-sponsored Seminar on the Resumption of Private Sector Growth in Africa, held in Nairobi on December 7–8, 1994. At this seminar, a group of African businessmen and corporate personalities agreed almost unanimously that one of the major constraints to effective business relations was the lack of a coherent set of rules known in advance and applied in a transparent fashion, and the lack of appropriate judicial systems to apply such laws in an evenhanded, efficient, and expeditious manner. Many participants noted that, where laws and regulations exist, they undergo frequent changes that are not even communicated to the public.¹

The views of African leaders and industrialists on the interconnection between law and private sector development were also a subject of discussion at the Private Sector Forum held on the occasion of the Twelfth Meeting of the Conference of African Ministers of Industry, in Gaborone, Botswana, on June 3–5, 1995. This Forum, which was held under the auspices of the United Nations Development Programme's Regional Bureau for Africa, the United Nations Industrial Development Organization and the African Business Round Table, brought together African ministers and private sector participants to review the constraints affecting private sector activities in Africa. The Forum’s objective was to make recommendations for action by governments. One of the recommendations

emanating from the Forum related to the importance of the existence of an appropriate legal and regulatory framework to enable the private sector to operate effectively. In a section dealing with the creation of an enabling environment for private sector development and promotion, the Report of the Forum states, among other things, that:

 Governments should promulgate clear, coherent and stable laws and regulations, especially relating to the private sector, which should be widely disseminated. In addition, governments should establish the appropriate institutional framework to administer, implement, and to ensure the transparent and orderly enforcement of these laws and regulations.2

The importance of having an appropriate legal and regulatory framework in African countries, which includes having lawyers with adequate skills to serve the changing economies and be competitive in an increasingly global economy, has also been recognized in a recent Report of the African Governors (mainly the Finance and Economic Planning Ministers of Africa) of the World Bank Group.3 In this Report, the Governors recognized that capacity inadequacies in the judiciary and legal system as a whole pose major constraints to the development of capacity in the private sector, as well as other sectors in the economy. The Governors noted further that “the private sector cannot develop without an effective and efficient legal framework, modern laws, and adequate protection of investment interests.”4 They therefore proposed a myriad of priority actions that include the following:

A 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. It is clear that “piecemeal” reform of the legal system often does not yield the desired result. When an entire legal system has broken down, it is not enough to reform only a limited area of the law, such as banking laws, for example, without confronting the weaknesses in law enforcement in general. Modern banking laws are of little use when the

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4. Id., at p. 9.
lawyers, courts, and other legal institutions responsible for implementing them lack the capacity to do so effectively. What is required is a broader strategy of reform which addresses the legal system as a whole....

The report continued:

Comprehensive legal reform is a long-term process which requires commitment from government and continuous and sustained effort over time. It also requires development, after an appropriate diagnosis, of a coherent series of activities to be undertaken in a phased manner over a period of time. For instance, a country might decide to improve the functioning of the courts, registries, and libraries, and reform the laws related to private sector development as a first phase to spur on this sector, which is recognized as the engine of growth in Africa.5

Finally, the noted interest in the legal and judicial framework has also been recognized, most recently in the Declaration of the Ministers of Finance of the CFA Franc Zone issued in April 1997. In that Declaration, the Ministers took note of the necessity of ensuring the legal and judicial protection of economic activity, notably by applying, harmonizing, and codifying law within the framework of the Organization for the Harmonization of Business Law in Africa (Organisation pour l'Harmonisation en Afrique du Droit des Affaires) or OHADA; improving the operation of judicial systems; and fighting corruption. In the Declaration, the Ministers stressed:

...the efforts made to harmonize rules and regulations at the level of the Franc Zone and the subregion's alignment with the wish to bring about an environment which is favorable to promoting private investment in the Franc Zone.6

On the basis of the foregoing, it is evident that, in Africa today, the need for the revision of the laws affecting business activity is clearly realized as a priority in many quarters. Indeed, many African governments have taken on this task and have made some progress, particularly in the past few years. This renewed interest in legal reform, particularly in the commercial and corporate law area, also derives from the realization that Africa will not emerge as an economic power during the twenty-

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5. Supra n. 3, at p. 53.
first century unless the private sector becomes the engine of economic growth. For without significant involvement of the private sector, Africans will not be able to compete effectively in the midst of the liberalization, deregulation, and significant cross-border flows emanating from the Uruguay Round of GATT negotiations and the birth of the World Trade Organization. Also realized is that law and legal systems are becoming globalized, and, without major changes to ensure compatibility with laws and legal systems around the world, Africa will not participate effectively in the global economy.

This study includes a historical perspective of legal reform programs in Africa, especially after the post-independence period. It then reviews the experience to be discerned from World Bank–financed legal reform projects in Africa, which have the primary objective of promoting private sector development. It focuses primarily on legislative reform, that is, reform of substantive laws and subsidiary legislation, and activities designed to ensure the appropriate application of the new texts, such as capacity building and strengthening of legal institutions, including the ministries responsible for justice, the judiciary, and the legal profession.
Chapter 2

Legal Reform in Africa—A Historical Perspective

Immediately after the advent of independence in many African countries, whether French-speaking or English-speaking, the new political orders in the countries began putting into action measures toward the "Africanization" of the legal orders in the countries. As Kwame Nkrumah, the first Prime Minister of Ghana, said on the occasion of the First Session of the First Parliament of Ghana after 113 years of British rule in the Gold Coast:

The achievement of freedom, sovereignty and independence is the product of the matter and spirit of our people. In the last resort, we have only been able to become independent because we are economically, socially, and politically able to create the conditions which made independence possible and any other status impossible....

Independence is, however, only a milestone on our march to progress. Independence by itself would be useless if it did not lead to great material and cultural advances by our people. In the constitutional law area in particular, new ways were introduced for Africans to rule Africans—the notion of "self-government." This was based on the spirit of nationalism that swept the continent, stemming from the pro-independence movements of the 1940s and 1950s. However, although many of these states gained independence at the height of agitation against the foreign colonial power, many of the laws that were based on the legal regime introduced by the colonial power were continued in full force and effect. In the French-speaking countries, for example, the various constitutions enacted at the time of independence provided that the laws and regulations then in force were to continue until

8. Ghana is born: March 6, 1957, at 54.
amended or repealed, unless such laws were directly in contravention with the spirit of specific provisions in the constitution.9

Countries with Common Law Traditions

In the English-speaking countries, much of the same situation prevailed. Some of these countries undertook a number of legislative initiatives preceded often by conferences and workshops in which distinguished members of the legal profession, notable foreign lawyers, as well as political and civic leaders and business executives, participated.

In Ghana for example, legislative reform was preceded in many instances by the establishment of single-purpose commissions10 appointed to delve into the enactments in particular areas of the law with a view toward making proposals for consideration by the legislative branch. These single-purpose commissions followed the examples of such commissions found in the United Kingdom and also borrowed from the objectives and procedures of the New York Law Revision Commission, which is noted for its groundbreaking activities in legislative reform.11 These commissions were given the authority to review the laws in the particular sector; propose modifications to them, taking into account their operation over time, as well as adjustments required to account for the changes in governmental structure following independence; and generally to make proposals for the modernization of the laws.

In the case of the company law reform in Ghana, a commissioner was appointed by the government to carry out the tasks referred to above. The commissioner was, in addition, required to “take into account and examine the laws of such other African States as he may consider appropriate and [he shall be entitled] to recommend that any existing or proposed law in relation to companies enacted by or proposed to be enacted by any African State may be adopted in whole or in part for use in Ghana.” Equally important, the commissioner was expected to “take into


10. See, e.g., the Commission of Enquiry into the Working and Administration of the Company Law of Ghana was established by a Commission of the Governor-General dated August 25, 1958, under the Commission of Enquiry Ordinance (Cap. 249).

account the need for encouraging African enterprise in Ghana and the encouragement of foreign investment therein." The starting point was a companies law in force that was based on the English companies ordinance of 1907. The law, which was in turn based on the 1862 British Companies Act, was more than 50 years behind time when it was made applicable in the Gold Coast Colony. In accordance with the instruction given to the commissioner to take into account the need for encouraging African enterprise in Ghana and the encouragement of foreign investment, the commissioner and his colleagues held extensive discussions with business executives, including those in the expatriate community, in the country. With respect to the promotion of African business enterprise, the commissioner realized that the system of family ownership made it important to find a way to distinguish business activity from the interests and activities of the family. Without such differentiation, very often, there is little chance of ploughing profits back into business because of family obligations. The commissioner suggested as a solution the promulgation of an incorporated private partnership act, which would allow two or more individuals, up to a maximum of 20, to incorporate a business by registering with the Registrar of Companies certain particulars which are less onerous than those that are required by the Companies Code. The advantages alluded to in the report included the fact in such cases that the firm’s property can be distinguished from those of the family, so that difficulties regarding rights and obligations on a change of membership are avoided. More important, “the business is given a far better chance of survival so that the founder has something that he can pass on to his children.”

The Government enacted the new law (the Incorporated Private Partnership Act (Act 152), as well as a new Companies Code (Act 179 of the Laws of Ghana) which, with a few subsequent amendments, is still in force. Following the example of Company Law reform in the immediate postrepublic period in Ghana, legislation was promulgated in business or commercial areas, including an Apprentices Act (Act 45), Insolvency Act (Act 153), Sale of Goods Act (Act 137), Bills of Lading Act (Act 42), Capital Investments Act (Act 172), Bills of Exchange Act (Act 55), and


13. Id. at pp. 6–7. The process followed in this law reform exercise was reminiscent of the process followed by the Committee on Company Law Amendment appointed by the President of the U.K. Board of Trade in June 1943 to consider major amendments to the U.K. Companies Act of 1929. The work done by this Committee was incorporated in the Companies Acts of 1947 and 1948. This process is described by A. Goodhart in *Law Reform in England*, 35 A.L.J. 126, 127–128 (1959).
Although, as noted above, many of these pieces of legislation followed precedents that were prevailing in the United Kingdom and to some extent in United States jurisdictions, notably Delaware, an effort was made to bring innovation to the process and to tailor the foreign laws to Ghanaian circumstances.

These legal reforms in the corporate law area were seen as a way toward the development of a more sophisticated but suitable legal framework, which would spur on and facilitate increased commercial activity, particularly for indigenous Ghanaians. It was also intended to expand economic activity and serve as a basis for more rational, consistent, and predictable decision-making by the courts. And, as might be surmised from the list of areas tackled in the first years after Ghana became a republic in 1960, there was a focus on laws that were of significance to the business community. For example, appropriate licensing of apprentices, provision of clearer and more modern forms for import and export activity, and provision of appropriate legal mechanisms for credit and security were deemed as necessary to encourage the entrepreneurial spirit. These legislative activities clearly demonstrated the belief that reforming business-related laws could trigger increased activity that would enable the country to make the “great material and cultural advances” which Kwame Nkrumah had alluded to. It was also reminiscent of law reform activities undertaken in the United States after the Depression and during the New Deal period when economic prosperity was the first order of business, and legislative actions which were taken in the 1960s by many countries in Latin America, notably Brazil, to energize the private sector.

This same interest in law reform was exhibited in the three East African countries, namely, Kenya, Tanzania, and Uganda, all of which had a similar legal framework to Ghana’s. In this case, the process of law reform was initiated after broad discussions of the legislative framework of these countries during a Seminar on Law and Social Change in East Africa, organized under the auspices of the East African Institute of Social and Cultural Affairs.


conditions, so far as this is possible, in which desirable social developments can more readily take place.\textsuperscript{17} In particular, the Seminar examined what contributions law could make to economic development, and among the issues raised for discussion were: "How far are the current commercial laws a hindrance, how far an aid, to smooth commercial intercourse? If East Africa, for historical reasons, can be regarded as an economic unit, to what extent do its laws recognize this? Are uniform laws of the pattern of the American Uniform Commercial Code desirable...?"\textsuperscript{18}

The main paper presented on commercial law reviewed the legislative provisions in force on conflict of laws, sale of goods, age of majority, contract of guarantee, law of associations, stock exchanges, unit trusts, partnerships, cooperatives, and companies. It came to the conclusion that the commercial law introduced through direct provisions of the British Crown by Order-in-Council for Uganda in 1902, for Tanzania in 1920, and for Kenya in 1921, were sufficiently "manageable to permit amendment and re-enactment with relatively little work and at relatively little cost."\textsuperscript{19}

In addition to the foregoing, many countries in Africa, which at the time belonged to the British Commonwealth (now the Commonwealth) also chose the medium of law reform commissions, modeled after those in the United Kingdom, Australia, and Canada (all Commonwealth countries), as vehicles for law reform, particularly in the commercial and corporate law area. The typical functions given to such commissions may be found in the statutes establishing the Law Reform Commissions of Nigeria and The Gambia as follows. The Nigerian Commission has the duty:

\begin{quote}
... generally to take and keep under review all Federal Laws with a view to their systematic and progressive development and reform in consonance with the prevailing norms of Nigerian society, including in particular, the codification of the laws, the elimination of anomalies, the repeal of obsolete, spent, and unnecessary enactment, the reduction in the number of separate enactments, the reform of procedural laws in consonance with changes in the machinery of the administration of justice, and generally in the simplification and modernization of Law.\textsuperscript{20}
\end{quote}

