Draft paper for the Africa Knows! Conference; panel D22

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What Law for what Development in Africa in the 21st Century ?

Résumé

Le pluralisme juridique est une réalité en Afrique. Le droit étatique, le droit coutumier et le droit de source religieuse coexistent et cohabitent. Dans la plupart des cas, les règles issues de ces différentes sources s'opposent. Le droit civil d'origine étatique par exemple (droit des personnes, mariage, état civil, succession, régimes matrimoniaux, droits fonciers, etc.) est rempli de règles issues de l'occident qui ne correspondent pas toujours aux habitudes des citoyens africains. Cela entraine une sorte de conflit avec le droit coutumier ou le droit religieux que les sujets de droit semblent privilégier, notamment en milieu rural. De même, en droit des affaires, l'ensemble de l'architecture de l'OHADA est calquée sur le droit français et ne correspond pas toujours aux besoins des sujets du droit. Ainsi en l'absence d'un droit approprié, en lequel les sujets de droit se reconnaissent, les activités économiques courent le risque de stagner, faute de consensus social sur le cadre juridique applicable. Cela entraine par exemple une prolifération du travail informel avec son cortège de problèmes. En réalité, dans toutes les sociétés du monde, il existe, à divers degrés, un certain pluralisme juridique, même si cela est plus visible en Afrique, notamment du fait des interventions extérieures orchestrées, entre autres, par la colonisation. À cet effet, ce pluralisme aurait dû être perçu comme un moyen d'enrichissement du droit au service du développement ; le but étant de produire des règles fonctionnelles. Le but de notre réflexion est de fixer les jalons d'une recomposition du droit en Afrique, afin de construire une intégration réussie entre les diverses sources du droit. Pour y parvenir, il va falloir faire des efforts pour prendre en considération les besoins et les habitudes des Africains (adaptation) au lieu de simplement recopier le droit produit dans d'autres sociétés. Des expériences réussies d'intégration des sources du droit au service du développement en Afrique seront citées.

Abstract

In Africa, legal pluralism is a reality. State, customary and religion-based laws coexist and cohabit. In most cases, the rules stemming from those different sources clash: for instance, in state-enacted civil law (marriage, civil status, inheritances, matrimonial regimes, land rights etc.) western-style rules are omnipresent, which do not always fit the habits of African citizens; hence a conflict of sort with customary or religious law, which subjects law seem to prefer, notably in rural areas. Likewise, when it comes to business law, the global architecture of OHADA is a calque of French law and does not always match the needs of Africans. Thus, in the absence of an appropriate law, which subjects of law can recognize as their own, economic activity runs the risk of stagnating, for lack of a social consensus as to the applicable legal framework. This results, for instance, in the ubiquity of informal work with its cortege of negative consequences. In actuality, legal pluralism exists to various degrees in every society in the world although it is more obvious in Africa, notably due to external interventions carried out, among others, by colonizing powers. For such purpose, said pluralism should have been assessed as a means of enrichment of the law, in the service of development, and with the purpose of yielding functional rules. The goal of our reflection is to lay foundations for a reconstruction of law in Africa, in order to successfully integrate the various sources of law. To attain such goal, one should strive to take into consideration the needs and habits of the Africans (thus use an adaptive method) instead of merely mimicking the law produced in other societies. Successful experiences in integrating several legal sources in the service of development in Africa will be cited.

Keywords : Law, Development, Africa, Law Effectiveness

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Introduction

Law is classically defined as a set a formal rules that regulate relationships in a society. In some languages than English (for instance, French, but also in other Romance languages such as Italian), the same word (*droit*) also refers to prerogatives and privileges granted to each individual, by virtue of the law (rights, or *droits subjectifs*).

Those rights may derive from various sources: state law, customary law, case law, religious law etc., depending on a country's legal culture. In the scope of our reflexion, we will discuss law and rights in the African context.

