An Experiment in Legal Pluralism: The Cameroonian Bi-Jural/Uni-Jural Imbroglio

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Cameroon's political stability, against considerable odds, must impress even the casual observer as singular and extraordinary. The upheavals of the early 1990s appear to have been weathered, and the country now looks set on pursuing some form of democracy which may ultimately help it out of the present debilitating economic recession.

While the threats to the country's political unity may appear to have been checked, there are simmering underneath many burning issues which give no cause for complacency. In fact, the advent of pluralistic democracy, with an Anglophone, Ni John Fru Ndi at the forefront, has reactivated certain deep-seated centrifugal forces which lay dormant during the long years of one-party dictatorship. As the country now muddles along the difficult democratic path, many fundamental institutional changes are absolutely necessary to enable it to sustain the course, and get rid of the formerly authoritarian governmental structures and systems.

One of the most vexing problems that needs urgent attention is the unsatisfactory state of Cameroonian law and its impact on the operation of the legal system. Resolving this is not only crucial to sustaining the democratic process but is also vital for the economic recovery that is a necessary concomitant. A society that lacks the lubricating influence of an effective and well-functioning judicial system can only be compared to the trunk of a body without arms or legs to enable it to act or move. In this respect, Cameroon provides an excellent example of a comparative law melting pot, with peculiar multifaceted legal problems. It illustrates what happens when two, often divergent legal systems, the English common law and the French civil law, are thrown together. Can an amalgam of principles and rules from these two different legal systems make a coherent functioning whole?

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It has been pertinently remarked that law is the distilled essence of the civilisation of a people and that it reflects that people's soul more clearly and truly than any other organism.[1] At Independence and the re-unification of the former British and French administered portions of Cameroon, a bi-jural legal system became imperative and inevitable. This is now being progressively dismantled in the process of developing and establishing a Cameroonian legal system. The impending and inescapable institutional reforms that must take place provide an important reason to examine and appreciate the Cameroonian experience in bi-juralism and the recent halting moves to formulate uniform laws that will apply to both the Anglophone and Francophone provinces where there still persists a very strong and divergent colonial cultural heritage, identification and loyalty.

As Mancini in one of his famous lectures remarked, a sovereign in framing laws for his people must consider their habits and temperament,[2] and one should add here, their legitimate aspirations and cultural heritage. When account is taken of the fundamental and basic differences in principles and rules that distinguish the common law from the civil law, then the enormity of the task facing the Cameroonian legislator can be appreciated. This is compounded by the fact that these inherited legal systems have now come to be regarded as an integral part of a culture which must be jealously preserved and protected. The Cameroonian bi-jural system is in effect an uneasy cohabitation of two alien legal systems superimposed upon a multitude of more than 250 different ethnic customary practices and usages.[3] It is within this complex setting that the Cameroonian legislature has sought to formulate uniform national laws.[4]

No systematic attempt has ever been made to assess the impact on the law actually being applied of such an amalgam of laws. This article tries to examine some of the legal problems that arise from the hasty and sometimes fatuous moves to develop a 'home-grown' legal system in a country with diverse colonial cultures and experiences as a direct

1 N Anderson, *Law Reform in the Muslim World*, (Athlone Press, London, 1976) p 1.

2 Cited in J Morris, *The Conflict of Laws*, (2nd ed, Stevens & Sons, London, 1980) p 33.

3 The separate issue of the interaction of the received laws with the pre-existing customary laws and customs is not explored in this article. Some works which treat aspects of this include: B Nwabuze, *The Machinery of Justice in Nigeria*, (Butterworths, London, 1963) pp 6-23, and A Park, *The Sources of Nigerian Law*, (Sweet & Maxwell, London, 1963).

4 For the purposes of this article, the terms 'unify' and 'harmonise', unless the context indicates otherwise, are used interchangeably.

consequence of two contrasting legal legacies. The peculiarities of the Cameroonian legal conundrum is such that any attempts to answer all the questions raised will verge on trying to respond logically to illogicalities and absurdities.