\textsuperscript{17} Id. at 7-10.
\textsuperscript{18} Supra at n. 16, at 8.
\textsuperscript{19} Supra at n. 16 Commercial Law in Modern East Africa at 109.
The Gambian Law Reform Commission is required to:

... study and keep under constant review the status and other laws comprising the laws of Gambia with a view to making recommendations for their improvement, modernization, and reform, including, in particular, (a) the elimination of anomalies in the law, the repeal of obsolete and unnecessary enactments and the simplification of the law; (b) the reflection in the laws of customs and values of the Gambian society, as well as concepts consistent with the charter of Human and People's Rights of the Organization of African Unity; (c) the development of new areas in the law by making them responsive to the changing needs of the Gambian society; (d) the adoption of new or more effective methods for the administration of the law and the dispensation of justice; (e) the codification of the unwritten laws of The Gambia.21

The functions of the Law Reform Commission of Ghana, Malawi, Namibia, Zambia, and Uganda are similar, and indeed, the same formula could be found in other countries, including those outside Africa.22

These law reform commissions in Commonwealth countries have held yearly meetings organized by the Commonwealth Secretariat to share information on various subjects for which legal reform has been contemplated. To assist in this effort, a Commonwealth Legal Advisory Service was established by the Commonwealth Prime Ministers’ Conference in 1961. This service provides information on new developments of special interest to lawyers in the respective countries, and particularly on law reform. The advisory service also arranges for assistance to any Commonwealth country that desires help in the preparation of particular pieces of legislation. To its credit, it has provided significant assistance in the drafting of legislation in several Commonwealth countries over the years, as well as in the training of legislative draftsmen, a program that


22. Compare with the terms of reference of the Law Commission of India constituted August 8, 1955, which was "to review the system of judicial administration in all aspects and suggest ways and means for improving it and making it speedy and less expensive; to examine the central Acts of general application and importance and recommend lines on which they should be amended, revised, consolidated, or otherwise brought up to date." Compare also with the functions of the Law Reform Commission of Tanzania in the Law Reform Commission, § 4(2), of Tanzania Act, No. 3 of 1980.
started in 1974. At the recently held 12th Commonwealth Law Conference in Malaysia, representatives of law reform agencies and commissions in the Commonwealth met and resolved to establish an association to enhance cooperation between them and to share more regularly and effectively lessons of experience.

Countries with Civil Law Traditions

In the French-speaking countries, the same objective of restructuring the legal systems to promote economic development was important in the immediate post-independence period. As in the English-speaking countries referred to above, much of the laws of these countries remained French Law, which were incorporated into the laws of the respective countries (then colonies of France) through statutes enacted on a piecemeal basis, in Senegal, then in Guinea, Dahomey (now Benin), and Côte d'Ivoire (Afrique Occidentale Française or A.O.F.) and thereafter, Gabon, Central African Republic, Congo and Chad (Afrique Equatoriale Française or A.E.F.).

The commercial and company laws applicable in Senegal were extended to French Guinea in 1892 and to Dahomey and Côte d'Ivoire by decrees. However, the content of the received law was not necessarily the same in each territory, and therefore an effort was made to bring all the laws in line through a single reception provision issued in a decree of August 6, 1901. This decree was further amended by a decree of April 15, 1902, which had the effect of harmonizing the laws in all of the countries.

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In the so-called A.E.F. countries, created by the decree of January 15, 1910, the basic body of French Law, including civil and commercial legislation, was introduced by several successive reception statutes.28 Article 17 of the decree of March 17, 1903 is, for instance, the decree by which French Law was incorporated in the laws of Gabon, Republic of the Congo, Chad, and the Central African Republic.

The period after independence in these countries also witnessed a flurry of legislative activity. Much as in the English-speaking countries, this activity consisted mainly of constitution-making, but special emphasis was also placed on the position of customary law within the context of the legal order. Also, even though these “fledgling states” and economies depended mainly on the production of primary goods for export, there was interest in reviewing and modernizing their business-related laws. This was, however, not a high priority especially since large-scale commercial activity was confined to French businessmen operating in the former colonies. In Côte d’Ivoire, for example, there was very little reform undertaken by the Ivorian National Assembly of the commercial code and other business-related laws; the laws operating in France prior to 1955 continued to apply in Côte d’Ivoire, even though there had been significant changes in respect of many of them in France. For example, the law on commercial companies in 1966 and the law on bankruptcy were amended in France in 1967. In contrast, the most significant legislative achievements during this period were in the development and promulgation of new laws relating to the status of persons, which replaced both the existing customary law and the French Civil Code. These laws, promulgated on October 7, 1964,29 include the law relating to names, the civil registry, marriage, divorce and separation, paternity and filiation, adoption, succession, wills, and gifts. This set of legislation constituted a radical law reform process since its purpose was intended to transform the traditional Ivorian social structure, taking into account European cultural norms and practices.30 As has been noted further by Professor Salacuse, the National Assembly recognized that such radical changes required time and extensive programs of public education and therefore provided that the effective dates of such legislation could be delayed for up to two years.31

28. Decree of June 1, 1878, Art. 14, (1878), Bulletin des Lois (12th Series), Decree of September 28, 1897, art 23, 6 Penant III (1897), Decree of March 17, 1903, etc.
30. For a discussion of the consequences of these laws, see Salacuse, supra n. 8 at 131-144. See also R. Mundt, The Internalization of Law in a Developing Country—The Ivory Coast’s Civil Code, in 12 AFR. L. STUD. 60 (1975).
31. Supra n. 9 at 133.
This effort at reform of the Ivorian Code Civil may be contrasted with the process used for the eventual amendments to the Code Civil and the Code de Commerce in France. With respect to the Code Civil, several commissions were established, beginning from 1904 through 1964, which considered appropriate amendments to these codes. The task for undertaking the reforms were entrusted to two commissions composed of distinguished professors and judges. In the case of the Civil Code, the commission consisted of 12 members, including three professors, three members of the Conseil d’Etat, three magistrates of the Cour de Cassation and three practitioners (one lawyer each practicing in the Conseil d’Etat and the Cour de Cassation, respectively, and one notary). The commission for reform of the Code de Commerce included 14 members: four professors, four magistrates, and six practitioners. The commissions’ methods of working were essentially to have preliminary drafts prepared by interested ministries or prepared by their own staff or one of their members, leading to full sessions of the commissions to adopt drafts and reports. It took several years of debate, consideration, and consultation before amendments to the respective codes were promulgated.

In Senegal, which also voted overwhelmingly to accept the 1958 French Constitution to become an autonomous republic within the French Community, much the same legal situation existed. After revising its 1959 Constitution to take account of its independence after the breakup of the Federation of Mali, it embarked on a sweeping program of reform of the laws that it had received as part of its colonial heritage. As in other French-speaking countries, the laws received from France prior to independence continued in full force and effect until amended or repealed. However, it also carried out far-reaching law reform activities related to the promulgation of a new code of civil and commercial obligations. This reform consisted of five different parts that were adopted on separate occasions. This reform activity took somewhat into account the principles of customary law and the special circumstances prevailing in Senegal, but it was essentially based on French legal principles.

35. The Law related to Partie Générale was adopted in 1963, the Contrats Spéciaux in 1966, both going into effect in 1967, with the three last parts on Sociétés Commerciales, Effets de Commerce and Garanties et Sûretés du Crédit going into effect much later.
Guinea, unlike the other countries that were under French rule, voted by a large margin to reject the 1958 French Constitution, which would have made it an autonomous republic within the French Community. Thus, it was immediately faced with the adoption of a new constitution, as well as a new legislative framework. Its National Assembly adopted a new constitution on November 10, 1958, which declared Guinea a "democratic, secular, and socialist republic." To ensure that the rule of law continued, the National Assembly promulgated an ordinance that made the legislation in force at the time of the break with France applicable in its territory, as long as their provisions were "compatible with the sovereignty of the independent State of Guinea and in conformity with the interests of the Republic of Guinea." This meant that the courts continued to apply the French law in force at the time of independence.

Indeed, although the French Code de Commerce continued in effect, the Guinea legislative bodies, wishing to break new ground, enacted a new law on business corporations, which reflected the role enterprises should play in an economy that was fast becoming socialist in character. In so doing, it took into consideration concepts applicable under French law but adapted them to suit the sociopolitical and economic situation in Guinea and the newfound aspirations of its government.

The case of Congo-Kinshasa (Zaire), now Democratic Republic of the Congo, illustrates another perspective in lawmaking in Africa. Unlike the British or the French, which enacted laws on behalf of its territories in Africa, the legal system or laws of Belgium did not apply by simple automatic extension to the Congo. Instead, even though the laws were heavily influenced by Belgian law and were largely copies thereof, they were individually promulgated to be applicable in the territory. With respect to commercial transactions, Congo had a commercial law that was constituted by a series of decrees issued during the colonial era to provide a basis for commercial activities by the Belgian and other foreign companies operating in the Congo. These laws remained fairly intact immediately following the post-independence period.

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37. Law No. 4 of November 10, 1958, Art. 1.
39. The new code recognized six types of sociétés (companies), the société d'état (state corporation), société coopérative (cooperatives), société anonyme (publicly held corporation), société à responsabilité limitée (the closed or privately held corporation) and the société d'économie mixte (the mixed company). See J. Hazard, Guinea’s Non-Capitalist Way, in 5 Colum. J. Transnat’l L. 231.
**The Ethiopian Experience**

No review of legal reform in Africa in the past 40 years would be complete without a reference to the legal reforms undertaken in Ethiopia during the 1950s and early 1960s. Although several new laws were promulgated during this period, the law that has been widely discussed in intellectual circles is the Ethiopian Civil Code of 1960, which was written by a team led by the notable French legal scholar, Professor René David.

Many studies and law review articles have been written on these new laws (general codes) promulgated in Ethiopia between 1957 and 1965, especially because the methodologies used, the processes followed, and the objectives for the law reform exercises, were unique. In each case, a process was designed that was intended to use the law as a tool for social engineering in order to improve the development prospects of the country. In so doing, it was intended that the best out of the external systems of law and practices that appeared to have worked in those societies would be transplanted to Ethiopia. Such laws were, however, supposed to be adapted to the new sociopolitical milieu in Ethiopia.

In this connection, the then Emperor of Ethiopia indicated the following at the beginning of the codification processes:

> The necessity of resolutely pursuing our program of social advancement and integration in the larger world community ... make[s] inevitable the closer integration of the legal system of Ethiopia with those of other countries with whom we have cultural, commercial and maritime connections. ... We have never hesitated to adopt the best of what other systems of law can offer to the extent that they respond and can be adapted to the genius of our particular institutions....To that end, we have personally directed the search for the outstanding jurists of the continent of Europe to bring to us the best that centuries of development in allied and compatible systems of law have to offer....The great distinction of the continental experts whom we welcome on this occasion should not cause us to lose sight of the principle that we have stated, namely, that Ethiopia should endeavor to adopt and adapt the best that

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other legal traditions have to offer. However, as we have remarked, the point of departure must remain the genius of Ethiopian legal traditions and institutions, which have origins of unparalleled antiquity and continuity.43

Although the point of adaptation was stressed and the importance of infusing Ethiopian traditions and culture into the laws was an objective, it was clear that those who were responsible for the new codes were guided by the keen desire of modernization rather than by attempts to infuse traditional practices and values. Indeed, according to one of the reviewers of the work on the Civil Code, “after a general meeting of the Commission established to oversee the civil codification, the expert then retired to the privacy of his workroom, located in Paris, to do the actual drafting.”44 More important, Professor David in his famous article on the considerations of the codification of the civil law in African Countries, stated the following:

With conditions in the modern world, where highly developed states exist, it is inconceivable that one might build in a country such as Ethiopia the road which has been built in western Europe in the course of centuries of groping. Ethiopia cannot wait 300 or 500 years to construct in an empirical fashion a system of law which is unique to itself, as was done in two different historical eras by the Romans and the English. The development and modernization of Ethiopia necessitate the adoption of a “ready-made” system; they force the reception of a foreign system of law in such a manner as to assure as quickly as possible a minimal security in legal relations (with an understood reservation for a subsequent adaptation, to specific Ethiopian needs, of the corpus juris thus received).45

Various members of the law and development movement of the 1960s and 1970s who taught law at the University of Addis Ababa and who carried out empirical studies of this legal reform process have since written about the failure of the Civil Code and the other codes promulgated during this period to take hold in Ethiopia in view of factors related to the sociocultural and economic milieu in which they were introduced.46 In particular, it has been noted that in the early years of the application of

44. Singer, supra, n. 42, at 84.
the Civil Code, for instance, that the Code was not well known to the judges in Ethiopia. Even at this writing, questions remain about its efficacy and indeed about success of the technique and methodology utilized in that major legal reform exercise.