Africa is a continent characterised by a tradition of orality, which translates, in the legal sphere, into a preference for customary law, understood as a variety of law relying on customs. Custom in this context is a repeated practice that comes to be accepted as law. The "repeatedness" criterion is not insignificant and fits the French saying "*une fois n'est pas coutume*" ("once is not a custom"). In practice, said custom may be written or unwritten. In the latter case, as for most of Africa, issues of proof inevitably arise. However, that aspect is mitigated by the fact that, where the custom is consecrated, the inhabitants accept it and manifest such acceptance over and over through their actions. Said acceptance, in its turn, makes the custom mandatory.

After living for a long period of time under the prism of customary law, African populations have been subjected, at some point, to other legal sources they were not used to. Colonisation strived to promote state-enacted law and, to some extent religious law. State-enacted law is grounded in the authority of the State, which enjoys legal personality and authority, through the use of positive law, which binds the entire national collective. As to religious law, it relies on the dicta of a particular religious creed.

Facing those intrusions, most African states obtained independence around the 1960's, sometimes amidst painful circumstances. Ill-prepared, they simply maintained the ways of the colonisers, including their legal systems, with the result being a sometimes unbearable cohabitation between state law, customary law and religious law. Lawmakers could have benefitted from that legal pluralism to construct an original law, enriched by contrasting experiences. But until now, such a global restructuring towards an adaptive law has not been achieved, although progress has been made in some countries. On the contrary, one notices a surge in legal mimicry, consisting, for African law-makers, in calquing the laws forged by the former coloniser, without any effort to adapt it to local realities. As to business law, authors note that the result is more fitted to the interests of foreign investors than to those of local businesses.

In the presence of this sometimes-disorganised legal pluralism, how may Africa plan its development, insofar as the law, which is supposed to govern life within a society does not always suit the ways of the populations? How can law help escape the current underdevelopment?

In order to come up with some answers, we shall mainly use the analytical method, and examine the research on legal sources in Africa and follow a critical and prospective method. The present work is helmed by a scholar of African descent, who can contribute concrete testimonies about legal pluralism, based on his experience, and a European scholar, which will contribute perspective. Analysis will be limited to private law, being the specialty of both authors – we will not discuss specifically public law issues.

After a presentation on legal pluralism in Africa, we shall insist on the necessity of restructuring law in Africa as a vector of its development.

I. Diversity of the legal sources in Africa: legal pluralism

Africa features a variegated fabric of sources, each claiming legitimacy, although the question of whether this is per se problematic or rather a promising trend towards a more efficient model of law needs to be addressed.

A. Coexistence and cohabitation of sources

1. State-enacted law and religious law as foreign imports

It is as impossible to speak of legal history of Africa as a whole as it is to speak of African history or African geography without sacrificing accurateness to too shallow a generality. For instance, how could one even compare the history of Egypt (one of the cradles of Western civilisation); with estimations dating the Early Dynastic period at around 3100 BC, and that of Cabo Verde, which had been discovered by the colonizers and therefore has no human history, including *no precolonial history*, to speak of before 1456 AD ? Should we address French, British, Portuguese, German colonies in the same fashion as if the legal system of the respective coloniser was perfectly identical, as were their attitude towards the African populations? And even so, how to take into consideration territories which had had the experience of multiple colonisers over times (Cameroon, South Africa) or on the contrary never been colonised for a long period of time (Liberia, Ethiopia)?

At any rate, stating that one cannot make generalisations about Africa is itself a generalisation and one must at least attempt to establish some common ground. Although some parts of Africa were indeed ruled by States that did exhibit most of the traits listed by Norbert Elias before colonization, the planned pre-eminence of state-enacted law was indeed mostly a European novelty, although it has been proposed that European historiography had considerably downplayed the seriousness of entities such as the Ashanti and Benin Empires in West Africa or the Kongo Kingdom in Central Africa, with a large amounts of written records attesting a solid political organisation[1]. Nevertheless, the idea of a monopolisation of law by the state is indeed quintessentially European, albeit introduced in a very gradual fashion. The best evidence of the ambiguousness of the role of State-enacted law in the African colonies could be found in French law. France does maintain under its sovereignty two African territories in the Indian Ocean. But whereas in Reunion, the same law applies substantially as it would apply in Paris (or in Pointe-à-Pitre…), the situation in Mayotte is very different, since questions of personal status (such as marriage ceremonies) are, in part, governed by local customary law, although some scholars argue that this exception is on its way to extinction[2].