The future of the bi-jural experiment is inextricably linked with the future of Cameroon's hard-earned political unity. An ugly dimension to the present democratic revival is the unleashing of a powerful wave of fragmentation which has already taken a heavy toll on the former Eastern bloc states and the Soviet Union. This demon of fragmentation has hit Somalia and is seriously threatening to break up Burundi, Rwanda and now Zaire. The ghost of it hangs over Cameroon where the political unity of the country and the continuous co-existence of the Anglophone and Francophone communities depends on how well they can manage their diverse colonial legacies. As one writer put it, Cameroon is 'two different countries in one'.[5] Ideally, national unity can be reinforced by the development of a 'home grown' legal system, but the organic development of any such system requires a slow and gradual process which has a lot to benefit from the rich civil and common law heritage. The present slippery slide towards what many perceive as the total 'de-identification' of one legal legacy in favour of another has not only created a veritable legal imbroglio but may undermine the basis of a united Cameroon.

The Historical Setting

A proper appreciation of the Cameroonian legal quandary needs to be prefaced by a brief review of the historical developments that gave rise to this situation. Although the country has gone through three diverse colonial administrations and policies, beginning with the Germans from 1884 to 1916, it is the post-German period that is of particular relevance here.

After the defeat of the Germans in Cameroon by the British and French in 1916, the latter divided the territory into two unequal parts, with the French taking the lion's share. This dubious and arbitrary division is at the root of most of the country's present woes. The partition arrangement was later recognised by the League of Nations which conferred mandates on these two powers under the Treaty of Versailles. The mandates were superseded by trusteeship agreements on the creation of the United Nations. The British di-

5 M Azevedo (ed), *Cameroon and its National Character*, (EUGA, Mississippi, 1984) p 5.

vided their smaller portion into the Northern and Southern Cameroons, both of which were practically treated as mere appendages of their much larger Nigerian colony. After the UN-conducted plebiscite of 11 February 1961, the Southern Cameroons voted in favour of reuniting with the French Cameroons which had already become independent as the Republic of Cameroon on 1 January 1960, while the Northern Cameroons opted to remain with the Federation of Nigeria. This article is however concerned exclusively with the former. On 1 September 1961, the Southern Cameroons and the Republic of Cameroon became the Federal Republic of Cameroon. In a referendum held in 1972, this federal form of government was abandoned leading to the United Republic of Cameroon, thereby abolishing the two federated states of West Cameroon (the former British Southern Cameroons) and East Cameroon (the former French Cameroons). Several other constitutional changes have since taken place, but the most significant occurred in February 1984 when, by Presidential decree, the name United Republic of Cameroon was abandoned in favour of Republic of Cameroon, which incidentally is how the portion formerly under French administration was known on attaining Independence.

There is in many ways a direct relationship between the reunification process and the evolution of the Cameroonian legal system. Early strides after Independence towards complete political unification were matched by efforts towards legal unification. In fact, by 1964, barely two and a half years after re-unification, two federal law commissions were established. An understanding of the reality of the re-unification of West and East Cameroon and the nature of the colonial laws they inherited will clearly indicate whether political and legal unification were logically and pragmatically prudent and inevitable.

The Re-unification Problem

If the federal facade of re-unification finally gave way in 1972,[6] the 1984 constitutional amendment was the last nail in its coffin. A lot

6 See F Stark, 'Federalism in Cameroon', in N Kofele-Kale (ed), *An African Experiment in Nation-Building*, (Westview Press, Boulder, 1980) p 8, and J Bayart, 'The Neutralisation of Anglophone Cameroon', in R Joseph (ed), *Gaullist Africa: Cameroon Under Ahmadu Ahidjo*, (Fourth Dimension Publishers, Enugu, 1978) p 88, who demonstrates how from the start President Ahidjo made federalism irrelevant.

has been written about the re-unification intrigues,[7] and it is unnecessary to go into the details here. Nevertheless, the psychology of those who are assumed to have voted in favour of re-unifying with the former French Cameroons must always be borne in mind in understanding present-day Cameroon.

