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The Necessity of a Harmonious Legal Integration between the Penal Policy and Ohada's Policy

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Abstract
Created to promote and secure the business environment in Africa, the Organization for the Harmonization in Africa of Business Law (OHADA) has established legal standards and institutions resulting from the application of " a community-based integration policy.In its conceptualization, this integration policy insists on the harmonized legal and institutional framework to establish a climate marked by serenity and favorable to cross-border trade.However, the penal aspect established by the integration policy and intended to strengthen the achievements of this Organization raises difficulties for its implementation. The latter is manifested mainly by the reluctance of states to cede part of their criminal sovereignty in favor of community organization. That results in an inconsistency between the Organization's integration policy and that relating to the criminal area that would need to be resolved.Consequently, the search for coherence between the criminal policy of OHADA and the policy of Integration is evident and necessary. It can only be done through reform of penal policy by adopting appropriate mechanisms and legal instruments to confirm the impotence of such an initiative.
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INTRODUCTION

In the face of globalization and economic difficulties, some African countries have deemed it necessary to unite their efforts by creating a legal integration organization: the African Organization for the Coordination of Commercial Law (OHADA).

Created by the Treaty of Port Louis (Mauritius), signed on October 17, 1993, and OHADA entered into force on September 18, 1995. The Treaty was revised in Quebec on October 17, 2008, and entered into force on January 21, 2010. OHADA aims to formulate and adopt *"simple, modern and appropriate general rules…".* Achieving these goals will help eliminate legal and judicial uncertainty. That could only be done by establishing an integration policy.

Generally speaking, politics *"concerns the organization, the exercise of power, the government of men, by a state, within an organized society."* [1]In the narrow sense, it designates programs applied in concrete areas of the life of the City: these are the public policies that authority chooses to commit to intervening or not in a specific area[2].

Integration policy can, on the one hand, designate all the measures taken to define and apply the political will and, on the other hand, the sociological facts of the integration process[3]. All the countries that adopt the first have decided to converge towards an ordinary will. Sociological Integration is problematic; that is to say, it must be the Subject of critical reflection and knowledge acquired through research.

In the context of our study, the expression *"OHADA legal integration policy"* should be understood by the philosophy underlying the work of Integration. At the same time, coherence refers to the logical harmony which exists (which should have existed) between the general integration policy and the penal policy.

Putting an end to legal insecurity would be the manifest political will of the 17 Member States[4], thus making the space delimiting the Organization an attractive and economically stable region.

This political will has led to normative and judicial Integration in Business Law.

On the normative level, the signing of the Treaty of Port Louis has established that the Council of Ministers is competent to adopt uniform[5] Acts directly applicable in each State Party, notwithstanding any contrary provision of internal law prior or subsequent. These Uniform Acts cover much of what is known as *"business law."*

[1] A. J. ARNAUD (sous la direction de), Dictionnaire encyclopédique de théorie et de sociologie du droit, Paris, LGDJ, 1993, P. 453.
[2] A. J. ARNAUD (sous la direction de), Dictionnaire encyclopédique de théorie et de sociologie du droit, Op. Cit. P. 457
[3] Dominique SCHNAPPER, «L'intégration : enjeux de connaissance et de politique», https://www.vie-publique.fr/parole-dexpert/23843-lintegration-enjeux-de-connaissance-et-de-politique, consulted on 11/10/2021.
[4] Benin, Burkina Faso, Cameroon, Comoros, Congo, Congo R.D., Ivory Coast, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Central African Republic, Senegal, Chad, Togo.
[5] See: HABITSAMANA, Dictionnaire de Droit OHADA, in www.ohada.com/Ohadata D-05-33: "The Uniform Acts designate all the legal provisions which regulate a specific area of OHADA economic law, which apply in all African countries signatories to the OHADA treaty. In other words, the Uniform Act is a harmonized law

On the jurisdictional level, a Common Court of Justice and Arbitration[1] has been established, with the competence to ensure the interpretation and application of uniform acts. Moreover finally, the conference of heads of State and the Higher School of Magistrates complete the structural architecture of the Organization.

In any case, the stated desire of the initiators of the Treaty to establish a unified legal space in business law has encountered resistance in criminal matters. Indeed, member states of the Organization have found it challenging to transfer criminal jurisdiction to OHADA.

This one tries to seize the penal phenomenon to consecrate common legislation. However, criminal sovereignty would prevent this by refusing to delegate this competence to benefit any supra-state structure. This exclusive state competence in the criminal[2] field is justified by the fear of dispossessing national structures vested with popular legitimacy in favor of unelected community bodies, the legitimacy of which is sometimes questionable.

That should be added that National particularities are hardly unrelated to OHADA's reluctance to invest in the penal field. These national differences seem to call for differential treatment of criminal litigation to consider specific sensitive points[3].

That is why OHADA, while cautiously "omitting" to cite criminal law as one of the subjects to be standardized, has nevertheless deemed it necessary to recourse to criminal law in its policy whenever the need becomes absolute. That has had an impact on derived law[4].

We can thus see that OHADA does not entirely take over the criminal field. That disrupts the coherence of the process. By making incriminations in the uniform acts for the member states to take the corresponding sanctions, OHADA casts a blur on its penal policy. This notion must be clarified[5].

The criminal policy determines the modalities of a consistent and equal application of the criminal law throughout the national territory[6]. This definition joins ANCEL, which considers it *"the organized and deliberate reaction of the community against criminal, deviant or anti-social activities."*[7] DELMAS-MARTY defines it as *"the set of processes by which the social body organizes responses to the criminal phenomenon,"* with criminal law as *"the hardest core."*[8]

Therefore, all these distortions lead to significant consequences, harmful to business security and the equality of economic operators. That constitutes a departure from OHADA's standardization policy by introducing disruptive mechanisms, which should be corrected by harmonizing criminal policy and the objectives of the Treaty

To fully understand the usefulness of rationalizing[9] penal policy in the work of Integration, it is necessary to start from the integrative philosophy expressed in the Treaty.