**Between the Post-Independence Period and 1990**

Between the immediate post-independence period and 1990, few major legal reform exercises have been initiated that rival the attention paid to this issue in the immediate post-independence era. Those exercises that have benefited from World Bank involvement will be discussed more fully in another section of this study.\(^{47}\) In most cases, legal reform has been undertaken to deal with specific issues of interest to the particular government or in a particular area of law in which there is a glaring lack of legislation that impedes the developmental objectives of the country concerned. However, it should be noted that, with respect to foreign direct investment in Africa, much was done to promulgate investment codes and laws, particularly in the 1970s and 1980s, when the then prevailing view was that countries in Africa would attract significant investment if they created the most appropriate investment climate.\(^{48}\)

The law reform commissions in the English-speaking countries that had been given the principal task of updating and developing new laws failed to fulfill their mandates. Chief among the reasons for this was their inability to relate to, and work with, the respective attorney generals and ministers of justice who, under the provisions of the laws establishing such commissions, were the recipients of reports. In the case of Nigeria, the first few years of the work of the commission did not yield any results and, as has been stated, the difficulties of the commission “lay in the implementation, as their reports had been lying around gathering dust and cobwebs.”\(^{49}\) Progress appeared to be made depending on the person holding the position. Thus, for example, in Nigeria, more progress

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47. In particular, see pp. 29–32 for a discussion of the corporate law reform in Zambia in the 1980s–1990s, and pp. 43–47 for a discussion on the harmonization of the “droit des affaires” in the CFA Franc Zone.


was made from 1984 onward when the attorney general under the then existing military regime exhibited cooperation and commitment. This was partly due to the fact that, under the military regime, laws were passed much more readily and quickly than in the then existing normal democratic system. At the same time, another problem faced by these law reform commissions included the lack of resources to engage appropriately qualified and experienced staff and to fund their activities, office equipment, and library facilities. In The Gambia, for example, activities of the Commission were financed by bilateral aid agencies and, in some cases, by individual commissioners from their own coffers.

The Law of Nontransferability of Law

With this brief introduction to some of the significant legal reform exercises in the postcolonial era in Africa and beyond, it is important in the context of this study to introduce a notion that appears to be of relevance to legal reform exercises in general, but more particularly in Africa and other developing nations. This notion, “the law of nontransferability of law,” is particularly relevant to those legal reform activities that are intended to produce behavioral changes designed to improve the developmental prospects of a given country. This notion, which has been given much prominence in the writings of one of the doyens of the law and development movement, Professor Robert Seidman, simply stated, is that legal transplants never work and almost always lead to the failure of the law or laws to achieve its objectives in the new setting. In his view, attempts to copy the laws and institutions of some “model” country have hardly worked. This is because, among other things, the persons to whom a law is directed make choices within the constraints and resources in their own environment and such constraints and resources almost invariably differ from place to place. The only chance that progress may be made is to gather knowledge about how, in the new country, the persons to be affected by the law would behave, and that requires research. Therefore, as he wrote rather pointedly:

Turkey copied French law, Ethiopia copied Swiss law, the French-speaking African colonies, French law, Indonesia,

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50. See C. Wachuku, supra, at 17.
51. See P. Anin, supra, n. 21, at 77.
53. Id. at 46.
Dutch law. Universally, these laws failed to induce behavior in their new habitats anything like [that] in their birth places. Inevitably, people chose how to behave, not only in response to law, but also to social, economic, political, physical, and subjective factors arising in their own countries from custom, geography, history, technology, and other, non-legal circumstances.\(^\text{54}\)

Thus, in the view of many scholars in the law and development movement, which was in full bloom in the 1960s and early 1970s, legislative reform should not continue to follow the old tendency of adopting wholesale the provisions of legislation from the so-called advanced countries, whose economic and sociopolitical situations are vastly different from those of developing countries. Instead, the law, particularly in the commercial and corporate law area, must be modernized to spur on economic growth and development by adapting it to the needs of the particular country, taking into account the stage it has reached in the economic development process. Equally important, there ought to be an understanding of the institutional framework required to implement the law and whether the law is likely to induce the same behaviors in the new environment.

It should be noted, however, that some scholars have observed that it is easier to effect reform relating to issues involving the market place rather than those related to the family and social issues. The basis for this view is that law has more impact on areas of life that are relatively neutral (emotionally speaking) than on expressive and evaluative areas. Thus, as one such scholar wrote, "the family resists but the marketplace complies."\(^\text{55}\) Experience has, however, shown that legislative reform that does not take into account the particular circumstances of the country in question stands a high chance of failing even in the corporate or commercial law areas.

\(^\text{54}\) Id, at 44–45.
Chapter 3

The World Bank’s Role in Legal Reform

The World Bank’s role in legal reform, particularly in the business-related area—often referred to in World Bank parlance as private sector development (PSD)—has been significant since 1990. Prior to that year, the World Bank had financed technical assistance for legal reform in limited cases, particularly as conditions for its lending in a particular sector. For instance, a World Bank borrower may be required to make appropriate amendments to its laws on the establishment of agricultural produce prices as a basis for support to the agricultural sector. However, it is now becoming commonplace for lawyers from the Legal Department to act as project officers (task team leaders) for far-reaching legal and judicial reform projects worldwide, a far cry from a description given by the World Bank’s Office of Information in 1962 on the role of lawyers in the appraisal of World Bank–financed projects. In a letter written in response to the involvement of lawyers, a World Bank official responded as follows:

We have never had a lawyer included on a mission because of his legal knowledge. You have probably noticed from the reports [of the various missions] that the effort of a mission is generally directed towards broad economic planning and programming and that consequently its depth is extremely limited in the more specialized and highly technical areas such as the development of the legal system of the country or the legal problems incident to economic development. This is not to say that men [sic] with legal background are never mission members, but rather that, if they have such background, it is only incidental to their other abilities.

56. In this study from this chapter forward, the words “World Bank” refer collectively to the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) unless the context otherwise indicates.

In the same article is found a statement from a then forthcoming article to be published in 1963 or 1964 by Professor Allott on legal development and economic growth in Africa in which the Professor wrote as follows:

So far as I can discover, none of the economic missions or commissions has had a legal member still less one qualified in the way I suggest; from East Africa and Tanganyika to the High Commission Territories and Nigeria, it is the same story: the missions include bankers, economists, agricultural experts, technical experts, administrators, geographers—but the lawyers are strongly absent.\(^5\)

In short, there has been a major shift in the role of the lawyer in the World Bank, as well as a shift in the importance given to the existence of appropriate legal and judicial frameworks in the development programs of developing countries. Although in the past, the World Bank concerned itself with legislation and rules in the context of public sector management, a sea change has occurred in terms of activities since the 1970s. The 1980s, in particular, witnessed a major shift to policy-based lending—structural and sector adjustment lending—which very often entailed a review of the legal framework for the sectors concerned. More important, the notion that law is an important ingredient in the development paradigm is no longer in doubt. This has been buttressed by the advent of the issue of governance, which became an important part of the World

\(^{58}\) Id., at 512. In Professor Allott’s contribution to a Symposium on Changing Law in Developing Countries (London, 1962), Legal Development and Economic Growth in Africa, he made the following points of relevance to the role of the lawyer in development:

(3) The role of the lawyer in promoting economic growth in Africa has been largely ignored. The lawyer’s role has been largely ignored. The lawyer’s role has been no more than that of writing down in legal language what the economists and administrators have already decided on, but this is no longer acceptable. Intimate knowledge of customary laws and social structures and aspirations is required of a lawyer, who should engage in a creative dialogue with governments and their economic advisers; in other words, one requires specialists in ‘socio-legal dynamics’ who are also expert and creative draftsmen.

(4) Accordingly, economic commissions and study groups should include lawyers with such specialized knowledge and interests. Fundamental research into the existing laws, statutory, and customary, and into the specific inter-relations between that law and existing or projected social and economic organization also needs to be carried out.

Bank's mandate from the early 1990s and which involves accountability, transparency, and the rule of law.\textsuperscript{59} This has meant that more careful assessments are now undertaken of the legal and judicial frameworks of World Bank-borrowing countries in the context of its activities in such countries.

\footnote{59. For an exposition of the World Bank's mandate in this connection, see I. Shihata, \textit{The World Bank and "Governance" Issues in its Borrowing Members}, Chap. 2 of \textit{The World Bank in a Changing World} (compiled and edited by F. Tschöfen and A. Parra, Martinus Nijhoff, 1991) at pp. 53-96.}
The principal mandate of the World Bank, as stated in its Articles of Agreement, is to promote reconstruction and economic development in its member countries, primarily by providing loans and guarantees for the financing of specific projects, including projects for technical assistance. As important, it is required to facilitate investment for productive purposes, promote private foreign investment by guarantees and complementary loans, and assist its members in achieving equilibrium in their balance of payments, as well as promote international trade.\(^{60}\) The World Bank's mandate is, however, limited in some respects, for various provisions in the respective Articles specifically require both institutions to make arrangements to ensure that monies provided are used for the purposes for which they were given with due attention to considerations of economy and efficiency and without regard to political and other noneconomic influences and considerations.\(^{61}\) In addition, World Bank officials are not to interfere in the political affairs of members and should not be influenced in their decisions by the political character of the member; only economic considerations shall be relevant in decision-making, and even then these should be weighed impartially in order to achieve the purposes of the World Bank, as specified in Article I.\(^{62}\)

It is quite clear from these provisions and others that emphasize the nonpolitical nature of the World Bank (the Articles are replete with references to independent and technical judgments to be exercised in decision-making) that the World Bank was intended by its founders to be insulated from the politics of its members. Legal reform and judicial reform very often entail political aspects, in that such reform often involve actions which affect political and other groups in society and also raise sometimes difficult sociopolitical issues. In view of this and other factors, the

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\(^{60}\) Article I of the Articles of Agreement of IBRD. See also Article I of the IDA Articles of Agreement, which is similar and indicates that finance provided should further the developmental objectives of the IBRD and supplement its activities.

\(^{61}\) Article III, § 5 (b) of the IBRD Articles. See also Article V, § (g) of the IDA Articles.

\(^{62}\) Article IV, § 10 of the IBRD Articles, and Article V, § 6 of the IDA Articles.
framework for the World Bank's engagement in this area of work has been the subject of various opinions and writings of its General Counsel. These opinions are based in part on the recognition that fundamental policy changes that several borrowing members of the World Bank have undertaken since the 1980s must be accompanied equally by fundamental changes in the overall legal and institutional framework. With the growing interest in legal reform, particularly in the commercial and corporate law arenas and especially in the context of private sector development, the World Bank's then Senior Vice President and General Counsel, Mr. Ibrahim Shihata, during whose tenure much of these advances have taken place, stated as follows in a speech delivered before the First Global Rule of Law Conference in 1994:

Supporting legal and judicial reforms is not mentioned as such in the World Bank's Charter. But, as already mentioned, experience has shown that such reform cannot be ignored in the process of economic development or adjustment. It particularly confirms that the successful implementation of fundamental policy changes in the business environment and in the financial sector normally requires fundamental changes in the overall legal and institutional framework.

More broadly, legal reform and judicial reform, complemented by civil service reform, are often prerequisites for the facilitation of investment. Together, they constitute basic elements of "good order" in the management of a country's resources, i.e., of its governance. For these reasons, I advised the Bank's Board in 1990 that these activities may readily fall within the Bank's mandate upon the request of a borrowing member country.63

In coming to the conclusion that he stated to the Executive Directors of the World Bank that the World Bank may favorably respond to requests for assistance in legal reform, the then General Counsel succinctly described some of the issues that are characteristic of the legal systems in many borrowing countries as follows:

The legal system may be generally unresponsive to the needs of important parts of the community, including the business community. Laws and regulations may be complex, deficient, unwritten or nonexistent. Rule-making, whether in the form of

63. Address delivered on July 15, 1994, in Washington, D.C., before the First Global Rule of Law Conference.
legislation, regulations or minor decrees and directives may not be based on comprehensive data and analysis and are often influenced by vested interests and interpersonal considerations. The civil service in charge of administering the laws and regulations may be poorly trained and motivated. Delays, red tape, uncertainty, and corruption can result. The court system and judiciary may follow protracted procedures resulting in unreasonable delays and may be unable to enforce judgments. No system of commercial arbitration may exist. Even minor commercial disputes may remain unresolved for years. The local legal and accounting professions may be underdeveloped or, given the excesses of the regulatory framework, may perceive their role as agents of avoidance or evasion of binding rules. This situation makes investment decisions more difficult and costly for domestic and foreign investors alike.64

And with specific reference to the critical importance of legal reform in private sector development, he has written as follows:

The Bank's deep involvement in PSD makes it important, in fact, inevitable, for it to focus more critically on legal and institutional framework issues. The Bank's approach in this area, as in other aspects of its work, must be tailored to the different social and economic circumstances in its borrowing countries. In particular, the Bank has to be sensitive to the historic, social and, in some cases, religious background to the legal system and the institutions involved in legal administration and enforcement. Societal attitudes to law, the gap between modern and traditional sectors, the tension between the laws governing such sectors, the degree to which corruption is tolerated or the manner in which law is actually used and enforced (supportive, repressive, neutral) are all factors which should influence the Bank's understanding of the situation in each country.