There is now sufficient historical evidence to show that the Anglophones of British Southern Cameroons in 1961 were placed on the horns of a dilemma, and came fairly close to a choice between the 'devil and the deep, blue sea'. The period of British administration as part of Nigeria was an unhappy experience marked by the domineering and often humiliating treatment of Southern Cameroonians by the Nigerians, particularly the Igbos. On the other hand, the French tactics in brutally suppressing the Union des Populations du Cameroun (UPC) rebellion in their part of Cameroon, and French policies in general had created a deep suspicion and dislike for the 'French way'[8] among the Anglophones. Quite contrary to the expressed wishes of the dominant political forces in the Southern Cameroons at the time, the UN refused to put the issue of a desire for a separate existence to the voters in the 1951 plebiscite. Although the voters opted for union with the former French Cameroons rather than with the Federation of Nigeria by a vote of seven to three, there is overwhelming evidence that if the third alternative of Independence or continued trusteeship had been provided, Independence would have carried the day.[9] The Anglophones in 1961 were thus forced, with the complicity of the UN and the indolence of the British, to choose the lesser of two evils. As one writer has put it, the re-unification episode was far from being the reunion of two prodigal sons who had been unjustly separated at birth, and was more like a loveless arranged marriage courtesy of the UN, between two people who hardly knew each other.[10] If the weak and ineffective federal arrangements agreed upon in 1961 did not sufficiently reflect the Anglophone mode of the time, its progressive dismantling through constitutional amendments of highly

7 See generally: R Bjornson, *The African Quest for Freedom and Identity, Cameroon Writing and the National Experience*, (Indiana University Press, Bloomington, 1991) pp 123-126; M Delancey, *Cameroon Dependence and Independence*, (Westview Press, Boulder, 1989); D Gardiner, *Cameroon: United Nations Challenge to French Policy*, (Oxford University Press, London, 1963); R Joseph, note 6 above, pp 3-90; T Le Vine, *The Cameroon Federal Republic*, (Cornell University Press, Ithaca, 1971); and N Susungi, *The Crisis of Unity and Democracy in Cameroon*, (1991).

8 See M Delancey, note 7 above, pp 41-43.

9 Id, at p 43; and D Gardiner, note 7 above, pp 111-115.

10 N Susungi, note 7 above, at p 77.

dubious legality have reinforced past misgivings, and indicate political absorption and assimilation rather than political integration.[11] This, in fact, is the political context in which the Cameroonian legal system is evolving.

The Legacy of Foreign Laws

The League of Nations agreement with the British and French conferred on the latter in Article 9, 'full powers of administration and legislation'. They were authorised to administer Cameroon in accordance with their laws and as an integral part of their territory, subject to such modifications as may be required by the local conditions. This was the basis for the almost wholesale exportation of the English common law and the French civil law to Cameroon, or what is commonly referred to as received laws. But the nature and scope of the reception of these foreign laws was different in both former West and East Cameroon, or what will hereinafter be referred to as the Anglophone and Francophone provinces.[12]

Because the British administered their portion as an integral part of Nigeria, laws that had been introduced into the latter were simply extended to the former. But the actual basis for the introduction and observance of English law in the then Southern Cameroons was the *Foreign Jurisdiction Act* of 1890. On the basis of this Act, section 11 of the *Southern Cameroons High Court Law* (1955) (*SCHL*) and section 29 of the *Magistrates' Court (Southern Cameroons) Law* (1955) were enacted. These in similar terms provided for the application of the common law, the doctrines of equity and statutes of general application which were in force in England on 1 January 1900. In family matters, probate, divorce and matrimonial causes and proceedings, section 15 of the *SCHL* 1955 directs the High Court to apply the law and practice from time to time in force in England. This law also directs the High Court, in section 27, to observe and enforce every customary law and usage which is not repugnant to natural justice, equity and good conscience or incompatible, whether directly or indirectly, with any law in force. Successive Cameroonian constitutions have recognised and maintained the applicability of this received English common law in the Anglophone provinces in so far as they have not been superseded by local enactments. It will suffice at this stage just to point out that the exact meaning and the scope of re-

11 Id, at p 84; R Bjornson, note 7 above, at p 123.

12 Cameroon is divided into ten provinces, two of which are made up of the former British Cameroons and the rest, the former French Cameroons.

ceived English Common law applicable under section 11 of the 1955 law remains a matter of great controversy. Its broad language allows for the continuous application of some Nigerian laws expressly extended into the former Southern Cameroons by the British, such as the Evidence Ordinance, the Criminal Procedure Ordinance and the Companies Ordinance.