For this, the provisions of Article 2 of the Treaty could enlighten us. This article provides: "*The purpose of this Treaty is to harmonize business law in the States Parties by drawing up and adopting common rules that are simple, modern and adapted to their economies, by implementing appropriate legal procedures…".*

This provision of Article 2 outlines OHADA's integration policy: *"simple common rules."* In light of this discourse contained in article 2, penal policy should be assessed. After having been convinced that criminal matters are not standardized, it is advisable to come to the idea that if the objective sought is the adoption of a standard, simple rules directly applicable in the States Parties (notwithstanding all provisions of domestic law to the contrary), it must be noted that in criminal matters, this principle suffers from adjustments which disrupt the coherence of the integration policy.

It s urgent today to give complete success to this effort of legal Integration, to bring the penal policy in coherence with the global policy, because the obstacles to a community penal policy, however legitimate they may be, can give way to the Court's imperatives which had justified the advent of OHADA and which have for names, the security of investments and investors, the modernization of legal rules. That is why the choice of a

[1] Ibid.: "The Common Court of Justice and Arbitration (CCJA) of OHADA was created by the Treaty of Port Louis of October 17, 1993 entered into force in 1995. The OHADA Court of Justice and Arbitration is a community court whose mission is determined by article 14 of the Treaty. It sits in Abidjan (Ivory Coast). "

[2] A. HUET, L'impact du droit communautaire sur le droit pénal, in Simon (D.) (Sous la dir. de), Le droit communautaire et les métamorphoses du droit, Strasbourg, PUF, 2003, p. 13 et 14.

[3] Gaston KENFACK DOUAJNI, « suggestions en vue d'accroitre l'efficacité de l'OHADA », in www ohada.com/Ohadata D-04-01, P. 2

[4] As opposed to all the uniform material rules applicable in the Member States of the community organization, the primary source of which is the institutional treaties.

[5] See article 5 of the constitutive treaty of OHADA

[6] Michel, Paul. "Politique pénale et politique de sécurité", in Nicod, Marc. Qu'en est-il de la sécurité des personnes et des biens ? Toulouse : Presses de l'Université Toulouse 1 Capitole, 2008. (pp. 113-118)

[7] M. ANCEL, Pour une étude systématique des problèmes de politique criminelle, Archives de politique criminelle, 1975, P.15

[8] M. DELMAS-MARTY, Les grands systèmes de politique criminelle, Paris, PUF, 1992, P. 13..

[9] Joseph ISSA-SAYEGH, la problématique de la construction d'un droit du travail régional dans les pays africains de la zone franc, Communication au séminaire ORAF/CFDT/UGT-CI (Abidjan mai- juin 1995) sur le thème " La dimension sociale de l'intégration régionale des pays africains de la zone franc. L'harmonisation du droit du travail comme facteur de progrès social. In www.ohada.com/Ohadata D-02-26, P. 8

"front" criminal policy was seen as *"the Achilles sinew"* of a work seen as progress in the fight against the legal balkanization of Africa.

Therefore, the following question should be asked: ***is it possible to have efficient coherence between the OHADA penal policy and the integration policy?***

In addition to being necessary, such consistency is also possible since OHADA has visibly come up against obstacles that other community organizations have managed to overcome. For example, UEMOA, OAPI, and CIMA have put in place a penal policy that is admittedly sometimes inclusive but gives the said organizations competence to enact penal sanctions or provide a control mechanism for enacting such policies sanctions.

Consequently, two significant concerns will guide our developments: first, the interest in rationalizing OHADA's penal policy; second, the way to proceed with such a rationalization of the penal policy.

I. The interest of a penal policy in harmony with the integration policy

The value of a coherent penal policy is no longer to be demonstrated, given the multiple negative consequences which result from the current State of OHADA's penal policy. Such Harmonization only adds to legal and judicial security insofar as we can thus reduce the risks of movements in criminal policy in the OHADA area, even if this should lead to a more relative reading of the various obstacles to the Integration of the penal field.

1.1 Reducing the risks of movements in criminal policy in the OHADA area

Rationalizing penal policy to minimize the observed or observable inconsistencies means strengthening the legal and judicial security of operators and businesses; in fact, framing the national margins to re-establish equality between economic operators in the OHADA area that the national margins risked compromising. It would thus be the first tribute to the much desired legal certainty and confirm the wish of the States Parties to acquire a shared space.

1.1.1. Supervision of national margins in criminal matters

The characteristic of OHADA uniform law is, in principle, its immediate and direct application in the legal order of the member States. Nevertheless, by proceeding as it did in criminal matters, OHADA offers little guarantees that Community criminal business law will apply immediately. In other words, despite its undoubted prowess, and OHADA's weaknesses, it is not lacking. OHADA has left States with substantial national margins. They are mainly manifested, both at the normative and judicial levels, by the technique of criminalization by reference.

On the normative level, the basis for the hesitation in the effective transfer of the criminal domain is the content of the provisions of the 2nd paragraph of article 5 of the Treaty.

Indeed, article 5 of the said Treaty distributes the competencies between the OHADA legislator and those of the member states. The OHADA legislator has jurisdiction over overcriminalization. These incriminations are inserted in the corpus in the various uniform acts. That leaves much maneuvering for national parliaments, giving them the responsibility to set the penalties defined by the uniform acts[1].

On the judicial level, we are witnessing a splitting of the criminal procedure between the national courts and the CCJA on the legal basis of Article 14, paragraph 3 of the Treaty.

This fragmentation means that when a case involves a judicial decision applying criminal sanctions, the CCJA must declare itself incompetent to hear such a case. Its competence should be limited to the interpretation and application of the incriminations provided by the Uniform Acts and refer the rest of the case to the National Court of cassation. The latter will be in charge of applying the sanctions provided for in the field by the national texts.