[1] Territories and people with almost *no* political organization were the minority. Some examples: the *Tallensi* in modern-day Ghana and the *Diola* in modern-day Senegal.

[2] Ralser E. (2012). Le statut civil de droit local applicable à Mayotte, Un fantôme de statut personnel coutumier. Revue critique de droit international privé, 733-774.

Lubaale maliba; buli afuluma alyambala bubwe: God is like a skin, everyone wears it in his own way, as each individual has a right to worship his own god in his own way[3]. In precolonial times, the African reality was sincerely reflected[4] in this Lugandan proverb, due in part to the exceptional variety of systems of beliefs through the continent. There is no evidence that early westerners, for instance the Romans, authentically imposed their religious systems nor, with further reason, did they force any legal system based on their religious creeds. As a matter of fact, the trend started with the Muslim Invasion of Northern, then Western Africa, starting in the 7th century AD, which was followed several centuries later by the colonisation coming from Christian European countries, themselves not perfectly identical nor homogenous in terms of religion. Portugal and French were predominantly Catholic countries, German had a Lutheran majority with a demographically and culturally minority, and the United Kingdom is, almost by design, Anglican. It is evidently worth noting here that even in the times of colonization, the European powers had been largely de-Christianised, as had their laws, Portugal being somewhat of an exception. At any rate, it is actually Muslim *sharia* that is at the forefront of religious law in modern-day Africa, with, once again, a much-contrasted tableau. Sudan and Mauritania apply *sharia* in both civil *and* criminal matters, whereas many countries where the population is almost entirely Muslim do not use *sharia* at all in the law: this is the case for Niger, Chad or Senegal. Tunisia has the particularity of being the only Arab-majority country in the world with no acknowledgment of *sharia* in its legal system.

2. Customary law as a vehicle for traditions *weltanschauung*

The list of eminent scholars, whether they be Africans or "Westerners"[5], who have dedicated long and through studies over customary laws in Africa is a long one, and one could get easily lost if only in the rich and penetrating works of Togolese Guy-Adjete Kouassigan[6] and Nigerian Taslim Olawale Elias[7]. It is therefore not our intent to attempt a recension of these customs, but only to sketch a description of the narrative to which they are subject and their function. For colonisers, the very existence of African customs, besides being a direct and frontal attack at their sovereignty, was a sign of poor organisation and of course of a lack of advancement in civilization, as law was at the time conceptualized as an exclusive prerogative of the state (even in Metropolitan France, "modern", civil-code inspired law was thought as an effort to repel customary law): therefore, customary law is seen as not *really* law[8].

Obviously, any thorough examination of customary law in Africa reveals a complex, refined system, synchronized with African values and worldviews, as is evidently the case with the case of land rights, viewed as a collective, multi-secular issue. Olawalae has furthermore stressed the influence of African customs on modern international law (itself mostly customary in nature), as the notion of Nation-State has historically never gained much traction in traditional Africa, state sovereignty was likewise not seen as an obstacle to the settlement of regional issues. It is often forgotten that the last Emperor of Ethiopia, Haile Selassie was the forefather and most notable proponent of the theory of collective security in international relations, as he eloquently

[3] Walser F. (1982). Luganda Proverbs. Berlin Dietrich Vermer Verlag.
[4] Nsereko D. (1986). Religion, the State, and the Law in Africa. Journal of Church and State, 269–287.
[5] The terminology is patently absurd, as Senegal or Morocco are geographically more western than Greece or Germany.
[6] Kouassigan G.-A. (1966). L'homme et la terre. Droits fonciers coutumiers et droit de propriété en Afrique occidentale. Berger-Levrault. 283 p.
[7] Olawale E.T. (1956). The Nature of African Customary Law. University of Manchester Press.
[8] Magnant J.-P. (2004). Le droit et la coutume dans l'Afrique contemporaine. Droit et Cultures, 167-192.

described the notion in his speech to the League of Nations given in the wake of the Italian invasion of Abyssinia[9].