As regards the reception of the French civil law in the Francophone provinces, a French decree of 22 May 1922 extended to French Cameroons all laws and decrees promulgated by France in French Equatorial Africa. For most of this period, the French created and operated two parallel systems of courts each administering a different system of law, one for the 98% indigenous and unassimilated Cameroonians, pejoratively referred to as 'subjets' and the other for whites and assimilated Cameroonians referred to as 'citoyens'. The former were governed by customary law and the latter, French law. French civil law was, however, extended to unassimilated Cameroonians progressively and piece-meal, and by Independence in 1961, received French statutes (or modified versions of them expressly extended to Cameroon), as well as legislation specifically enacted in France for Cameroon (comprising various codes, laws and decrees) were generally applicable. As in the case of the received English common law, successive constitutions have left intact all such received French laws as have not been superseded by local legislation. A particularly striking feature of French legislative policy in Cameroon was that it appeared to work by 'trial and error'. Enacted laws were often quickly amended, repealed, re-enacted or simply replaced.[13] But perhaps most unsettling was the rule that laws, decrees and regulations in force in France could be rendered executory in Cameroon only by a decree of the French Head of State.[14] Thus, in one case, it was held that in the absence of such a special decree, and failing local legislation, a penal law could not be applicable in Cameroon.[15] What law then applied?

The reception of foreign laws, and the arbitrary choice of a 1900 limitation date, in the case of received English common law, was clearly a temporary measure, and their ill-defined scope left the door open for reform. Just how these reforms were to be carried out, not only to determine the exact scope of application of the received laws but also how to adjust them to local conditions, was the challenging

13 C Anywaywe, *The Cameroonian Judicial System*, (CEPER, Yaounde, 1987) p 97.

14 Articles 1 and 2, Decree of 16 April 1924.

15 *Procureur General Yaounde c. Fende et Malika* (1959) Penant, p 434.

task that the Cameroonian political leadership inherited on the attainment of Independence and re-unification.

Uni-Jural Structures Within an Uncertain Bi-Jural Framework

The genuine and legitimate search for a 'home-grown' legal system must be premised upon the existence of adequate institutional structures. This is even more imperative in the Cameroonian context on account of the co-existence of the two divergent legal cultures and traditions. The present state of laws is a mirror reflection of the institutional framework within which they are formulated and operate, with the most important aspect being the constitutional setting.

The Constitutional Position

It is submitted that the legal system and the judiciary in particular, as the third arm of government, is so important that the Constitution must set down in clear terms its fundamental structure and organisation. Like most written constitutions, the Cameroonian Constitution of 1972 attempts to indicate the structure and organisation of the judiciary. On the crucial issue of the continuous co-existence of two different legal systems and therefore legal districts, successive constitutions have maintained a cautious silence, only leaving room for inferences. With regard to this, the recently amended 1972 Constitution, in its transitional and final provisions, states in Article 68:

> The legislation applicable in the federal state of Cameroon and in the federated states on the date of entry into force of this constitution shall remain in force in so far as it is not repugnant to this constitution, and as long as it is not amended by subsequent laws and regulations.

The bi-jural system or at least the remnants of it which exist today de facto, has no clear *de jure* Constitutional recognition or protection. This contrasts rather sharply with the bilingual status of the country on which the Constitution states in Article 1(3):

> The official languages of the Republic of Cameroon shall be English and French, both languages having the same status.

Though this token bilingualism which the Constitution wishes, rather than guarantees and protects, is more a possibility for the future than a reality of the present, it is nevertheless recognised. If the two inherited languages can be declared to have the same status, why could the same not be made of the two legal systems? The underlying philoso-

phy behind the legal, and probably political unification process will show that this was not an inadvertent lapse.

The Underlying Philosophy

No assessment of the Cameroonian bi-jural experience and the surreptitious evolution towards a uni-jural system can be complete and meaningful without some consideration of the motives and impulses which lie behind the movement. Unfortunately, these are not always the ordinary dictates of justice, fairness and the good administration of the law as should be expected, but misconceived bigotry and political opportunism and convenience.