The impact of this fragmentation in practice is the heterogeneity of case law: Community criminal case law and the case law of national jurisdictions, resulting from the application of non-harmonized criminal law.

These normative and jurisprudential heterogeneities will undoubtedly also contribute to strengthening national particularism.

This particularity resides in the legal system of the different States. Indeed, OHADA has 17 member states with different legal traditions, including a bilingual state (Cameroon, English-speaking, and French-speaking), a Portuguese-speaking state (Guinea Bissau), and a Spanish-speaking state (Equatorial Guinea). Even if the first States Parties were of civil law tradition, the fact remains that since the accession of Cameroon, Guinea-Bissau, and Equatorial Guinea, the situation has changed. Indeed, even if the Portuguese and Spanish-speaking states are very close to the French legal tradition, Cameroon is still partly a member of the Common Law, a legal system different from the Romano-Germanic system.

With different legal cultures, the OHADA area is composed of States with heterogeneous levels of development. Heterogeneity reinforces their reluctance in the total transfer of their criminal jurisdiction. The standardization of specific rules would undoubtedly create imbalances. Moreover, this is at the level of the application of sentences. That is what justifies the position of the Community legislator in non-criminal matters: to refer it to national law.

Therefore, grasping the need to supervise the national margins is to apprehend the adverse effects of the

[1] D.ABARCHI , La supranationalité de l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires, opt.Cit,p15

lack of a framework for the intervention of national legislators in criminal matters, compromising the effectiveness of OHADA's objectives.

However, for this technique to be effective, it should be accompanied by a control body or device[1]. Instead of providing such mechanisms to ensure that criminal sanctions are set up, OHADA has been content to stipulate the determination of criminal sanctions in a peremptory manner. Hence, member states risk immobility or delays in enacting criminal sanctions. OHADA could have prevented this problem, as could WAEMU. Articles 64 and 75 of the WAEMU treaty instituted a multilateral surveillance system to standardize the application of community regulations.

In addition, the Court of Justice is vested with the power to examine actions for failure by the Member States to fulfill their obligations under the Treaty.

Without establishing such a mechanism, we would see the survival of national margins in OHADA member states, specifically in the criminal field. Hence the warning of an author[2] on the lack of homogenization and conformity of national law leading to the survival of legal particularism[3].

1.1.2. Promote the emergence of guiding principles in criminal matters

Some authors believe that it is easier and more desirable in legal integrations to "order the multiple" than to establish "the unique," and as such, already consider OHADA law as a hegemonic law both because of the rigid nature of its method and in its attempt to dispossess States in matters of essential attributes.

Indeed, the disturbances and inconsistencies introduced by the "diplomatic management" of the criminal issue result mainly from two factors. The ambiguity of the method results from the obligatory concurrence of normative competencies in the determination of the offense referred to by OHADA law, a concurrence according to which the Council of Ministers intervenes to standardize the constitutive elements of the offense. In contrast, it is up to the national authorities to complete the incrimination by a sanction. However, it is customary in criminal matters that the provisions of the offense and those affecting the sanctions are contained in the exact text. Therefore, proceeding as OHADA has done removes from the incrimination its "legal autonomy," as Professor NDIAW has stated, and thus subordinates its application to the enactment of the sanction.

Since it is neither precisely uniform nor truly harmonized, the technique used in criminal matters is complex. Certainly not, at least not because of the objective of simplicity and efficiency sought through legal Integration. Few standard rules, too many complex rules, legal Integration in criminal matters is far from being adopted, which harms their quality. In fact, and contrary to what ISSA-SAYEGH[4] teaches from the outset, the option between Harmonization and standardization is neither always clear nor always fortuitous in terms of normative Integration.

Indeed, we note that through article 5, paragraph 2, the criminal offense is where a mixed transaction has been made between the need to have shared principles in criminal law and the impossibility of arriving at uniform rules. On the contrary, it is often the rule in organizations with normative Integration. However, suppose it has proved necessary to reflect on this issue within the OHADA framework. In that case, it is because of the option made, at the outset and in principle, to standardize the rules in business law. That means that at the outset, in opting for the adoption of standard rules in the form of uniform acts, the scheme chosen in criminal matters is far from conforming with this principle[5].

At the risk of maintaining these specificities to legitimize an institutional and legal autarky of the States, it is urgent to find standard rules, despite the diversities. Otherwise, the legal landscape would be dependent on state borders and harmful to the legal security of investors and citizens.

In our opinion, there is nothing to prevent from a legal point of view, and the penal sovereignty of States should stand in the way of this irresistibly.

The research of common principles is necessary because it is the only guarantee of prevention of the risks of inequality in the typical legal space between the liberalist leadership of the investors and the flexibility of the economic rules of the States.[6]

The need for these common principles is intended to mitigate the effects of the fragmentation of the legal element of the Community criminal standard, which could lead to an actual probability of seeing the same offenses receive different sanctions in different States. Consequently, this Integration situation by reference could question the idea of a common legal area. In its vocation to extend to all African states, OHADA will

[1] Mireille DELMAS-MARTY (sous la dir.). - Critique de l'intégration normative. L'apport du droit comparé à l'harmonisation des droits, coll. « Les voies du droit », Paris, PUF, 2004, P 18.
[2] Roger MASAMBA : l'OHADA et le climat d'investissement en Afrique, in www.ohada.com/ Ohadata D-06-49, P.7
[3] Joseph ISSA SAYEGH : L'ordre Juridique OHADA, Communication au colloque ARPEJE, ERSUMA, Porto Novo, 3-5 juin 2004, in www.ohada.com/ Ohadata D-04-02, P. 4
[4] Joseph ISSA-SAYEGH, Quelques aspects techniques de l'intégration juridique : l'exemple des actes uniformes de l'OHADA In Revue de droit uniforme, UNIDROIT. Rome 1999-1, p. 5.
[5] Joseph ISSA SAYEGH : L'ordre Juridique OHADA, Op. cit., p. 4
[6] Mohamed M.O. SALAH et Abdoullah CISSE, Droit des sociétés, Droit des sûretés et Droit bancaire. Quelle place pour les vice-présidents dans les sociétés anonymes ? Africajuris, P. 5

theoretically be able to accommodate other countries with diverse legal cultures. The heterogeneity of the criminal sanctions of these national diversities can encourage the emergence of shopping forums[1] and raise the question of equality between States, between economic operators, or even between litigants. That is contrary to a more substantial integration of the criminal field, as noted by DELMAS-MARTY[2], and would favor developing a standard legal system. Indeed, the operator or the litigant installed, for example, in Côte d'Ivoire may not receive the same treatment as those established in Mauritius or Mali because of the divergence of responses to the offense.