B. Potential conflicts between the sources

Legal pluralism is not an issue in itself, but may become one if the legislator does not make an effort to make the law intelligible. Conflicts can therefore arise in private law, notably in civil law and business law.

1. In civil law

So as to illustrate the potential hearths of conflict between legal sources in civil matters, we can invoke family law (in particular, marriage) and real estate law.

A marriage is a lawful union of two persons under the conditions set forth by the law.

In Cameroon, for instance, civil marriages are governed by written law, in particular ordinance number 81/02 of 29 June 1981 on the organization of civil status. Upon reading the text, one wonders about the role of customary marriage in the Cameroonian context, as the 1981 ordinance does not address the matter precisely. Indeed, whereas customary marriage was abolished but the law of 11 June 1968 on the organization of civil status, one realises that it has not been rehabilitated[10]. In spite of the position of the law, a large fraction of the population, notably in rural areas, elects a customary wedding because of a better identification to it.

Further to Article 81 of the 1981 ordinance, "customary marriages must be transcribed in the registers of civil status of the place of birth or of residence of one of the spouses. Nevertheless, the President of the Republic may, by decree, forbid, on all of part of the territory the celebration of customary weddings. The provision thus does not specify the legal value of customary marriages, because of the polysemy inherent to the word "transcription" (*transcription*).

Transcription is defined as "a publicity formality for certain legal deeds, consisting in copying; in part or in whole, said deed on an official record"[11]. But should one regard transcription as a *substantial* formality, in other words one which is necessary for the validity of any customary marriage, or as one only need for evidentiary purposes? Upon further analysis, one can demonstrate that transcription "which on purpose is to enable spouses married according to customary rites to evidence their marital status, does not constitute the marriage but only declare it. Therefore, spouses that would not have their marriage transcribed would nonetheless be married, but they could only prove the marriage through transcription and thus the marriage is opposable to them, but not to third parties"[12].

All things being considered, there appears to be some form of hierarchy between the two forms of marriage. Civil marriage would be more legally valid than its customary counterpart, as the latter demands transcription as a condition of its publicity or evidence. Such organisation is thus source of conflicts between sources insofar as most Africans seem to identify more with customary marriage[13], and one could therefore be surprised at the higher status granted to the form of marriage inherited from the colonisers rather to that most fitting African values and traditions..

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[9] Baer G.W. (1973). Sanctions and Security: The League of Nations and the Italian-Ethiopian War, 1935-1936, International Organization, 165-179.

[10] Bokalli V.E. (1997). La coutume, source de droit au Cameroun. Revue générale de droit, 37-69.

[11] Ibid.

[12] Ibid.

[13] In the western region of Cameroon, the fact of marrying civilly without marrying customarily has no value in the eyes of the community which only endorses customary marriage as a true alliance between the spouses.

Another example can be found in real estate law.

In precolonial Africa, there already existed certain forms of land appropriation. The later introduction of modern forms, based on registration. As for marriage law, the civil procedure is the one better grounded in law and only an attempt of acknowledgment, or admission, of customary practices is sketched. Against that backdrop, the syntagma "local land practices" (*pratiques foncières locales*) is often used too express the reality of African land regulations as they are observed. "This concept expresses the renunciation of contemporaneous African societies to reproduce blindly ancestral principles in the management of social relationships, without however, conforming strictly to the laws and regulations promulgated by the State. In a way, it expresses the capacity for adaptation and legal creativity of local African communities"[14].

2. In business law

Traditional Africa holds *reciprocity* in paramount importance. Reciprocity refers to a cycle – to give, to receive, and to give back – within which the circulation of the goods is at the service of the social connection. Tontine could usefully explains the importance of reciprocity.