Admittedly, a number of factors will limit the role the Bank can realistically play in assisting interested countries to develop their legal and institutional framework. However, committed to structural adjustment or private sector development,

governments ultimately decide what is politically feasible in their societies. Amending laws and regulations in the broad areas mentioned or changing administrative and judicial processes and associated institutions is inherent in the sovereign powers of states and raises difficult sociopolitical issues.65

Mr. Shihata, then General Counsel, has also advised that any legal reform process should be part of a long-term plan embedded in the concerned country’s economic strategy. Equally as important, legal reform cannot be successfully implemented if it is not based on adequate information and analysis and is not supported by the principal interested parties in the country. In his view, countries should be given adequate time for the adoption of new laws and regulations which suit them most. Further, such laws and regulations should be discussed by all interested parties, including the general public. Such a process would lead to the law remaining “in force for reasonable periods of time without further modifications that threaten the stability needed for the business environment.”66

66. Id., at 236.
Chapter 5

Modes Used for World Bank Assistance

World Bank assistance takes many forms and, over the years, the World Bank has established trust funds and other instruments to assist in the financing of its activities and those of its member governments. The principal means of financing of such assistance includes loans made by IBRD, credits made from the International Development Association (IDA), the World Bank’s soft-loan window, which is funded through transfers from the net income of IBRD and successive replenishment by members, as well as grants from its Institutional Development Fund, established in 1992. The World Bank has also established trust funds with monies provided by donors which are members of the World Bank for specific purposes, including technical advisory services to its member countries. The most important of such trust funds is the Japanese-financed Population and Human Resources Development Fund, used mainly for preparatory activities for projects to be financed by the World Bank. Financing is also provided by the United Nations Development Programme to assist in project preparation. In some cases, the World Bank acts as executing agency for the activities contemplated. In addition, World Bank legal staff have, in the context of what is referred to in World Bank parlance as “sector work” (i.e., preliminary studies to ascertain the nature of issues in a particular sector), or during preparation or appraisal of upcoming projects, prepared reviews of the laws in a particular area to be submitted for consideration by the government concerned at no cost to the prospective borrower. Such diagnostic studies and analyses are financed through the World Bank’s own administrative budget. In some cases, consultants have been employed by the World Bank’s Legal Department to carry out these studies paid out of the administrative budget.

All these financing instruments have been used in one way or another in World Bank assistance programs for legal reform in Africa. Also, many of the World Bank–financed legal reform activities have entailed amendments or enactment of specific laws in specific areas of relevance to the objectives of the project or program in question. For example, in the Second Structural Adjustment Credit for Benin made in July 1991, where financial assistance was provided by IDA to assist the borrower in the
execution of a structural adjustment program with emphasis on private sector development, the borrower undertook to "take measures to enhance the recovery of bank loans, including reform of relevant judicial procedures, land title records and commercial laws, enactment of legislation to implement an import taxation structure and industrial protection system, and a review of the legislation pertaining to investment promotion, labor relations, and commercial activities."

Where significant legal reform activities are envisaged in a program such as the one in Benin referred to above and the government concerned cannot fund the expertise required, IDA may provide financing through associated credits designed to finance the technical advisory services required for undertaking the work. In other cases, such work may be financed by a bilateral aid agency.

In all cases where the activities to be financed by IDA are to be carried out through the engagement of legal and technical advisory services (meaning lawyers and financial experts), it is required that such advisory and consulting services be procured by the government concerned under contracts awarded in accordance with The World Bank's Guidelines: Selection and Employment of Consultants by World Bank Borrowers, the most recent version being the one adopted in January 1997 to replace the long-standing guidelines adopted in 1981. It should be noted that the recent amendments have the effect of putting increased emphasis on transparency, including issues related to fraud and corruption. The guidelines also continue to emphasize the promotion of the World Bank's policy of increased use of consultants from borrowing countries, taking into account the basic principles underlying the guidelines that are "the need for high-quality services, the need for economy and efficiency, the need to give qualified consultants from all eligible countries an opportunity to compete in providing services financed by the World Bank, the World Bank's interest in encouraging the development and use of national consultants in its developing member countries, and the importance of transparency in the selection process." The World Bank's role in the selection process is to review the request for proposals, including the cost estimate, contract packaging, the evaluation of proposals, award recommendations, and the contract emanating therefrom, and to ensure that the process has been carried out in accordance with the procedures specified in the agreement between IBRD/IDA and the borrower.

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Chapter 6

Selected Examples of World Bank–Supported Operations and Programs

The Africa Region has received considerable assistance from the World Bank to carry out comprehensive legal reform of business-related laws. The requests from African countries came originally during the 1980s in the context of adjustment programs, pursuant to which they pledged to amend various pieces of legislation relevant to the adjustment process. In the early 1990s, however, more requests for assistance were received to revamp the legal and judicial system per se, but very often, this was linked to the newfound interest in private sector development. This section of the paper describes and analyzes some of the major legal reform programs in the business-related sectors supported by the World Bank.

Zambia

Since 1992, the government of Zambia, with the support of the World Bank and other financing institutions, has carried out a comprehensive and major legal reform program of its business-related laws. This program has been undertaken in conjunction with successive economic adjustment programs, all designed to assist in reversing the economic fortunes of Zambia. The financing operations associated with these programs include a combination of structural adjustment credits, which finance general imports in the context of the proposed policy reforms, as well as technical assistance credits to finance advisory services and capacity building in the public service but with significant attention to the legal sector. The World Bank has not been the only external financing agency

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68. Privatization and Industrial Reform Adjustment Credit (July 1992), Privatization and Industrial Reform Technical Assistance Project (July 1992), Privatization and Industrial Reform Credit (May 1993), Second Privatization and Industrial Reform Credit (September 1993), Financial and Legal Management Upgrade Project (September 1993), Economic and Social Adjustment Credit (April 1994), Economic and Investment Promotion Credit (July 1995), and Economic Recovery and Investment Promotion Technical Assistance Project (December 1996).
involved. Zambia has also received significant assistance from the International Monetary Fund, the International Finance Corporation, and several bilateral aid agencies such as the United States Agency for International Development (USAID) and the Overseas Development Agency of the United Kingdom (now the Department of International Development).

The net effect of these operations is a major overhaul of the laws related to commercial activities in Zambia, including the establishment of modern institutional structures for the supervision and regulation of the financial sector and encompassing licensing, organization, operation, and supervision of financial sector institutions. Conditions for release of the tranches of the proceeds of credits in the various adjustment operations that were derived from various letters of sector and development policies formulated by the government of Zambia and furnished to IDA as a basis for its financial support have included actions in almost every aspect of the corporate law of Zambia.

These have included requirements for:

(a) an amendment of the Companies Act to modernize and simplify the requirements related to the formation, operations, reorganization, and winding up of Zambia-registered companies and to streamline the registration of foreign companies;

(b) enactment or amendment of legislation to provide for a modern financial sector, including the operations of the Zambian central bank to supervise other financial institutions and banking institutions;

(c) enactment of a Securities Code and adoption of the necessary regulatory framework, including establishment of a stock exchange and regulation of brokers, investment advisers, unit trusts, etc.;

(d) removal of all legal prohibitions that inhibit trading, manufacturing, or service activities, except those related to taxation, health, safety, and environment;

(e) enactment of a law for the control of restrictive trade practices and limitation of monopoly powers;

(f) enactment of a new privatization law and an investment act;

(g) amendment to the land law to facilitate, among other things, subdivision of land, and real estate transactions;

(h) enactment of a new fiscal regime for mining and promulgation of regulations for environment impact assessment, particularly for mining-related operations; and

(i) revision of the law and regulations governing insurance companies, pension funds, and other contractual savings institutions.\(^{69}\)

\(^{69}\) These tranche release conditions are taken from Schedule 2 to the Development Credit Agreements for the adjustment operations referred to in the preceding footnote.
Before devising the law reform program, a review was undertaken of the status of the laws governing business activity. It was found that many of the laws of concern to the business community were outdated and originated from the colonial period. For instance, the law applicable to contracts was the English Law in effect on August 17, 1911 and so were the Companies Law, Insurance Law, etc. In addition, legislative texts were not available widely in the country; lawyers and judges relied on informal means of ascertaining applicable laws. Services associated with business operations, in particular, the services provided by the Registrar of Companies, were in a state of chaos and needed significant improvements in storage and retrieval capabilities in order to cope with the anticipated expansion of business activities due to the adjustment program.

The extent and magnitude of the Zambian corporate law reform process has meant that the government has had to engage a variety of technical and legal advisory services, including firms, individual experts, many of whom have backgrounds derived from the common law and Anglo-American law traditions. It is important to note that, in view of the principles stated at the beginning of this study, the World Bank has made a special effort to support the Ministry of Legal Affairs in Zambia with a view toward ensuring that the laws and regulations are understood, owned, and drafted in final form by lawyers in Zambia. Although conscious of the fact, as noted previously, that in certain areas in the commercial sector, such as banking and securities, laws may be more easily transplantable, even in such cases, the Zambian government has made some effort to ensure that the economic and sociopolitical circumstances of Zambia are taken into account in the lawmaking process. Actions taken in this respect included the holding of various workshops and meetings with interested parties and stakeholders to discuss drafts of the proposed laws before being taken through the parliamentary process.

To further strengthen the World Bank's and the government's resolve, a component was included in an Economic Recovery and Investment Promotion Technical Assistance Project, approved at the end of 1996, entitled "Commercial Legal Reform," which has the objective of further strengthening the capacity of the Department of Legal Drafting in the Zambian Ministry of Legal Affairs "in reviewing and drafting commercial laws, preparing legislative texts, subsidiary legislation and other legal drafts through the employment of experts and the provision of long- and short-term training of staff in legislative drafting."

70. Source: World Bank staff Back-to-Office Reports.
This new assistance builds on the IDA-financed project, the Financial and Legal Management Upgrading Project (FILMUP), the legal documents for which were signed in September 30, 1993. FILMUP is designed to assist in the improvement of “flow of public and private business activity and the implementation of development programs and to facilitate reform through capacity building and institutional development in the areas of accounting, auditing, public sector procurement, and provision of legal services and of business information.”

This project, which has been ongoing since 1993, is intended to deal with specific issues identified as impediments to the proper administration of justice, ranging from the very poor physical working conditions in the law courts and the poor state of the legislative framework and of legal reporting in the country, to improving the ability of the Ministry of Legal Affairs to develop, draft and assist in the promulgation of laws and regulations required to support Zambia in its wide-ranging economic and social reform agenda. Financing under the project has assisted the government in the enactment since 1993 of a plethora of legislation affecting commercial activities, including a Privatization Act, an Investment Act, a Securities Act, a Commercial and Fair Trading Act, a Zambia Revenue Authority Act, a Companies Act and a Value Added Tax Act, all envisaged under the World Bank-financed operations referred to above. The Project itself has been successful in facilitating the training of a significant number of lawyers involved in commercial law issues, including officials of the Law Practice Institute, the Institute of Legal Drafting, and the Registrar of Companies. In addition, it has provided much needed office equipment and materials (including textbooks and reference books) to the Supreme Court and High Court and also assisted in the establishment of a permanent Industrial Relations Court in Ndola.

Tanzania

Support for legal reform has also been a key part of Tanzania’s transition strategy from an economic system based on extensive public ownership of the means of production—as detailed in the Arusha Declaration of 1967—to an economic system based on a market economy and an important role for the private sector. Recognizing that such a new economic system must be based on the existence of transparent accounting and auditing systems, as well as a legal system consisting of appropriate laws

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73. Id., Part D of Schedule 2 to the Development Credit Agreement.
74. Supra, n. 68.
and regulations reflecting the needs of the changing society and administered in a transparent manner, the Tanzanian government requested the assistance of IDA and other agencies to finance legal reform activities as part of the implementation of its Economic Recovery Program. Thus, Tanzania’s Financial and Legal Management Upgrading Project, the legal documents relating to which were signed on September 4, 1992, was designed to assist in the achievement of this objective by the provision of equipment, materials (including hardware and text books of all kinds), as well as training of staff in the legal sector, namely the Judiciary, the Attorney General’s Office, and the Law Reform Commission. As important, the Project included components designed to assist in the revision and printing of the laws of Tanzania and its law reports and a “review of commercial and related laws, including laws that impact on private sector development.” Another important component was an in-depth study and the development of a strategy for improving the sector’s performance as a whole.

The review and possible reform of the commercial and business-related laws was required to remedy the state of these laws, particularly if they were to facilitate increased commercial activity. In 1992, apart from minor changes relating to the fees charged for various filings and services, the Tanzania Company Ordinance, bankruptcy, and other commercial laws originated from the colonial period. The Companies Ordinance, for instance, was based on the 1938 English Companies law and was not supportive of modern business activities. The interrelationship between the laws in the corporate law area, such as tax, foreign exchange licensing, securities, and banking, also needed to be reviewed to ensure consistency of approach and application.