It is the same on the judicial level because of the interpretation and application of regulations.

Ultimately, notwithstanding the *" Law of Difference, "*it seems essential to establish common principles in criminal matters without unique regulations.

1.2. Have a valuable reading of the sovereignty of member states

The establishment of a common penal policy, even if difficult, is eminently necessary for the preservation of the legal unity of the OHADA area. First of all, theoretically, this common penal policy is feasible; better, in practice, it is confirmed through the experience of some community organizations.

1.2.1. The theoretical foundations of a possible harmonization of the penal field

If *"OHADA law is above all a common-sense law because it considers the complexity and originality of African realities,"* it should also be a logical law considering the risks of distortion of its work by the questionable exclusion of the criminal field.

From a theoretical point of view, it should first be noted that the sovereignty argument is refutable in more ways than one.

First, the conception of sovereignty that founded the OHADA option in criminal matters is a classic conception of sovereignty. From the first sketches of a League of Nations to the advent of the European Union, including the United Nations - to take just these examples, the perception of sovereignty has evolved. In fact, As an essential attribute of the State, criminal sovereignty thus postulates, in its positive sense, the exclusive competence of each State to intervene in criminal matters, and in its negative sense, the impossibility of delegating this competence to any supra-State structure. This exclusive competence of the States in criminal matters is justified by the fear of dispossessing national structures invested with popular legitimacy to the benefit of non-elected community bodies, whose legitimacy is sometimes questionable. In order to understand the fear of possible dispossession of criminal competence to the benefit of the community body, it is necessary to refer to the consistency of criminal policy. Criminal policy, including legislation and criminal justice, is an integral part of the regalian missions of the State because, through them, the State organizes social peace on its territory. Nowadays, entities are working to erase themselves; an ultimate paradox may seal the fate of the idea of sovereignty

In addition, limiting the work of Integration based on sovereignty was greeted with reservations because, from a constitutional point of view, concessions of sovereignty were admitted and enshrined in most African constitutions, notably those of the OHADA member states. The decision of the Senegalese constitutional judge confirmed this on December 16, 1993. It recognized that the ratification of the OHADA treaty does not *entail "any change in the international status of Senegal as an independent and sovereign State, nor any modification of its institutional organization and that the relinquishment of some of its institutions - the Court of Cassation but also the National Assembly - is neither total nor unilateral."*[3]

Another foundation is an attempt to reconcile legal and linguistic diversities. In this respect, OHADA, like several countries, first tried to resolve the language barrier by opting for the translation of community legislation into the different languages of the community.

As for the legal diversity, one could be inspired by the existence of cohabitation between the legal systems and specifically in civil law[4]. The model could be adapted to OHADA criminal law. That also applies to the European Union.

Therefore, it is not easy to dissociate these diversities from the question of sovereignty. The requirements of legal security and economic development are more pressing than the question of sovereignty, as evidenced by Mr. Badie.[5]

Logically and in a dynamic of Integration, the States could have given OHADA the power to enact and apply its incriminations accompanied by penal sanctions. The groundwork had already been laid by most states,

[1] ANOUKAHA et alli. ; *OHADA, Sociétés Commerciales et GIE*, Bruylant Bruxelles, 2002, P. 237
[2] Delmas Marty (M): *les grands systèmes de politique criminelle*, op. cit. P 359
[3] Decision n ° 3-C-93 of December 16, 1993, case n ° 3-C-93 of the constitutional council of Senegal in https://conseilconstitutionnel.sn ›consulted on 11/11/2021
[4] Voir infra.
[5] (B) Badie : un monde sans souveraineté, collection « l'espace du politique », Paris, Fayard, 2004, p 10 et p 84.

providing the possibility of making concessions of sovereignty to achieve Africa's economic and political union[1].

1.2.2. The experience to be drawn from comparative law; the practical basis for a possible harmonization of the criminal field.

In some respects, no element of the criminal domain appears in the provisions of Article 2 of the OHADA Treaty because the sovereignty of States and the desire to preserve the particularities of each State are obstacles to this. This articulation, which denies the Organization the competence to enact and apply criminal sanctions, has often been perceived as originality.

- **African organizations**

- The Inter-African Conference of Insurance Markets (CIMA)

The **CIMA** is an integrated insurance industry organization in fourteen African countries, 13 of which are French-speaking. It was created on July 10, 1992, in Yaoundé, and came into force on February 15, 1995, with the development of single legislation. CIMA's main objective is to establish a single set of regulations for insurance companies and operations in its member states. In order to achieve this goal, CIMA first found the following bodies: the Council of Ministers, the General Secretariat, and the Regional Insurance Control Commission (CRCA). It then developed a Code directly applicable within the States through the transposition system.

Thanks to this mechanism of direct and immediate applicability, the Code replaces the scattered legislations of the Member States. Indeed, before the CIMA Code came into force, the insurance sector in the CIMA zone was characterized by generalized insolvency of insurance companies and a lack of confidence in the insured. That reinforces the work of the Regional Insurance Supervisory Commission, which, acting supranationally, supervises the operations of companies and issues and withdraws licenses. As a result, insurance has become a credible industry, financially sound, and can play its role in the countries' economies.