Reciprocity, yielding social links based on ethnicity, family, community etc., was replaced, on the initiative of colonisers, and later newly-independent states by forms of business and employment law grounded in other values. The more nefarious consequence of such "modern" legislation is the exponential growth of informal work. According to the definition provided by the International Labour Conference in 2002[15], "informal economy" is made up of any economic activity of workers and economic units not covered by formal provisions, by virtue of legislation of practice. As these activities are not in the scope of the law, these workers operate at the margin: either they are not covered in practice, as the law is not applied in their case even if they do operate within the scope set forth by the law, or the law is not complied with because it is unfit, constraining, or imposes an excessive burden. Actors of the informal sector are economically and socially very vulnerable, working in dire conditions for an extremely low pay.

II Towards restructuration of law in Africa

Restructuring law implies, on the one hand, a theoretical adaptation, drawing inspiration from the available sources, and on the other its use in the service of development.

A. An end to legal mimicry : Adaptation of law to the African experience

1. Development of a business law capable of fostering trust

A tremendous effort has been made in recent years to make uniform the business laws of several countries, mainly of West Africa, through the OHADA or *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*[16] and its effort to draft and issue uniform acts as to several key matters in business law (company law, cooperatives, securities, transportation of goods etc.), as in matters of adjudication (mainly mediation and arbitration) and enforceability. The OHADA

[14] Ouedraogo, H.M.G. (2011) De la connaissance à la reconnaissance des droits fonciers africains endogènes. Études rurales, 79-93.

[15] ILO (2002). *Travail décent et économie informelle*. International Labour Conference. 90th session: http://www.ilo.org/public/french/standards/relm/ilc/ilc90/pdf/rep-vi.pdf

[16] It was created in 1993 and currently includes 17 States (Benin, Burkina Faso, Cameroon, Comoros, Côte d'Ivoire, Central African Republic, Congo, Democratic Republic of Congo, Gabon, Guinea, Guinea Bissau, Equatorial Guinea , Mali, Niger, Senegal, Chad and Togo) mainly French-speaking in Central and West Africa. It is a legal integration organisation aimed at standardising business law. It is in this capacity that it adopts uniform acts, the provisions of which are directly applicable in national law. Ten uniform acts (AU) have already been adopted and relate to various matters of business law. Martor et *al.* (2009). Le droit uniforme africain des affaires issu de l'OHADA. Litec. 382 p.

holds a permanent court in Abidjan, Côte d'Ivoire and makes public its case-law. A uniform act in employment law is still in the process of being finalized, if enacted, it would be to the best our acknowledged, the first true supranational act in this matter. OHADA acts have certainly made life easier for international trade between African countries by reinforcing legal certainty and ensuring an advanced degree of rule of law.

Critics of the initiative usually take two forms: first, the idea of making things uniform instead of varied is infinitely (maybe literally *ad infinitum*) debatable. The very same debate exists[17] in matters of European company law, in which the trend has been to work, through directive, to a levelling of the playing field to eliminate the possibility of a so-called "Delaware effect", i.e. companies fleeing to a jurisdiction with perceived more favourable conditions for management, to the detriment of shareholders. Harmonization, and in the case at hand standardisation in commercial matters is also of limited efficiency without a uniform, or at least comparable, tax environment. As for employment law, the chances of such standardization are evidently very low in the next future.

2. Development of a business law capable of formalizing activity

Against the backdrop of the lack of formalization so characteristic of most African milieu, and in the perspective of an empowering, inclusive development, it is impossible not to cite the works and effort of Peruvian economist Hernando de Soto Polar in his now classic *Mystery of Capital*[18] notes that lower classes in developing countries do possess capital, mainly in the form of land and other forms of real estate, but such property is not properly recognized by the legal system in which they are placed: their property is not, for all relevant purposes, *legal* property as it is not properly recorded nor acknowledged as such. This is a tragedy as the principal engine of a well-functioning capitalist economy is the ability for small entrepreneurs to access financing through the mortgaging of their real estate property; therefore, the lack of legal recognition effectively cuts those lower classes from the entire economic circuit, and favors stagnation and the inevitable crony capitalism endemic to certain (but not all) parts of Africa (and certainly not only Africa):

> "An elite minority enjoys the economic benefits of the law and globalization, while the majority of entrepreneurs are stuck in poverty, where their assets—adding up to more than US$10 trillion worldwide—languish as dead capital in the shadows of the law."