With respect to the commercial law review, a variety of law firms and legal professionals with experience in Africa were contracted, and several comprehensive reviews have been carried out, together with recommendations that have formed the basis for new laws that are being drafted for submission to parliament. Some of this work is still ongoing. Much of the work has been done with the collaboration of foreign and local consultants in view of the government’s policy of requiring foreign consultants to enter into joint ventures with local experts. It must be noted that this combination of lawyers and, in particular, the significant role of local Tanzanian lawyers may ensure that the revised laws in this

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76. Id., Part B.1 (c) of Schedule 2 to the Development Credit Agreement (Description of the Project).
77. Id., Part C.1 of Schedule 2 to the Development Credit Agreement.
important area of economic life take account of advances in the legislative frameworks and texts in the developed world, as well as the sociopolitical and economic milieu in Tanzania. A donor’s conference was held in October 1997 with the purpose of discussing the recommendations of the legal sector study and obtaining the necessary financing to initiate implementation of the programs. The conclusion of the Conference was that more work was needed to refine and prioritize the activities and programs included in the study. The government has done this work and adopted in October 1999 a Medium Term Strategy and Action Plan (2000-2005) which was presented to a Donors Roundtable in December 1999.78

Kenya

As part of Kenya’s program for parastatal organization reform and privatization, IDA has been supporting various legal reform activities, all designed to assist in the establishment of a legal and institutional framework that would encourage and facilitate private sector development in Kenya. As may be obvious from the previous discussion of World Bank support in this area, diagnostic studies have been found to be invaluable, if not critical, to the success of any law reform program. Thus, in the case of Kenya, IDA, as administrator of grant funds provided by Japan,79 engaged the services of an American law firm, working in partnership with Kenyan law firms and legal professionals, to assist in identifying reforms in the legal and regulatory framework within which business enterprises can be expected to operate and grow efficiently, including an assessment of the adequacy of various laws, such as those on bankruptcy, insurance, contracts, foreign exchange control, restrictive trade practices, Kenya’s State Corporations Act, and the potential of transferring parastatal organizations to operate under its Companies Act. These professionals were also required to evaluate existing Kenyan legislation that may affect the government’s program for private sector development, privatization, and restructuring. The consultants also had within their terms of reference the task of assisting the government in formulating a monitorable program of divestiture of several parastatal enterprises, as well as to prepare a number of enterprises for privatization.


The review focused on what is necessary in the legal framework to stimulate, encourage, and sustain private sector development from several perspectives. Chief among these were how the laws affected entry into the commercial market; laws or practices that add or eliminate predictability, and conversely risks; how the laws tend to enhance or detract from a level playing field among competitors; and the government's ability to instill confidence in the private sector. The consultants concluded, among other things, that there were clear disincentives to private sector investment to be found in the provisions of many laws. For instance, the provisions of the Restrictive Practices Act and the State Corporations Act required a higher level of ministerial and executive discretion, which often influenced enforcement and promoted the preferential treatment of government-owned companies. This comprehensive report on laws affecting commercial activities is serving as a background and diagnostic document for the proposed comprehensive law reform program in the corporate law area. This work is, however, being undertaken in piecemeal fashion.

In addition, to support the proposed legal reform effort, a component was included in the follow-up project, the Parastatal Reform and Privatization Technical Assistance Project, to finance short-term training courses for lawyers in the Kenyan Attorney General's Office with special attention given to the Legislative Drafting section to enable it to cope with the increased amount of drafting required during the reform period.

**Ghana**

The methodology outlined above in the case of the World Bank programs in Tanzania and Zambia has also been followed in Ghana, where the Government, with World Bank financial assistance, is carrying out a series of diagnostic studies in various areas of the legal sector, including studies on the effectiveness of the judicial service, the design of new legal databases and information systems, improvement of law libraries and registries, as well as the functioning of the Attorney General's office. This project was preceded by a review of the legal and regulatory framework...

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affecting the private sector and of the legislation governing the proposed privatization program financed in part by the administrative budget of the Legal Department. The World Bank is also collaborating with the Economic and Legal Advisory Services Division of the Commonwealth Secretariat, which has undertaken a diagnostic survey of selected commercial legislation in order to recommend measures for the removal of impediments to private sector development and for strengthening the enabling role of such legislation in private sector development. The effort of the Commonwealth Secretariat has been focused on areas such as the regulatory framework for public utilities, insolvency, and bankruptcy laws as they relate to individuals and companies, the interaction between the investment code and the exchange control laws, the companies code, and issues relating to corporate governance generally, the nature of transparency in licensing regimes, the differential treatment of various sectors covered by the investment code, and sectors not covered by the dispute resolution processes and the possible expanded role of arbitral proceedings.83

It is intended that after completion of the comprehensive diagnostic review of the legal sector, including the laws that affect private sector development, significant legal reform activity will ensue with the support of the World Bank and other donors and bilateral aid organizations. The Commonwealth Secretariat Team uncovered interesting facts on the corporate law of Ghana and proposed for consideration by the government of Ghana a legal reform process that is entirely consistent with the World Bank approach. With respect to the diagnosis, the Team found that The Insolvency Act that was passed in 1962 in the first wave of legal reform in Ghana had never been brought into force. Further, the Companies Code of 1963 and The Bodies Corporate (Official Liquidations) Act of 1963 did not provide for restructuring of companies in the nature of the U.S. Chapter 11 procedure, and new legislation was required to cover the law governing mortgages of movable property. Also, it raised questions about the apparent inconsistency between the objectives of the Ghana Investment Promotion Centre Act and the maintenance of the limits of foreign ownership of capital in securities listed on the Ghana Stock Exchange. Finally, it recommended a revamping of the Arbitration Act by the enactment of a new Act based on the UNCITRAL Model Law.84

With respect to the legal reform process, the Report suggested that the Government should endeavor to draw on the experiences of countries with growing economies such as Malaysia and Singapore, which have

84. Id. at 148-158.
legal traditions similar to Ghana. However, it notes quite appropriately that the new laws should be customized to the “needs and circumstances of Ghanaian concepts and mechanisms for the removal of legal impediments to private sector development and for strengthening the enabling role of law in private sector development.” Finally, it notes that account should be taken of the capacity of the governmental and administrative machinery to implement and enforce any laws adopted, taking into account Ghana’s own experience.

As part of the legal reform process, and in recognition of the fact that a systematic revision of the laws of Ghana was called for, Ghana’s Parliament enacted a new law in 1998, the Laws of Ghana (Revision Edition) Act 1998 (Act 562), which is intended to lay the framework for the revision of the more than 1,800 pieces of primary legislation and a large number of subsidiary pieces of legislation. The main purpose of this exercise is the “repeal of obsolete and obsolescent enactments” and “the changing of the language of enactments in order to bring them into conformity with current usage.” Under this law, a Statute Law Revision Commissioner has been appointed to prepare bills for introduction into parliament, where:

(a) an alteration or amendment in the substance of an enactment is desirable, or
(b) an enactment requires considerable alteration or amendment involving the entire recasting of the enactment.

These revisions would include a review of several business-related laws, and to this end, at the request of the government of Ghana, the World Bank is providing assistance from the proceeds of the IDA Credit made for the Private Sector Development Project.

Uganda

Since the early 1990s, Uganda has been carrying out a structural adjustment program designed to help reduce poverty by, among other things, strengthening its economic and social infrastructure, enhancing the provision of

85. Id. at 148.
86. § 3 of Act 562, LAWS OF GHANA (Revision Edition) Act, 1998. The Commissioner appointed is the Honorable Mr. Justice V.C.R.A.C. Crabbe, one of the doyens of legislative drafting around the Commonwealth and for many years Professor of Legislative Drafting and Director of the Legislative Drafting Programme at the Faculty of Law of the University of the West Indies. He was also Secretary of the Commission of Enquiry into the Working and Administration of the present Company Law of Ghana, established in 1958, supra, n. 10.
87. Supra n. 82.
public services, and developing its private sector. The Institutional Capacity Building Project,\textsuperscript{88} which is designed to help establish greater institutional and human capacity to develop and implement public policy and support the growth of the private sector, includes a Legal Sector Reform component, which, among other things, is intended to strengthen the legal framework for private sector development. This is to be achieved through the consolidation of gazetted laws, the compilation and printing of court decisions, and the implementation of a law reform program. It also includes assistance to the Ministry of Justice and Constitutional Affairs, the Judiciary, and other major institutions in the legal sector, as well as a legal education program and improvement programs for the administrator general, the public trustee, and the registrar general. A review of the corporate laws affecting the private sector indicated that since 1967, when the Constitution of Uganda and the Judicature Act was enacted, the statutory law, which was largely received from the United Kingdom, had not undergone any revision to make them relevant to the development aspirations of the country. Legislation in every sector that affected business, industry, and the private sector were outdated. Indeed, such laws were very often constraints to efficient operations within the private sector and therefore required reform.

The government contracted with a Washington law firm working in association with a local Kampala law firm to carry out a review and compilation of all existing business-related laws, specifically to identify outmoded provisions and to recommend ways of modifying the laws to facilitate modern business activities. An important feature of this work was also to seek to harmonize related laws, such as exchange control and investment laws. The law firms were expected to draft bills to be considered by the government. An important part of this exercise was the consultations held with persons affected by the laws and other stakeholders. To ensure adequate consultations, the business-related laws were divided into four lots.\textsuperscript{89} The existing Law Reform Commission was brought into the exercise to undertake the coordination of the views of the representatives of relevant governmental entities and other stakeholders, particularly in the private sector. The results of these workshops have


\textsuperscript{89} Business Associations, Commercial Activities, Land, Bonding/Labour and Immigration, Intellectual Property & Industrial Rights, Professional Associations/Procedural Law, Alternate Dispute Resolution/New Legislation (e.g., Commercial Credit, Arbitration, Hire Purchase, etc.). For a discussion of this process, see P. Kabatsi, Capacity Building in the Legal Sector—An African Perspective—the Uganda Experience, delivered at World Bank Lawyers Forum, June 12, 1998.
been taken into account in the proposals presented for government consideration.

One of the most important effects of this project is to give "an impetus to the legislative process." In addition, it has given the government an opportunity to review the international conventions to which Uganda is a party and to incorporate such provisions into its laws. Equally important is the fact that the project brought together resources and an awareness of the need for Uganda to modernize its corporate laws to bring them as up-to-date as those in neighboring countries, such as Kenya and Tanzania.

**Senegal**

In the West Africa region, Senegal has one of the most comprehensive legal systems, which provides lessons of experience to other countries. However, there are gaps in the laws affecting the business community that need to be filled, as well as laws that need to be adapted, simplified, and revised. Thus, in the context of the Private Sector Adjustment and Competitiveness Credit, the Government agreed, as a tranche release condition, to enact legislation to revise, simplify, and make transparent its free trade zone regime including benefits and procedures related thereto. 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.

In the ongoing Private Sector Capacity Building Project, prepared in parallel with the above-mentioned adjustment operation, the government of Senegal intends to carry out a broad range of studies, as well as to organize workshops and seminars to render the policy and regulatory framework conducive to competition, competitiveness, and the development of new and existing private enterprises, including the modernization of the Registry of Commerce. Similarly, it also intends to carry out studies and review legislation governing the creation, registration, and functioning of commercial and business enterprises, and to strengthen and upgrade the processing and administrative capabilities of the judicial

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90. Id., Kabatsi at 19.
91. Development Credit Agreement (Private Sector Adjustment and Competitiveness Credit) dated February 23, 1995, between Republic of Senegal and International Development Association. Paragraphs (a) and (b) of Schedule 3 to the Agreement.
institutions. In order to strengthen the legal reform, the project also envisages the provision of word and data processing and filing equipment, books and journals, and organization of training for staff of the said institutions, and refresher courses for judges, primarily in the area of commercial law.

Prior to the inception of the project, the government established a Working Group, including representatives of the administration, and of the private formal and informal sectors, as well as private legal practitioners, to identify key areas where the legal framework for business activity required reform. The recommendation of this Group indicated that reform was required particularly for dispute settlement, dissemination of information on administrative procedures, and consolidation and harmonization of the business laws. For the purposes of coordinating this project, the government has established a Legal Reform Committee, chaired by the Minister of Justice, which comprises members from civil society as well as the private sector. Consistent with the objectives of the project, the committee has, among other things, been involved in developing ideas for change and drafting several amendments to the provisions of an array of business-related laws. It will be interesting to observe how this effort will be coordinated with the activities under the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) (see pages 43 to 47 below).

Côte d'Ivoire

In the case of Côte d'Ivoire, IDA supported an Economic Management Project whose purpose, among other things, was to assist the government in updating its commercial laws and, in particular, to train lawyers, both in government and private practice, in the details of the new laws. These components were included on the basis of an initial assessment that the laws in the business-related areas were largely out of date and too complex for modern business practices. Revisions were therefore needed to the commercial code, the company law, and certain provisions of the civil code dealing with contracts and labor. In this connection, because these issues were also on the agenda of the OHADA initiative, financing was included for the purpose of facilitating Ivorian participation in the regional workshops under the initiative. This project also supported the

93. See, e.g., M. Sall, Mesures pour le renforcement de l'environnement juridique pour le secteur privé, March 15, 1994, Dakar, Senegal.

establishment of an arbitration court to deal with commercial disputes within the Chamber of Commerce and Industry in Abidjan.