The single chapter of Title IV of the said Treaty lays down criminal sanctions. The penalties listed in Article 545 range from a simple fine to imprisonment for three years. Paragraphs 3 and 4 of Article 545 are clear: *"Any person who presents for subscription or causes to be subscribed contracts on behalf of an enterprise not approved for the branch in which these contracts fall shall be punished by a fine of 500,000 to 2,500,000 CFA francs and, in the event of a repeat offense, by a fine of 1000000 to 5,000,000 CFA francs and by imprisonment for six months to three years or by one of these two penalties only."*

- **The African Intellectual Property Organization (OAPI)**

With 17 member states, the African Intellectual Property Organization (OAPI) was instituted by the Bangui Agreement on March 2, 1977. This agreement was amended on February 25, 1999, effective in February 2002. Its institutional system is composed of three institutions: the Administrative Council (the supreme body with administrative and regulatory functions), the High Commission of Appeal (with jurisdictional functions), and the General Management (in charge of the Organization's executive tasks).

Driven by the will to promote the contribution of intellectual properties to the development of their States and to protect uniform and effective intellectual property rules[2], OAPI has elaborated uniform legislation included in ten annexes to the Bangui Agreement, which are of direct and immediate application in the legislation of the member States. This uniform regime has made it possible to centralize patents and protect them against unfair competition in member countries.

This uniform legislation has enabled OAPI to go even further in defining a standard criminal policy in intellectual property. Annex 1 (patents) of the revised Bangui Agreement has, in its Title V (infringement, prosecution, and punishment), established not only the incriminations and sanctions but also the procedure to be followed and the burden of proof[3]. For example, Article 58 of Annex I provides: *"Subject to the provisions of Articles 8 and 46 to 56, any infringement of the rights of the patentee, either by the use of means which are the Subject of its patent, or by receiving stolen goods, or by The sale or display with a sale view, or the introduction into the national territory of one of the Member States of one or more objects constitutes the offense. This offense shall be punishable by a fine of 1,000,000 to 3,000,000 CFA francs without prejudice to civil damages". At the same time, Article 59 states: "1) In the event of recidivism, in addition to the fine referred to in Article 58, imprisonment of one to six months may be imposed.*

2) A repeat offender has been convicted for the first time within the previous five years of any offenses in this schedule. "

Annex VII (of the said Agreement) also provides criminal sanctions for the different offenses it determines.

- **West African Economic and Monetary Union (WAEMU)**

WAEMU was created in Dakar on January 10, 1994, to anchor the economic Integration of its eight-member countries using a common currency: the CFA franc. Through its Treaty, WAEMU has set itself five main

[1] Voir notamment : article 39 de la constitution de la 5è République du Niger, Préambule et article 96 alinéa 4 de la Constitution du Sénégal consolidée.
[2] The preamble of the Bangui Agreement was in force in 2002.
[3] See Title V of Annex I to the Agreement (Article 58 and following)

objectives: to strengthen competition in economic and financial matters; to put in place simplified control procedures capable of reconciling national performance and monetary policies; to establish a common economic market based on the free movement of people and goods; to harmonize national sectoral policies through the implementation of joint actions and possible standard procedures in the main areas of economic activity; and to harmonize the laws of the States Members to the necessary extent for the efficient functioning of the common market. Like most community organizations, the Treaty is the basic norm. The derived regulations in article 42 of the Treaty will follow hierarchically: regulations, directives, and decisions.

Also aiming at establishing a standard criminal policy, WAEMU has favored the path of Harmonization either through directives or through uniform laws. In this sense, we can cite the case of the Uniform Law on the repression of offenses related to checks, bank cards, and other electronic payment instruments and procedures; issued in December 2011 and entered into force in 2012.

This law is in line with the Harmonization of the legislation of the member states of the West African Monetary Union (WAMU) in the monetary, banking, and financial field, the principle of which is contained in article 22 of the Treaty of November 14, 1973, constituting the WAMU.

It results from implementing the reforms provided for by Regulation No. 15/2002/CM/WAEMU of September 19, 2002, relating to payment systems in the member states of the West African Economic and Monetary Union. It results from implementing the reforms provided for by Regulation No. 15/2002/CM/WAEMU of September 19, 2002, concerning payment systems in the WAEMU member states[1].

Like OHADA law, the community regulation was out of step with the firmness and accuracy of criminal law, based on the legality of offenses and penalties. Difficulties relating to its interpretation and application were emerging without forgetting that the repressive arsenal was focused on preventive treatment.

They are establishing the establishment of the fixed prison sentences incurred in the event of an offense, together with a fine.

In the same vein, the new Uniform Act of 2011 institutes new incriminations in Articles 4 and 16 of the Uniform Act, any material and data that may allow the commission of the offenses of counterfeiting and falsification of checks and bank cards.

Furthermore, the attempt to commit the offenses of counterfeiting and falsifying cheques, bank cards, and other electronic payment instruments is now incriminated by articles three paragraphs 1 and 16 paragraphs 2 of the new Uniform Act. Finally, it organizes the protection of the confidentiality of information centralized by the Central Bank under Articles 127 to 130 of Regulation No. 15/2002/CM/WAEMU through adopting new criminal offenses in Articles 12 to 14.

• <u>Outside Africa: the European Union (E.U.)</u>

The European Union is a community organization that has opted for an integration policy. Indeed, the Member States have delegated a certain number of powers. That led to the accession of 27 States[2].

The Organization has acquired a legal arsenal and some institutions to achieve these objectives[3] and values[4].

As regards the first, it is made up of primary law and secondary law. The primary law is made up of the various treaties, the most recent of which is that of Lisbon[5]. as regards secondary law, The legal acts composed are the regulation, the directive, the decision, the recommendation, and the opinion [6]

As for the institutions, we have the Council of the European Union, the European Commission, the European Parliament, the Court of Justice of the European Union, the European Council, and the European Central Bank.