If, through an effort in toil, but not necessarily considerable in monetary terms, a "legalization" process could be achieved to acknowledge the wealth and make it moveable and available, this would result in tremendously increased opportunities for millions of growth initiators in Africa.

We also propose that a similar mobilization of wealth to generate even greater wealth could be used with African intellectual property such as traditional know-how, but also unrecognized copyrights and designs, where an effort towards recognition could result in vastly improved conditions for creators and those in charge of conserving and transmitting invaluable ancestral knowledge and customs.

B Using law at the service of continental development and of promotion of Africans.

Besides the issue of the solution of legal mimicry, law, especially I its economic dimension, should be used at the service of African development. Whereas law is most often imported from

[17] Or at least, should exist…

[18] De Soto H. (2000). The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else. Basic Books.

the west, scholars note that it tends to be used to serve foreign interests, at the expense of African interests. One illustration stems from OHADA law, and in particular from distribution of securities to the public.

According to a 2008 study, "despite their importance in local economies and their critical role in terms of economic development, SMEs have a very limited access to financial markets especially in Sub-Saharan Africa (SSA). On the one hand, the penetration rate in SSA is very weak – total bank assets only make up for 32% of GDP in average and credits to the private sector account for less than half these assets; on the other hand, financings are mainly granted to large, often foreign corporations. According to several studies […],, difficulties in obtaining financing are the main obstacles on the development of SSA SMEs, rather far above corruption issues, infrastructural deficiencies or abusive taxation. Studies show that 80 to 90% of SSA SMEs experience significant financing constraints. Barred from accessing financial markets, SMEs most often cover all their needs through personal resources"[19].

In current OHADA company law, only *sociétés anonymes* (SAs) can solicit the public for financing. By contrast, in Belgian lawn this option is made available to all types of company forms. Articles 58 and 82 of the uniform act relating to commercial companies (AU-DSC-GIE) set forth a double interdiction. On the one hand, Article 82 forbids unauthorised companies to solicit public savings and on the other hand, Article 58 provides that corporation (*Sociétés anonymes* and *Sociétés par actions simplifies*) may issue negotiable securities whose issuance is forbidden for other company forms. Since Article 853-4 of the same text forbids *Sociétés par actions simplifies* to solicit public fiunds, the option is therefore only open to s*ociétés anonymes*[20].

The AU-DSC-GIE defines the SA as a company in which shareholders are liable for the company's debts only to the extent of their contributions and where shareholders hold transferrable shares (Article 385). As for its incorporation, the SA must have a minimum share capital of 10 millions of CFA francs (circa Euro 15,000, since one euro is worth approximately 655 CFA francs and the nominal value of the shares is set by the articles. However, the share capital of SAs soliciting public funds shall be at least 100 million CFA francs (Article 824 of the AU-DSC-GIE). The SA's articles are established either through a notarial deed or by any deed guaranteeing authenticity, and filed with acknowledgment of inscriptions and signatures by all parties with a civil law notary's minutes in accordance with Article 10 of the AU-DSC-GIE. Under OHADA law, the SA is by far the most burdensome company both as to its incorporation and its functioning. The amount of the minimum share capital is very high although the founders may pay it up in several tranches (within a certain timeframe). Furthermore, accounts must be done both regularly and yearly, in a rigorous way, as the SA is assimilated to a medium or large-sized corporation. The SA is often mandated to use the normal system of presentation of its financial statements, above a certain turnover threshold. SA companies must appoint an internal auditor, which results in additional costs to the company. Finally, the SA is the only company form whose securities could be listed with a stock exchange, which is the locale *par excellence* of speculation activities that are sometimes detached from the real economy[21].
In practice, given the tremendous size of the informal sector in the economies of the Member States of OHADA (roughly 90%), and taking in consideration the OHADA's purpose of attracting foreign investment, one may conclude that SAs are chiefly foreign endeavours.