Guinea

In Guinea, a couple of projects have been financed\(^9\) to build capacity in the country for the revision of laws affecting private sector development and to improve the functioning of the Ministry of Justice and the judiciary. In one of these projects,\(^9\) IDA financed the services of legal advisors, who were placed in key ministries involved with the government’s public sector and privatization programs, to assist in the revision of laws and to train lawyers. Under the Financial Sector Adjustment Credit, in particular, the government has adopted a new code for regulating the carrying out of economic activities in its territories. It has also taken measures to improve the functioning of the judiciary, which is responsible for adjudicating disputes ensuing from business activities. In particular, it has focused on the promotion of transparency of judicial proceedings through regular publication of court decisions and the carrying out of media campaigns through radio and television programming to discuss a possible legal reform program, especially to promote business activities. There is ongoing work to formulate a comprehensive legal reform program, and this effort will be supported by another World Bank–financed operation currently under preparation.

Mozambique

Following collaboration among the World Bank, the Swedish Agency for International Development and the government of Mozambique, an in-depth study of capacity building was prepared for presentation to the Donor Community in 1991, and subsequently as a basis for a capacity-building operation to be financed by the World Bank. With respect to the legal framework, it was found that most legislation in the country emanated from the colonial era and, indeed, was composed mainly of old Portuguese codes which had been barely amended since independence. There were many reasons for this, but chief among these was the fact that immediately after independence, there were only about 25 lawyers in the country, increasing to about 90 by 1991. In the business-related area, even though the government had promulgated a private sector development


law which envisioned a democratic, pluralistic society and a free-enterprise system, the country did not have modern legislation covering company law, corporate finance or bankruptcy, nor did it have appropriate tax regulations or administrative law.

It was expected that some of these drawbacks would be redressed through support provided under two operations financed by the World Bank in 1989 and 1993, respectively. The first project, which was essentially for the strengthening of capacity and increasing the stock of qualified professionals in the country, included a legal component to provide, among other things, on-the-job training in legal research and drafting techniques, mainly for the Legal Department of the Ministry of Finance. The 1993 project continued the capacity-building and institutional strengthening efforts and, in particular, provided funding for the strengthening of the legal reform program, especially in the business-related areas. This included the carrying out of specialized seminars on the new laws and amendments proposed in subject areas, such as corporate law, banking law, and mortgage and securities law. These projects assisted in spurring on legal reform in Mozambique, and the reform process is continuing unabated.

Burkina Faso

An IDA credit made to Burkina Faso in 1992 has assisted the government in activating a process for legal and judicial reform. The Public Institutional Development Project included, not only a component designed to assist in the revision of the "droit des affaires," but also revision of mining and land tenure laws, which were found to have fundamental shortcomings. In particular, the component was intended to reactivate the legislative drafting section of the Ministry of Justice, to improve the processes for publication of laws, and to commission a study for the establishment of commercial arbitration facilities. The reform activities

98. Part A.3 of Schedule 2 to the Development Credit Agreement, dated December 1, 1989 (supra n. 97).
envisaged have now been folded into actions being taken by the government under the OHADA initiative.

Other Countries

There have also been significant legal reform activities in the Comoros, Mauritania, and Madagascar, all of which are designed to build the appropriate legal framework within which the private sector can continue to prosper and to help the countries achieve their developmental objectives. Included as an Annex to this study are brief summaries of ongoing legal and judicial reform projects in Africa compiled by the Africa Division of the World Bank’s Legal Department.

Organisation pour l’Harmonisation en Afrique du Droit des Affaires (OHADA)

In the French-speaking African countries, World Bank assistance in legal reform in the commercial and corporate law arenas has been somewhat overshadowed by the adoption and signature of the Treaty establishing the Organisation pour l’Harmonisation en Afrique du Droit des Affaires (or OHADA, according to its French acronym) in October 1993. This treaty represents the culmination of a long-standing wish of these 16 countries, 14 of which belong to the CFA Franc Zone, and Equatorial Guinea and Guinea Bissau, to promote further economic integration through the adoption of a business law framework, which will spur on increased business activities designed to improve the economic fortunes of the countries. The central objective of the treaty is therefore “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.”


102. Traité Relatif, Titre 1, supra, n. 101.
forth in *Titre 2, Article 9* of the treaty, the matters that fall under the definition of “business law” and are therefore within the scope of application of the treaty include rules related to company law, the legal status of trades, labor law, bankruptcy and receivership, arbitration law, accounting law, and sales and transport law.

The Treaty provides for a very unique procedure for the adoption of the uniform acts. Once an act is adopted by the unanimous vote of at least two-thirds of the states represented at a meeting of the Council of Ministers of OHADA, such act becomes an act of general application in the states and is binding in its entirety without requiring the enactment by any state legislature of any further domestic legislation.103 The uniform acts normally take effect 90 days following their adoption, although it may be contested during a period of 30 days after it has been published in the OHADA Official Journal. Equally important, the treaty requires the acts also to be published in the official gazettes of the states or by any other appropriate means, which the treaty does not specify. Finally, as alluded to earlier, the uniform act is directly applicable notwithstanding any earlier or subsequent provisions of domestic law to the contrary.104

The process followed in the preparation, adoption, and entry into force of the uniform acts is indeed unique. As of this writing, six uniform acts have been adopted and entered into force, four of them during 1998 and two in 1999. These are the uniform acts on general commercial law, the law of commercial companies and economic interest groups, the organization of secured transactions, bankruptcy proceedings and the discharge of liabilities, debt collection proceedings and mechanisms of execution, accounting law, and arbitration law.105

The process established in the treaty for the adoption of uniform acts appears to have been derived from a proposal made by Judge Keba M’Baye, former President of the Supreme Court of Senegal and a former Judge of the International Court of Justice at a meeting held in Cotonou, Benin, in 1963 of the *Union Africaine et Malgache*. At that meeting, Judge M’Baye proposed the establishment of a *Bureau Africain et Malgache de Recherches et d’Etudes Legislatives*, which would be a center of information

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105. L’Acte Uniforme portant sur le droit commercial général, l’Acte Uniforme portant sur le droit des sociétés commerciales et du groupement d’intérêt économique and l’Acte Uniforme portant organisation des sûretés, l’Acte Uniforme portant sur le droit des procédures collectives et d’apurement du passif, l’Acte Uniforme portant sur le droit des procédures de recouvrement et des voies d’exécution, l’Acte Uniforme portant sur le droit comptable, and l’Acte Uniforme portant sur le droit de l’arbitrage. Drafts of these laws were submitted to national commissions established in several of the countries that were parties to the Treaty, and meetings were held to discuss them. It should be noted that there were three two-day sessions held to finalize drafts of the above-mentioned laws.
and documentation and for study and preparation of laws and an instrument for harmonization of legislation. Once legislation has been prepared by the Bureau, it is then to be presented to the chiefs of state of the French-speaking African countries, which could by unanimous vote enact the laws, which would then be automatically applicable in all of the states, subject to constitutional limitations and variation in details.\footnote{See a discussion of this idea in A. Farnsworth, supra n. 36 at 7-8. Judge Keba M'Baye was one of the original proponents of the OHADA idea and one of the main cosponsors of the initiative. See also a discussion by M. Alliot in 11 J. Afr. L. 94 (1967). Indeed, when the process started, Judge Keba M'Baye visited the World Bank in November 1992, after the President of the World Bank (then Mr. Preston) had received a letter from the President of Senegal, to present an initiative for regional legal reform, primarily in the CFA zone. The author cochaired meetings with Judge M'Baye on November 12-13 in Washington at which the World Bank's support for the proposal was offered. During the meetings, two principal areas of concern were discussed. The first concerned the degree of ownership and internalization of the reform proposed within the African countries involved in the initiative. Although there was no clear indication that African lawyers would be extensively involved during the critical preparatory phases, which were, in reality, being carried out by French lawyers in Paris, the judge indicated that the project activities would be shifted soon to Africa. The second concern related to the relationship between this initiative and that of the Union Monétaire Ouest Africaine countries, which was also pursuing reform activities. Judge M'Baye indicated that he would ensure close collaboration between the two.}

The process to be followed under the OHADA Treaty is therefore similar to that proposed for the \emph{Bureau Africain et Malgache de Recherches}. As provided in the treaty, uniform acts are to be prepared by the OHADA Permanent Secretariat (based in Yaounde, Cameroon) in collaboration with the states prior to discussion and consideration by the Council of Ministers for adoption. It should be noted in this connection that, in accordance with its mandate, the drafts of the uniform acts that have been adopted were prepared by consultants engaged by the Permanent Secretariat. These drafts were reviewed in meetings called by the Permanent Secretariat and attended by representatives of national commissions in the states that had previously received drafts for study, analysis, and comments. More important, the national commissions appeared to be the vehicles through which lawyers in the states participated in this crucial law reform exercise, even though these commissions were not properly constituted in some states, nor were they operative. In addition, although some of the consultants were lawyers from the states, some of them were practicing at the Paris Bar.

An additional feature of this law reform exercise is that, as provided in the treaty,\footnote{Traité Relatif, Titre V, Art. 31, supra n. 101.} a court of justice and arbitration (\emph{Cour Commune de Justice et d'Arbitrage}) has been established to ensure constant and uniform interpretation of the Treaty and the laws and regulations adopted under it.

\footnote{107. See a discussion of this idea in A. Farnsworth, supra n. 36 at 7-8. Judge Keba M'Baye was one of the original proponents of the OHADA idea and one of the main cosponsors of the initiative. See also a discussion by M. Alliot in 11 J. Afr. L. 94 (1967). Indeed, when the process started, Judge Keba M'Baye visited the World Bank in November 1992, after the President of the World Bank (then Mr. Preston) had received a letter from the President of Senegal, to present an initiative for regional legal reform, primarily in the CFA zone. The author cochaired meetings with Judge M'Baye on November 12-13 in Washington at which the World Bank's support for the proposal was offered. During the meetings, two principal areas of concern were discussed. The first concerned the degree of ownership and internalization of the reform proposed within the African countries involved in the initiative. Although there was no clear indication that African lawyers would be extensively involved during the critical preparatory phases, which were, in reality, being carried out by French lawyers in Paris, the judge indicated that the project activities would be shifted soon to Africa. The second concern related to the relationship between this initiative and that of the Union Monétaire Ouest Africaine countries, which was also pursuing reform activities. Judge M'Baye indicated that he would ensure close collaboration between the two.}
The court is based in Abidjan, Côte d'Ivoire. The court, which is composed of seven judges appointed by the Council of Ministers, exercises jurisdiction over all matters relating to the application of the uniform acts, as a supranational Supreme Court. The Court is charged with the issuance of advisory opinions on draft uniform acts. It also is important to note that its judgments are legally enforceable in each of the states under the same conditions and with the same force as the decisions of national courts. Lastly, the court is empowered to organize arbitration proceedings by approving and appointing arbitrators when so requested by a party in any of the states.\textsuperscript{108}

Finally, an important feature of the treaty is that it is open for adherence by all states that are members of the Organization of African Unity and other states as well.\textsuperscript{109} Whether or not non-CFA Franc countries may join is a major question in view of the fact that the uniform acts adopted so far have their origins in present French law, and the constitutional aspects of the process of the adoption of them may pose serious problems for countries, especially those that follow the common law traditions.

In view of the earlier comments and description of the considerations underlying World Bank support for legal reform projects, the World Bank's modes of support for this initiative have been two-fold. First, it provided financing to some of the national commissions to undertake their reviews of draft texts of uniform acts, including the financing of consultants engaged by such commissions. The World Bank also provided other forms of assistance to support the operations of these committees, including computers and other equipment. Second, it contracted out knowledgeable consultants to review the drafts furnished to the World Bank for comments and then participated as an observer in the discussions organized by the Permanent Secretariat for the review of the draft texts and provided comments on early drafts of some of the uniform acts.

In addition to the foregoing, since the establishment of the Permanent Secretariat, the World Bank has made it a point to attend all conferences organized by the Secretariat to which it is invited. Representatives of the World Bank attended the first conference held to raise funds for the capitalization fund of OHADA. At that conference, the World Bank representatives stated that, while the World Bank supports the OHADA initiative, it will provide financing to support particular activities envisaged by

\textsuperscript{108} Traité Relatif, Titres III and IV, supra n. 101. The role of the Court of justice and arbitration in examining draft uniform acts and issuing advisory opinions is similar to the consultative role of the French Conseil d'Etat. See B. Ducamin, The Role of the Conseil d'Etat in Drafting Legislation, in 30 I.C.L.Q. 882 (1981).