The functioning of the European Union is based on three pillars: the European Communities, the standard foreign and security policy, and finally, cooperation in the field of justice and internal affairs. It is the last pillar that deals with the criminal aspect.

This pillar aims to first promote police and judicial cooperation in specific areas, including terrorism, trafficking in human beings, illegal drug and arms trafficking, corruption, and fraud, racism, and xenophobia.

Next, judicial cooperation aims to facilitate and speed up legal procedures and enforce decisions, mutual assistance, and extradition between the Member States to establish minimum rules[7].

In other words, the European Union *"had only given competence in certain matters, excluding the*

[1] See articles 83 and following of Regulation n° 15/2002/CM/WAEMU
[2] England withdrew from the European Union in 2020
[3] Article 3 of the Treaty of Lisbon
[4] The European Union is founded on the following values: Human dignity, freedom, democracy, equality of all citizens before the law, rule of law, human rights
[5] Amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17.12.2007); entered into force on 1 December 2009.
[6] See : - Article 288 of the Treaty on the Functioning of the European Union (hereinafter TFEU')
- Sources and scope of European Union law | Factsheets on the European Union | European Parliament (europa.eu) in https://www.europarl.europa.eu/factsheets/fr/sheet/6/sources-et-portee-du-droit-de-l-union-europeenne consulted on 24/01 /2022
[7] See Articles 31 and 32 of the EU Treaty

maintenance of public order and the sanctioning of disturbances to this order... especially since the process of drafting Community standards are more the responsibility of the Council, made up of government representatives, and therefore of the executive power, than of the European Parliament, the legislative power, to which, in the European democratic tradition, the definition of penal standards belongs"[1].

Consequently, like OHADA, the criminal jurisdiction of the European Union, defined by articles 82 and following of the TFEU, is to supplement the criminal rights of the member states each time an element of foreignness within the space is likely to hamper criminal repression[2].

From the above, *"European Union criminal law does not define offenses based on which persons may be prosecuted, nor directly applicable rules of criminal liability nor even rules of procedure allowing prosecution and judgment offenders."*[3]

2. The legal mechanisms for a coherent penal policy

Theoretically possible and practically used, the Integration of business law should not pose so many equations in the OHADA environment.

It may be possible and desirable, but the question is to know what mechanisms could be used to finally give OHADA's criminal policy the coherence it lacks.

For this, it would be necessary to ensure that the effectiveness of OHADA's legal Integration is not necessarily linked to the direct Integration of criminal sanctions. The Treaty could maintain the competence to enact sanctions while putting in place mechanisms to fight against the immobility of states without coming up against their sovereignty.

Secondly, the judicial architecture should be reformed to alleviate the difficulties of criminal litigation.

2.1. The legal mechanisms for defining a coherent penal policy at the normative level

Although there is no unanimous precept, there is an urgent need to bring rationality to penal policy to reduce its current shortcomings.

The first criticism of OHADA is the lack of jurisdiction over criminal sanctions. That contrasts with legal certainty and equality between litigants. Consequently, OHADA should extend its normative competence to include repressive measures to have a coherent penal policy.

Another criticism is the complexity of criminal policy, induced by the sharing of competences between national law and the Organization in the definition and application of criminal policy. This sharing was justified by the preservation of the sovereignty of the States.

They achieve full Integration of business law; the penal policy reform would require that the integration technique be flexible to preserve national sovereignty and particularities.

2.1.1. An extension of OHADA's scope of normative jurisdiction in criminal matters

The extension area must be identified before determining the procedure to be followed.

One can think of substantive criminal law and criminal procedural law in the field. By focusing on the competence to enact sanctions, the extension of the Organization's normative competence will avoid this competition between the Community bodies of incrimination and the national sanction bodies. This competition would denude the consistency of integrated criminal business law. Thus, the OHADA penal standard will include incriminations and sanctions - principal, complementary; and will acquire its legal autonomy.

The power to enact the principal sanction should be sufficient. However, the need to enact complementary penalties is desirable in the light of specific uniform instruments. Indeed, in laying down certain supplementary penalties, the Community legislator has, for example, defined in the Uniform Act Organizing Collective Proceedings, accessory penalties such as the publication by a bankrupt of the court decision, a ban on voting. Article 199 of this Uniform Act clearly illustrates this. Article 199 of this Uniform Act clearly explains this. That shows the usefulness of such a sanction not to create imbalances within the Community legal area. Therefore, it would be desirable to give OHADA the possibility of fixing so-called complementary sanctions.

The Integration of procedural law is not explicitly part of the matters to be integrated. However, in the uniform act on the Organization of collective procedures, the legislator has instituted specific policies in case of opening of joint operations. Article 234 paragraphs 1 and 2 gives the trustee or any creditor the possibility to seize a repressive jurisdiction.

Hence the usefulness of such provisions that allow having a single procedure on the extent of the integrated space.

Without thinking about the total Integration of procedural law, OHADA could implement some strategic procedures. That is necessary to resolve the question of the opening cases to cassation that would justify referral

[1] Delmas- Marty (M) : *les grands systèmes de politique criminelle*, op. Cit., Page 358
[2] Éliette Rubi-Cavagna, « Le Droit Pénal De L'Union Européenne : Un Droit Pénal Commun Porteur De Valeurs ? », in « Revue de science criminelle et de droit pénal comparé » Dalloz 2018, N°3, pp 663 - 674.
[3] Ibid

to the CCJA. ISSA-SAYEGH raises this question in the following terms: "Is the CCJA competent to set out the cases in which cassation is possible, or does it conform to those provided for by the national law of each State party?" [1] In answering this question, Article 28 of the regulations governing the CCJA states that it is the only national law that determines the causes, time limits, and the rules of procedure to be respected to file an appeal validly. Therefore, bringing a case before the CCJA is an extraordinary recourse[2]. That constitutes a source of uncertainty for the standardization of the judicial procedure.