[19] Lefilleur J. (2008). Comment améliorer l'accès au financement pour les PME d'Afrique subsaharienne ?. Afrique contemporaine, 153-174.
[20] Tadjudje, W. (2018.) Renforcer le financement des entreprises par l'appel public à l'épargne : les enseignements de l'expérience belge. *Revue de droit international et de droit comparé*, n° 4, 461-487.
[21] *Ibid.*

Therefore, we may note that that small businesses and most local entrepreneurs cannot access the funds of the public.
In Belgian, this option is made available not only to all company forms, but also to promoters of independent businesses, whose equivalent in OHADA law would be the *entreprenant* status. In actuality, an independent worker may collect funds from the public within the frame of the current rules governing crowdfunding[22].

To make financing accessible to the Africans and thus reduce financial exclusion, in a perspective of legal adaptation, the reis no shortage of leads. Traditional Africa is used to the practice of tontine[23] sometimes perceived as illegal by financial authorities, but is managed both informally and efficiently. Following this trend, another possible solution is represented by mutual guarantee companies.
"Faced with such financial exclusion locals often call on their social relations. These financial practices regarded as « informal finance » stem from African social, customary and ethnic values and embody what one might call the permanence of traditional value besides modern finance. Such informal practices are remarkable to the extent that they rely on personal relations (family relation, social relations etc.). In most occurrences, not only do the people involves in the financial relations know each other, but the operations they carry out together are embossed in their social relations"[24].

In the case of mutual guarantee companies, the goal is for all members to gather monies so as to constitute a guarantee fund able to function as a guarantee for all; which guarantees could be used in the bank circuit to obtain loans from financial institutions. The main characteristic of mutual guarantee companies (as is the case for tontines) is *mutuality*, itself a mere organised solidarity and reciprocity system. In the general understanding of the term, reciprocity supposes the existence of two or more persons, of obligations of the same nature that bind them together as each member owes to the other the same duty. In mutual guarantee companies, each member must maintain their funds at the disposal of the group so that they may serve as guarantee for the others for a certain duration, including the time at which they will benefit from the guarantee. The same mechanism is at work in tontines. Each member receives in their turn the aggregate sum of contributions from the whole group, and is therefore bound to contribute at each session, in order to enable all members to benefit from the money pool as this member would. In both cases, there are interwoven and interconnected savings and lending activities. Such a reciprocity does not always exist in banks and microfinance within which the savings and loan activities may be perfectly disconnected from each other[25].

Eventually, in the African context and to derive maximal utility from legal pluralism, one should consider "so-called customary laws not as static rules promulgated by a now-forgotten traditional authority, but as a set of fundamental principles of regulation of social relationship, remarkable by their dynamism and flexibility. Such principles are the results of successful and unsuccessful circumstances experiences by societies and transmitted from generation to generation; they also

[22] *Ibid.*
[23] Defining tontine is not an easy task. In africa tontine may take many forms, which frustrates any cataloguing. Nevertheless, according to most scholars, a tontine is an association of persons who, united by links of a family, friendly, professional, clannish or regional nature meetfrom time to time in order to pool their savings, or to organise lending, so as to solve the individual or collective issues encountered by the members. See Lelart M. (2002). L'évolution de la finance informelle et ses conséquences sur l'évolution des systèmes financiers ». Mondes en développement, n° 119, 9-20.
[24] Tadjudje, W. (2016). Le cautionnement mutuel et l'inclusion financière en Afrique. Revue de l'ERSUMA, 1-12.
[25] *Ibid.*

result from compromises negotiated by the group to address, as efficiently as possible, the changes it was faced with. Deeply rooted in history and enjoying popular consent; customs can claim incontestable legitimacy and have shown an extraordinary ability to resist the more or less overt attempts by colonial and postcolonial States to replace them with so-called modern rules"[26].

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