\textsuperscript{109} Article 53 of the Traité Relatif, supra n. 101.
OHADA member states in the context of ongoing and proposed programs and projects financed or to be financed by the World Bank. Activities that have been planned by the states for support by the World Bank include seminars, workshops, and meetings designed to publicize OHADA uniform acts and financing of training programs for judges, magistrates, and lawyers, both in the public and private sector. The World Bank has already supported programs in Togo and Burkina Faso. It also organized a two-day seminar in Washington in December 1998 to familiarize its staff working on private sector–related matters in Africa with the substance of the adopted OHADA Uniform Acts. In addition, it organized in December 1999 a dialogue with the President of the OHADA Common Court of Justice and Arbitration and the Permanent Secretary of the OHADA Permanent Secretariat. The purpose of the dialogue, in which more than 50 World Bank Group staff participated, was to learn directly from these officials of OHADA the constraints being faced in the implementation of the harmonized legal framework and to assist in developing a program of actions to be implemented with World Bank support. Because of their interest in OHADA, other institutions such as the European Union, the African Development Bank, and USAID participated in the dialogue.

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Chapter 7

Specific Issues Identified in, and Lessons to be Drawn from, World Bank–Financed Operations and Programs

As may have been gleaned from this study, legal reform has been an important facet in the development process in Africa, particularly since the post-independence era. Almost all countries, whether influenced by the British, the French or the Portuguese, have gone through this process with varying degrees of intensity. The activities proposed by states and financed by the World Bank have demonstrated the need for sustainability if the law reform processes are to achieve their objectives.

In the course of the World Bank’s involvement in legal reform in Africa, particularly in the business-related area, some important issues that need attention in any law reform exercise have surfaced. These issues are reminiscent of the issues that were associated with the legal reform exercises in the post-independence period in Africa and in exercises in other continents as well.

Associated Reform Measures

First and foremost, it is clear that merely amending, modernizing, or promulgating new legislation would not necessarily achieve the objectives of many law reform programs. Laws are never self-executing, and much needs to be done after their promulgation, not only to inform those who will be affected or who are interested in the laws, but also institutions, such as courts, which will interpret and enforce these laws when disputes, which are inevitable, arise. If the legal system, including the courts, does not inspire confidence in the economic actors in society, and there are issues as to the quality, effectiveness, and impartiality of the administrative and judicial processes, the laws will not take hold. Legal reform should therefore not be limited to just law revision; it must include a review of related administrative capacity needed to implement the laws, as well as judicial capacity to interpret and enforce them when the need
This issue appears to have been dealt with in the legal reform programs in Zambia and Tanzania, as well as in the OHADA initiative.

Commitment

Another important issue relates to the need for a strong commitment of the government concerned to the legal reform program. This is not always easy to discern, particularly due to the competing needs for the scarce resources in most of these countries. Although a request for World Bank assistance may normally come through the Minister of Finance or Economic Planning, as the case may be, the World Bank's primary interlocutor in the country, the Ministry of Justice or the ministry responsible for legal affairs may not be committed. Conversely, the Law Ministry or the Law Reform Commission may be interested in this work but may not have the support of the ministry responsible for finance or other ministries with responsibility for the sector in which the reform is to be undertaken in the country. In the context of Africa, a major hurdle for law reform is whether it is necessary as compared to more pressing issues in education, health, or agriculture, especially if the process is to require the use of valuable resources. To ameliorate this problem, the World Bank's Legal Department, building on the history of legal reform in Africa in earlier decades, has suggested to many countries that the legal reform process should commence with the holding of a national seminar involving all the interested representatives in society to gain the necessary consensus on the need to improve the legislative framework in the area in question. In a number of cases, the impetus for the legal reform process has come from the private sector. In some cases, the issues identified from a review of administration of justice in the country have served as the impetus for legal reform. In Guinea, for example, a national seminar organized by the Ministry of Justice and officials of the Guinea Bar was held as a prelude to serious discussions on legal reform generally. There was an emphasis on business-related laws during the seminar, in view of the keen interest of the burgeoning private sector. The Head of State, who became aware of the positive results from the seminar, then requested the


112. See Article III, Section 2, of the Articles of Agreement of the IBRD, which provides as follows: “Each member shall deal with the Bank only through its Treasury, central bank, stabilization fund or other similar fiscal agency, and the Bank shall deal with members only by or through the same agencies.”
World Bank's assistance in the design and possible financing of a legal sector development project. This has also been the case in Madagascar, Benin, and the Central African Republic. The need for corporate law reform has also arisen in private sector development meetings or workshops where government officials and representatives mingle with a view toward identifying constraints to the development of the sector. These meetings and seminars have served to elevate discussions on these issues in government and civil society and to assist in building the commitment needed for the legal reform program. They are also reminiscent of the activities carried out in connection with the reform of Ghana's company law in the 1960s under the leadership of Professor Gower.\textsuperscript{113}

\textbf{Coordination Within Countries}

Meetings and seminars cannot, however, be a panacea for obtaining commitment to the legal reform process. Therefore, governments have been advised to pursue the objective of commitment and ownership throughout the legal reform process and to devise mechanisms to ensure the coordination of planned activities among all concerned institutions. As already observed, legal reforms, particularly those that have the objective of inducing behavioral changes—especially by interested parties, including the private sector—must be "owned" by them and must take into account local economic and sociopolitical issues. The capacity of the governmental institutions that may be charged with the monitoring and implementation of the law is key. For instance, amending the law on investment to establish a "one-stop" clearance process for foreign investors would not work in practice if officials of the Central Bank, the Income Tax Department or equivalent tax collecting service, and the Ministry of Finance were not aware of it or found such proposed changes in procedures to be undesirable. Therefore, establishing coordinating mechanisms, such as committees consisting of representatives of all interested parties, to review and monitor the programs of reform has been a key element to success in many countries. Such mechanisms have represented a desirable way of gaining and maintaining commitment to legal reform programs. This has been the case of Ghana, Tanzania, and Zambia.

\textbf{Prioritization}

There has been a very intense interest in many countries to immediately receive hardware (computer equipment, books for the law library, fax machines and vehicles) without development of a well thought-out program, including required research, meaningful consultations, and

\textsuperscript{113} See pp. 6–7 above.
involvement of interested groups. While the World Bank has acceded to requests to provide urgently needed hardware where justified, it has very often required the carrying out of diagnostic studies as a condition to its assistance, and by and large, these have been found to be extremely useful. By doing so, countries have had the opportunity to really evaluate their needs, to review their options, and to make informed decisions. In the case of Ghana, Kenya, and Tanzania, diagnostic studies served as a basis for the government’s determination of an appropriate list of priorities, as well as the sequencing of the desired legal reform activities. They also assist in unearthing the appropriate linkages that must be made between related areas of law—one must have a contract law, company law, and securities law before delving into issues related to bankruptcy. For privatization of state-owned monopolies, it may be necessary to ensure the existence of a framework for the regulation of the enterprises after privatization to ensure that efficient service may be provided at prices that are reasonable in the circumstances.\textsuperscript{114}

Research

An issue that has reared its head in many countries is whether the reform programs proposed have paid enough attention to research to ensure that the new laws will not only be acceptable to the communities to which they are directed but will, in fact, induce the desired behavior. Because of the speed with which reforms have had to be undertaken (such as in Zambia and under OHADA), a question arises whether significant and desired research has been carried out. In a large number of cases, speed has been predicated on the fact that business-related laws are such that they can operate successfully in any legal milieu with few adjustments to take into account the sociopolitical milieu. However, even in this area of the law, speed cannot replace the need for research into the behaviors of those to whom the laws will apply as well as those charged with its implementation. Without sufficient knowledge and understanding of the issues and the constraints faced by the target group, any attempt to remedy them through promulgation of laws may yield inappropriate or undesired results. In this connection, the views expressed by Professors Robert and Ann Seidman on the need for a research report are pertinent.\textsuperscript{115} The carrying out of


research can assist the legal draftsmen and policymakers to determine alternate solutions to the problems identified, and the research report can provide the factual, legal, and logical basis on which the proposed law is based. More important, lawmakers and the citizenry (target group) alike will have a clearer understanding of the quality of the proposed laws, and will better understand its likely impact on them. Finally, the research report would assist in ensuring transparency and accountability in the law reform process.

**Training for Legislative Draftsmen**

Many countries referred to in this study have used significant numbers of foreign consultants to draft the required laws under their legal reform programs. This has been mainly because of the paucity of appropriately trained and experienced legislative draftsmen in Africa. Although it may be the case that foreign draftsmen have been engaged as a result of donor agency involvement, the drafting capacity in government has been less than desirable. The few senior and acknowledged draftsmen are stretched. There is, therefore, a need to consider the strengthening of this specialized branch of the legal profession. Legislative draftsmen are responsible in many jurisdictions for translating policies into legal texts that are clear and understandable and, more important, that such texts will stand up in the courts which settle disputes based on the words in the law. If they are not appropriately trained (or represented in sufficient numbers in countries), the laws they draft may not be clear enough to achieve their objectives. As Confucius put it eloquently, “If language is not correct, then what is said is not what is meant; if what is said is not what is meant, then what ought to be done remains undone.”\(^\text{116}\) In this connection therefore, consideration should be given to strengthening and augmenting the training programs carried out under the auspices of the Commonwealth Secretariat in Barbados and Australia. The semester course at Boston University also offers an interesting choice for continuing legal education in this field.

**Law Reform Commissions**

An additional observation that may be made relates to the work of the myriad of law reform commissions established to ensure constant law reform in several African countries. The lack of effectiveness of these

commissions alluded to in the historical perspective continues, and the problems they face remain. Many of them continue to be understaffed, are not allocated adequate resources to do their work, and do not have the necessary facilities, including office equipment, library, and other facilities, to be effective. It is therefore necessary, in the course of the design of legal reform projects, to evaluate the effectiveness of these commissions and to ascertain how they can be organized or structured to ensure their appropriate involvement so that legal reform in the critical business-related areas continues in a sustainable fashion. The proposed establishment of a Commonwealth association of law reform commissions in the near future to strengthen the ties of these law reform commissions would be a useful way for the African commissions also to share experiences, methodologies, and systems.

**Use of Foreign Lawyers and Consultants**

Another issue that is clearly a concern and that might be gleaned from the historical perspective on legal reform in Africa relates to the use of law firms and legal consultants and advisers from other legal systems, particularly those in the western world. Although recognizing that in certain areas of corporate law, the sociopolitical and cultural environment may not be a critical element in the corporate laws' effectiveness and application, it is still absolutely important to involve the local legal profession in the legal reform process. This is especially important because such legal practitioners may be aware of intricacies in the existing law, the procedural questions, and the interrelationship with other laws, the problems of application, and court decisions that may inform the process. Indeed, it is appropriate to state that even when there is collaboration with foreign consultants, the final rendition of the bill and the law must be left to local draftsmen and lawyers. This is because they are familiar with the language and jargon used in legislative texts, which the foreign consultant may be unaware of, and almost always very conversant with, existing interpretation law. Further, such lawyers will, after all, be using these laws as a basis for giving competent advice to their clients who may be entering into serious legal commitments. Local legal practitioners therefore bring much-needed value added to the law reform process. As an eminent African legal draftsman has written:

The other face of importing expertise lies in a full grasp of:

(a) the corpus of the existing law, not forgetting the indigenous law;
(b) a thorough knowledge of the cultural, social political, and economic history of the country; and
(c) a full grasp of the personal motives that lurk behind the intent of the sponsors in promoting a piece of legislation.\textsuperscript{117}

Therefore, it is of utmost importance in the case of the reform of business-related laws, and indeed, in all cases of legal reform, to ensure that the best qualified consultants are engaged to carry out the legal reform and that these consultants have a full grasp of the motives that lurk behind the proposed reform programs in the light of the sociopolitical and economic framework of the country concerned. A good and helpful role for the consultant should be that of facilitator and resource person, bringing important and crucial lessons of experience from other jurisdictions to the legal reform program.

\textbf{Coordination of Foreign Assistance}

Related to the issue of foreign lawyers and consultants is the role of bilateral aid agencies. Some of these agencies have internal rules that require recipient countries to use the services of lawyers who are citizens of the country concerned. This means that, in some cases where a particular bilateral agency may be involved in a legal reform exercise, it may foster lawyers practicing in its country to work on the program. Although this may entail the use of highly competent specialists, sometimes the reform proposed merely becomes a transplantation of the laws on the subject in the expert’s own country. A larger issue is the coordination of the activities of the agencies, including donor agencies, the World Bank, and other multilateral institutions providing assistance for the reform program. Experience shows that many agencies become involved in legal reform activities for various reasons, ranging from an interest in human rights and governance, to the rule of law, privatization, and private sector development. This diversity of interest often leads governments to pursue disjointed programs of reform rather than the coordinated and holistic approach advocated by most professionals involved in this area. It also leads to duplication of effort and all the myriad of issues which may be raised by aid coordination generally, such as “flag waving,” promotion of the national interests of the donor, and hampering the cohesiveness of the country’s programs. As legal reform is to be carried out in accordance with the country’s own felt need, it is imperative that the country play a major role in the coordination of the role of external entities assisting in financing the program. Where it is not possible, it is useful for one agency to perform this role and to bring on board other agencies in meaningful

discussions with a view toward a division of labor that is satisfactory to officials in the country. The donor coordination, in the case of the Tanzania FLMUP Project referred to above, is an excellent example of what ought to be done on this subject. In that case, the donor community, including the World Bank, Denmark, Norway, Sweden, and the United Kingdom, agreed to support a holistic legal reform program by financing diagnostic studies covering the whole legal system. The reports, produced mainly by Tanzanian lawyers, were discussed at donors’ conferences in 1997 and 1999. Duplication of effort and overlap in advice has thus been avoided. The diagnostic studies for the business-related sector in Ghana was also coordinated with the Commonwealth Secretariat to ensure no duplicity of effort.