Consequently, an extension of the competence of OHADA is possible. It can be done either by amending the constitutive Treaty by the provisions of article 61 of the Treaty or by revising the uniform acts already in force and containing penal incriminations. The latter is more laborious and more rational.

This extension, ultimately, will aim to allow OHADA, instead of integrating procedural law in the field of business offenses, to enact the penalties that will accompany the incriminations it defines, significantly more than there are integration methods - direct or indirect - capable of achieving this harmonization and/or effective standardization of criminal law without undermining too much the sovereignty of States so defended.

2.1.2. A model of Integration compatible with the sovereignty of States and the diversity of legal traditions

Having noted the legal possibility and the political difficulty of Harmonization, it is now appropriate to ask ourselves how Integration can be implemented without affecting sovereignty. Some examples can be given.

First of all, the States could be made responsible for the defense of Community interests. This could be achieved through community assimilation, the principles and scope of which have been clarified by the case-law of the ECJ. This principle calls on States to sanction breaches of the Community legal order the same way they would sanction violations of their lawful demands. Interpreted narrowly, legal Integration at the criminal level does not require any specific efforts on the part of the States since it is a matter of sanctioning any breach of Community interests. The incrimination and punishment of offenses could be left to the competence of the States. Technically easier and gentler, this method nevertheless requires solid political Integration, which is not the case at the OHADA level.

Hence the need to use other mechanisms: the directive technique and the WAEMU uniform act.

The technique of directives will consist of enacting incriminations and sanctions in uniform acts. Their application by the member states will require transposition into their legal arsenals[3].

Finally, the Uniform Act, which is the experience of the WAEMU, could serve as a model[4]. Following the procedure for the drafting and adoption of uniform acts, the national parliaments could adopt this uniform act by changing the generic terms to specific terms[5]. That was the case with the Uniform Act on payment instruments, which contained criminal sanctions.

There are possibilities for a natural and desirable harmonization of the criminal field by OHADA. What is needed is a stronger political will to achieve it. That could only be effective in its application in the community sphere. Hence the interest in analyzing the judicial aspect of criminal policy reform.

2.2 The legal instruments for a coherent implementation of criminal policy at the judicial level

On the one hand, they concern with strengthening the competence of the CCJA and, on the other hand, improving criminal procedure by drawing on comparative law.

The CCJA has exclusive jurisdiction over the interpretation and application of the Treaty and its implementing regulations. It plays a vital role in OHADA's integration strategy. Indeed, the community jurisdiction is the guarantor of the application of uniform acts. After cassation, the Court evokes and rules on the case's merits, thus becoming a sort of the third level of jurisdiction. This solution of principle, avoiding referrals to national courts, is only very appropriate in cases where speed is a critical parameter (time is money.)

However, the national courts of cassation regain the fullness of their powers when it comes to the interpretation and application of the criminal sanction; because of their enactments by the States.

This procedural splintering constitutes the focal point of the criticisms made against the jurisdictional institution of OHADA. Moreover, if reform were to take place in this sense, it would be to rationalize the competencies of the CCJA in criminal matters, the only guarantee of the coherent application of the standard criminal policy. It aims to limit the risks of heterogeneity in case law resulting from the hybridization of the criminal norm, the legal element of which is the responsibility of both the Community legislator for incrimination and the national normative bodies for punishment. However, it is possible to deal with both

[1] JOSEPH ISSA-SAYEGH, *quelques aspects techniques de l'intégration juridique : l'exemple des actes uniformes de l'OHADA*,op. cit., P 21,.
[2] Ibid.
[3] Joseph ISSA-SAYEGH, la problématique de la construction d'un droit du travail régional dans les pays africains de la zone franc, communication précitée, P.7
[4] Voir supra p…
[5] Ibid.

community and national issues. The logic would have the CCJA be able to know this type of litigation to standardize the jurisprudence[1].

However, the rationalization of the CCJA's jurisdiction is subject to divergent opinions. The first doctrine favors granting jurisdiction to national courts for all criminal litigation, up to the cassation level, for the reasons mentioned earlier[2].

This position, unfortunately, presents the same risks: inequality between litigants due to the inevitable jurisprudential divergences.

The second tendency would be for the CCJA not to be forced to refer back to the national courts to examine the correct application of the sanctioning norm after having assessed the interpretation made of the incriminating norm. For this makes no sense[3].

The solution to this question of the CCJA's criminal jurisdiction could form the basis for reforming the OHADA system to resolve mixed disputes (between Community law and national law) likely to be submitted to the Community judge and not only the criminal aspect legal integration.

The solution to this question of the criminal jurisdiction of the CCJA could constitute the basis for reforming the OHADA system to resolve mixed disputes (between Community law and national law). That may be submitted to the Community judge, which only concerns the criminal aspect of legal Integration.

In the meantime, an examination of this question has allowed us to know that the distribution of competencies operated by the Treaty, simple in theory, can prove to be very complex in its implementation. The rationalization proposed here participates in the concern of perfecting a challenge in progress—a project based on comparative law, particularly by trying to establish new structures. The rationalization proposed here is part of the concern for perfecting a challenge underway. A project that can be based on and strengthened by the achievements of comparative law, especially that of the European Union.

A project that could be based on comparative law, particularly that of the European Union, considers judicial cooperation. In other words, a more or less extensive collaboration between judicial authorities of different countries generally results from conventions or a bilateral or multinational agreement. The mechanisms used in the criminal field are, among others, mutual legal assistance, extradition, cooperation in the investigation, instruction, and even recognition and execution of legal decisions. Its absence in the community legal arsenal favors investors who are perpetrators of an offense they have committed in a country with severe penalties and settle in another community member country with a flexible penalty.

Based on the experience of this European Organization, OHADA can strengthen its judicial system on judicial cooperation by taking into account the field of investigation and a lot of instruction and execution of legal decisions of a criminal nature.

Thus, the pole of judicial cooperation and police cooperation can be set up by OHADA like EUROJUST and EUROPOL.

EUROJUST is a judicial cooperation unit composed of 27 E.U. states members[4].

Its mission is to strengthen the effectiveness of the national authorities of the Member States of the European Union, responsible for the investigation and prosecution of serious cross-border crime and organized crime[5], and to bring criminals to justice quickly and efficiently.

The European Police Office (Europol) was established in 2009 by the decision J.O L 121 of 15/05/2009. Its objective is to support and strengthen the security bodies of the Member States of the Union and to reinforce the action of the competent authorities of the Member States and their cooperation in facing the phenomenon of organized and cross-border crime[6] (police, customs, immigration services)

Its field of intervention is. Therefore, the fight against crime in Europe by improving cooperation between the Europol liaison officers (ELOs) was seconded to the office by the Member States and simplified the transmission of information necessary for investigations[7].

3. CONCLUSION

What we can retain in the end is the urgency to rationalize penal policy within OHADA; It is that this more coherent disciplinary policy is, first of all, a necessity, that it is then possible, and that, finally and it is in no way dependent on the uniformization of penal sanctions.

[1] Joseph ISSA SAYEGH : L'ordre Juridique OHADA, op.cit., P. 4
[2] Joseph ISSA SAYEGH, quelques aspects techniques de l'integration juridique : l'exemple des actes uniformes de l'ohada, op.cit., P, 22.
[3]Jacqueline LOHOUES-OBLE (Prof. Université d'Abidjan), notes sous le Traité OHADA, Traité et Actes Uniformes commentés et annotés, JURISCOPE, 1999, p. 30.
[4] Each of the 27 member states has seconded a representative (prosecutors, experienced judges, or police officers of equivalent competence).
[5] Drug trafficking, money laundering, human trafficking, counterfeiting, computer crime, environmental crime...
[6] Article 3 Europol decision.
[7] Alexandra de Moor, Gert Vermeulen, "Europol, quoi de neuf? Une approche critique de la décision Europol", Érès, « Revue internationale de droit pénal », 2011, 1 Vol.82, PP. 157- 187

A standard and rational penal policy is a result, with multiple paths to achieve it: direct or indirect Integration, direct Integration through Harmonization, or standardization.

There is nothing theoretical or illusory about the existence of possibilities for integrating criminal policy practices; many community organizations have long taught us the lessons to be drawn from the communitarization of the penal field.

4. BIBLIOGRAPHY

1. **ABARCHI.(D**.),« La supranationalité de l'Organisation pour l'harmonisation en Afrique du droit des affaires » (OHADA), Revue burkinabé de droit, 2000, Spéc. p.l8 et s.
2. **ANOUKAHA (F.), CISSE (A.), DIOUF (N.), NGUEBOU TOUKAN (J.), POUGOUE (P.G.) (dir.), SAMB.(M.),** OHADA, Sociétés commerciales et GIE , Coll. Droit Uniforme, Bruxelles 2002.
3. **BADIE (B)**, un monde sans souveraineté, collection « l'espace du politique », Paris, Fayard, 2004
4. **DELMAS-MARTY(M.),** Les grands systèmes de politique criminelle, Paris, PUF, 1992.
5. **DELMAS-MARTY (M.),** (sous la dir.). - Critique de l'intégration normative. L'apport du droit comparé à l'harmonisation des droits, coll. « Les voies du droit », Paris, PUF, 2004.
6. **DOUAJNI(G.K)**, suggestions en vue d'accroitre l'efficacité de l'OHADA, Ohadata D-04-01,
7. **HABITSAMANA**, Dictionnaire de Droit OHADA, D-05-33
8. **HUET(A),** L'impact du droit communautaire sur le droit pénal, Strasbourg PUS 2003
9. **ISSA-SAYEGH (J.),** la problématique de la construction d'un droit du travail régional dans les pays africains de la zone franc Communication au séminaire ORAF/CFDT/UGT-CI, Abidjan, mai- juin 1995.
10. **ISSA-SAYEGH (J.)**, Introduction au traité et aux Acte Uniforme de L'OHADA, in www.ohada.com/Ohadata D-02-17, P.5
11. **ISSA-SAYEGH (J.),** Quelques aspects techniques de l'intégration juridique : l'exemple de l'OHADA, in www.ohada.com/ ohadata D-02-11
12. **ISSA-SAYEGH (J.),** la problématique de la construction d'un droit du travail régional dans les pays africains de la zone franc, www.ohada.com/
13. **ISSA-SAYEGH (J.),** réflexions et suggestions sur la mise en conformité du droit interne des Etats parties avec les actes uniformes de l'OHADA et réciproquement, www.ohada.com/ Ohadata D-04-12,2012
14. **LOHOUES-OBLE (J.),** notes sous le Traité OHADA, Traité et Actes Uniformes commentés et annotés, JURISCOPE, 1999.
15. **MASAMBA, (R).** l'OHADA et le climat d'investissement en Afrique, Ohadata D-06-49, 2006
16. **Paul (M).** "Politique pénale et politique de sécurité", in Nicod, Marc. Qu'en est-il de la sécurité des personnes et des biens ? Toulouse : Presses de l'Université Toulouse 1 Capitole, 2008. (pp. 113-118).
17. **Rubi-Cavagna(É),** « Le Droit Pénal De L'Union Européenne : Un Droit Pénal Commun Porteur De Valeurs ? », in « Revue de science criminelle et de droit pénal comparé », Dalloz, 2018, N°3, pp 663 - 674
18. **SCHNAPPER (D),** L'intégration: enjeux de connaissance et de politique», https://www.vie-publique.fr/parole-dexpert/23843-lintegration-enjeux-de-connaissance-et-de-politique, consulted on 11/10/2021.