Monitoring and Evaluation

Finally, a major concern discerned in this area of work relates to whether the assistance provided to the member countries of the World Bank would yield laws on the books that will achieve the objectives of the programs and spur on private sector development. There is a question as to whether or not the significant programs in Zambia and the OHADA countries will establish frameworks which will induce the expansion of the private sector because applicable rules have been clarified and infused with the necessary degree of predictability, thereby influencing positively the decisions to be taken by persons involved in the sector. Obviously, there are other considerations, such as the bureaucracies involved in the implementation of the laws and how the economic actors integrate the laws with their other considerations. Although some laws on the books may have “sunset” clauses or may have in-built monitoring and evaluation, consideration ought to be given to ways in which, after a number of years, the effectiveness of the laws promulgated under these reform programs may be evaluated. It is not clear in this connection whether the appropriate entities for this purpose should be law reform commissions, which may have been involved in the law reform program and therefore may have a vested interest, or some independent body consisting of stakeholders, namely, the business community and their lawyers. Evaluation of the effectiveness of these laws would require further study and deliberation and should be considered in all cases where major legal reform is undertaken. In this connection, impact studies should be undertaken to determine, among other things, the familiarity of the laws among its stakeholders; their acceptance of the laws and how their behaviors and decision-making have changed as a result; how the courts have adjudicated on disputes that have arisen as a result of the new laws; and whether judges are familiar with the principles underlying the new law. Such impact studies should yield helpful insights that might inform legal reform programs for the future.
Chapter 8

Conclusion

The historical perspective offered in this study was intended to emphasize the attempt by the World Bank and the countries in the Africa region to effect better law reform, taking into account the positive experiences from the past. It is clear from a review of some of the earlier reform activities in the business-related sector that, although some activities led to a more effective role of the law in encouraging and promoting private sector development, some of the top-down methodologies used failed to induce the changes intended for a variety of reasons. This included the fact that they involved transplantations of laws that expressed values and goals that were anathema to the social and political structures in the countries concerned. In such cases, the laws promulgated may have been, in the terminology used in the law and development movement, “fantasy law,” a term used first by van Vollenhoven to describe the failed attempt to introduce a model civil code in the Dutch East Indies in 1920 and referred to in the late Professor Schiller’s paper on law reform in 1966.118

There has been an attempt, in World Bank-supported programs, to learn from the experience of the past, and thus such programs have been designed to catalyze the activities of the respective country’s desire to modernize their economies, achieve significant economic growth with poverty reduction and promote private sector development in a sustainable fashion. The World Bank’s Legal Department, which has been responsible for the Bank’s work on legal and judicial reform, has been conscious of the rich legal heritage many of these countries have. Ghana, Sierra Leone, and Nigeria have had practicing African lawyers for more than a century each. More important, these countries, and also the countries following the French legal traditions, have been independent for

more than 30 years, and their courts have issued significant judgments on various legal issues in various areas of the law which may inform appropriately the modernization process. The World Bank has also obviously supported the infusion of the major advances made in the corporate law area in other jurisdictions, particularly in the OECD countries, into the law reform programs supported by it. However, the World Bank has also been conscious to recognize, as one of the preeminent English company law reformers, Professor Gower, has noted, that not everything in the legal garden in the advanced countries represents the perfection of human reason. It is therefore heartening to conclude, from this examination and review of the business-related reforms in many of the countries referred to in this study that attempts, successful to varying degrees, have been made to take into account the sociopolitical, cultural, and economic situations in some of the countries.

An additional feature that has underlined the law reform activities has been the effort to involve all stakeholders, particularly the community that is most interested in law reform in this area, namely, the business community. Indeed, the impetus for reform has sometimes come from that quarter, and therefore its representatives have been fully involved in the process, making it inclusive and participatory. Without these two elements, it is quite clear that these legal reform programs, which have been supported by some grant funds, but which, in many cases, consist of loans and credits that have to be paid back, will not achieve the desired effects. The grants and borrowed monies will have been wasted, and as important, the lawyers, the legal professions, and other participants may have gone into "self estrangement" as many law and development lawyers were reported to have done after the first decade of the law and development movement.119

The attempt to link these programs with broader legal and judicial reform is also important because the role of the entities that administer the laws and those responsible for dealing with disputes when they arise are critical. Their role, if played in an even-handed, efficient, and expeditious manner, brings credibility and predictability to the actions taken by the business community.

Finally, legal reform, whether in the corporate law area or elsewhere, is a long-term process that requires the continuous commitment of governments and significant cash outlays to maintain the modernized systems both in terms of material and manpower. The World Bank should

119. See D. Trubek and M. Galanter, Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States, Wis. L. Rev. 1062 (1974), in which it is indicated, among other reasons, that the scholars went into "self estrangement" because of their lack of understanding of the sociopolitical milieu in developing countries.
therefore continue to take all steps required on its part to ensure that the projects for which governments borrow monies are carefully conceived, with due attention to economy and efficiency and that the monies loaned are used for the purposes for which they are given, all in support of the agreed-upon objectives.
Annex

Summary of World Bank-Supported Operations in Africa

(This summary excludes the support provided to the OHADA Initiative.)

**Benin** A legal and judicial reform project, currently under preparation, will assist in the compilation of business laws, the dissemination of OHADA uniform legislation and training of the legal profession and members of the judiciary, as well as the construction and equipment of additional courts and renovation and equipment of existing courts.

**Burkina Faso** A legal component in a public sector institutional development project has assisted in the revision of business-related laws, provided training and capacity building for the legal profession and strengthened the operations of tribunals. The publication of the Official Gazette has also been financed.

**Cameroon** IDA has provided substantial assistance in the revision of Cameroon’s forestry and other environment-related laws. There has been an initial discussion of possible assistance in the legal and judicial sector.

**Cape Verde** Ongoing projects since 1994 have provided advisory services to the Ministry of Justice in drafting as well as extensive training to lawyers, magistrates, and judges in business and corporate law. These projects also include the development of arbitration facilities.

**Congo (Brazzaville)** IDA has assisted, through technical advisory services, in the promulgation of laws and regulations for the telecommunications, hydrocarbons, electricity, water, and transport sectors. Work is ongoing on the development of the legal and regulatory framework for privatization.

**Côte d’Ivoire** An IDA-financed project has, since 1993, supported the Ministry of Justice in the strengthening of the legal framework including updating of legislation, establishment of an arbitration court and training
of staff of the judiciary. Much-needed computers and equipment has been financed. A Private Sector Development-Capacity Building Project is providing further assistance in the dissemination of OHADA uniform acts, the harmonization of existing laws with the OHADA framework, training of lawyers in OHADA legislation, and is also financing selected activities to strengthen the arbitration court.

**Gabon** A legal component in a Privatization and Regulatory Capacity-Building Project is assisting in the compilation of applicable laws, the dissemination of OHADA uniform acts, and the revision of labor and social security legislation.

**Gambia, The** The proposed Country Assistance Strategy identifies the legal and regulatory framework as one of the major constraints to private sector development. The government, with the support of IDA and bilateral donors, has launched a comprehensive review of legislation and the effectiveness of legal and judicial institutions.

**Ghana** IDA has financed diagnostic studies in a wide range of areas in the legal and judicial sector, including the attorney general's office, the courts, the registries, and the libraries to determine actions needed to restore the efficiency of the whole system. IDA has already financed some urgently required equipment for the courts and is in the process of evaluating a program of actions for the legal and judicial sector prepared by the government.

**Guinea** Since 1994, IDA-financed credits have assisted in the improvement of the transparency of judicial proceedings. A resident legal adviser has been financed and a new legal and judicial capacity-building project is scheduled for FY2001. A national seminar on legal and judicial reform is scheduled for the summer of 2000.

**Kenya** IDA is financing, under the Civil Service Reform Project, the Judicial and Legal Reform Secretariat, which has been established by the Government to implement judicial and legal reform. In this respect, IDA is also financing a wide range of diagnostic studies in the sector to determine actions needed to improve efficiency in the delivery of legal services and thereby contribute to a reduction in corruption.

**Liberia** World Bank missions that visited Liberia immediately after the civil war discussed a strategy for Bank assistance to the legal and judicial sector in the aftermath of the civil war. The objective is to develop a program to assist in the rehabilitation of the sector, particularly in the context of the revival of private sector activities. Work that needs to be
done in this area would include the carrying out of an inventory, revision and dissemination of economic and business laws, and the rehabilitation of the judiciary.

**Madagascar** IDA is financing a comprehensive legal and judicial reform component under a public sector management project approved in 1996. Assistance is being provided for the reform, compilation, and publication of commercial and business laws. In addition, the project includes a training and continuing legal education program for judges, magistrates, and court personnel, and a study on the establishment of alternate dispute settlement mechanisms.

**Mali** The ongoing Private Sector Assistance Project approved in 1993 includes a legal and judicial reform component. Financing is provided for training and continuing legal education in business law for judges, studies on the legal environment of doing business, establishment and operation of a legal reform unit in the Ministry of Justice, the publication of a legal journal and countrywide training of all legal professionals in the OHADA Uniform Acts.

**Mauritania** An ongoing IDA-financed private sector development project is contributing substantially to the review and reform by Mauritanian lawyers of the laws pertaining to economic activities. The legal gazette has been computerized and will be linked to the Library of Congress GLIN system. Judicial personnel and lawyers are also being trained, and court procedures are being reviewed and streamlined.

**Nigeria** A proposed IDA-financed Economic Management Capacity Building Project, which may be approved in FY2000, includes a legal component aimed at providing assistance to Nigeria for the preparation of a comprehensive legal and judicial reform program.

**Senegal** In the context of a private sector capacity-building operation approved in 1995, a broad range of studies are being carried out to ascertain appropriate action to be taken to make the legal and regulatory framework conducive to private sector development and to competition and competitiveness. The project is also assisting in strengthening the operations of judicial institutions, and in providing training and continuing legal education to lawyers and judges. This component is being coordinated by a working group including lawyers, judges, and representatives from the public and private sectors.

**Sierra Leone** A self-standing judicial and legal sector capacity building operation was on the verge of Board presentation when a coup d'État
occurred in Sierra Leone. This project was designed to strengthen the operational capabilities of the attorney general’s office and other legal sector institutions through the provision of much-needed material and equipment and through training of lawyers and other staff. It also included assistance designed to improve the operations, including modernization and streamlining of court procedures and training of judges. This project will be reappraised in FY2001.

**Tanzania** Under the FILMUP Project, the Bank is financing various activities to enhance capacity in the Judiciary, the Ministry of Justice and Constitutional Affairs, the Law Reform Commission, and the Registry of Companies. Training is being provided to judges, magistrates, state attorneys, and the law reform commissioners. Recommendations of the comprehensive legal sector strategy have been adopted by government, and action plans for their implementation are now being finalized. Law reports have been brought up-to-date and laws updated. The government has adopted a medium-term strategy and action plan for the legal sector.

**Togo** A recently approved Public Enterprises Restructuring and Privatization Project includes a component designed to strengthen the legal and judicial system through the organization of a round table to build broad consensus on legal and judicial reforms, seminars on OHADA, updating and dissemination of legal information, and support to the Ministry of Justice. A study financed by a PHRD Grant is reviewing constraints to private sector development, including the legal and judicial framework.

**Uganda** Since 1995, IDA has been providing assistance to the legal sector through the Institutional and Capacity Building Project to assist in the consolidation of laws, the provision of training to the legal profession and the judiciary and support for legal education through the improvement and development of new curricula for local universities and training institutions. The operation of the registrar general’s office has also been improved through the provision of equipment. The Ministry of Justice is preparing a comprehensive legal sector reform strategy to be completed during FY2001.

**Zambia** Under the FILMUP Project, IDA is financing various activities to improve the judiciary, the Office of the Attorney General, and legal training institutes. Training is being provided to judges, magistrates, and state attorneys. Laws have been updated and printed. A component under a proposed Public Service Capacity Building Project will deal with further required assistance in the legal and judicial sector.
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An appropriate legal and judicial framework is essential to governance and progress in all countries. It is also an essential ingredient in any private sector development program. Thus, at the request of its borrowers, especially in Africa, the World Bank has actively promoted and supported programs to improve such frameworks since the 1980s.

Reforming Business-Related Laws to Promote Private Sector Development: The World Bank Experience in Africa describes legal and judicial reform programs in African countries. It also includes an historical perspective bringing together in one place an evaluation of such programs during the immediate post-independence era in civil and common law countries.

Within this historical context, this study draws several lessons of experience. These include the desirability of a comprehensive approach to legal and judicial reform; proper consideration of sociopolitical, economic, and cultural circumstances; government commitment to the objectives of reform programs; less reliance on foreign experts; and the strengthening of implementing agencies through capacity building.

This study contains ideas that should be considered in any law reform agenda designed to promote private sector development in Africa and elsewhere.