For a start, it must be noted that the first Cameroonian President, Ahmadou Ahidjo, was never enthusiastic about re-unification. For one thing, he feared that the influx of the mostly Christian Anglophones would swell the ranks of his southern opponents and alter the balance of power then firmly held by his northern Muslim supporters. But more seriously, he entertained misgivings about the Anglophone free and open multiparty system which could threaten his centralist autocratic inclinations. One of his primary objectives when re-unification became a reality was to move quickly towards neutralising all Anglophone particularism on the spurious grounds that this was an obstacle to his goal of national unity.[16] This policy has been reinforced and perpetuated by his successor Paul Biya who declared the 'consolidation of national unity to be the indispensable foundation' to nation-building. Rejecting the 'collection and juxtaposition of our diversities' he has pronounced himself 'firmly convinced that we should move on a higher level of unification, which is that of national integration'.[17] There is nothing inherently wrong with resolutely pursuing the goals of national unity and integration. The problem however is that the Cameroonian political leadership, firmly and exclusively controlled by the majority Francophones, imbued with Gaulish absolutism have inevitably regarded diversity and the persistence of Anglophone particularism with growing disfavour.

Underpinning the rhetoric of national unity and integration is a functional integration which has led to the restructuring of many aspects of the Anglophone social, economic and educational system in conformity with French models. Many of these changes have been

16 See M Azevedo (ed) *Cameroon and Chad in Historical Contemporary Perspectives*, (Edwin Mellen Press, Lewiston, 1988) p 99; and J Boyart, 'The Political System', in R Joseph, note 7 above, at p 77.

17 Cited by M Azevedo, note 16 above, at p 100.

perceived as 'de-identifying' the Anglophone from their inherited British culture, under the pretext of harmonisation.

The evolving Cameroonian legal system is today heavily laden as a direct consequence of this assimilationist approach to national issues. There are many Anglophones who initially saw nothing wrong in having uniform laws, but the progressive tendency to simply replicate French codes and laws has aroused bitterness and frustration. The death knell to the English common law tradition came rather prematurely in 1985 when a former Minister of Justice uncharacteristically unleashed a torrent of verbal attacks on the English legal structures operating in the Anglophone provinces.[18] His subsequent sacking has never fully allayed fears, nor stemmed the tide against the English common law influence on the development of uniform laws.

While politics have been subtle, Francophone civil law experts have been less placating in their declarations. A French expert who participated in the formulation of the first uniform Labour Code of 1967, observed in a detailed analysis of the Code that it was almost entirely drawn from a French law of 15 December 1952. He then honestly but rather inelegantly admits that this was due to their inability to come to grips with the intricacies of English labour law.[19] But, no one, however, expresses the spirit of the legal harmonisation philosophy in Cameroon better than Mr Alexandre-Dieudonne Tjouen, an eminent Francophone jurist and University don, in his work on the controversial uniform land laws of 1974. In explaining the predominance of French legal concepts he argues that the Anglophones, by voluntarily opting to re-unite with the Francophones in 1961, had implicitly undertaken to unconditionally accept and adapt to all existing laws in the former East Cameroon, and therefore have no legal choice in the matter.[20] Such an irrational and supercilious attitude exhibited by an academic may be difficult to understand or excuse. The fact is that free from any political restraints, he has only legally stated, though crudely and loudly, what in reality, a silent majority of Francophones, especially politicians and jurists like himself, believe and actually promote. If the argument contained in this bizarre scholarship is to be believed, then the English legal culture should have been simply discarded on re-unification. Unhappily, this pervasive legal dogmatism and the one-sided invasion of civil law principles and

18 Ibid.

19 R Doublier, *Manuel de Droit de Travail du Cameroun*, (LGDJ Paris, 1973) p 40.

20 *Droits domaniaux et techniques fonciers en droit Camerounais (Etude d'une reforme legislative)*, (Economica, Paris, 1982) pp 69-71.

concepts under the guise of legal unification and harmonisation has been facilitated by the present institutional structures within which the legal system operates.

The Institutional Structures

These can be conveniently put into two main, distinct categories—law reform commissions, and the normal legislative process.

Law Reform Commissions

As noted earlier, the impulse for unifying and harmonising laws was so strong in the early years of Independence and reunification that two federal law reform commissions were set up, the first to work on a Penal and Criminal Procedure Code, and the second to draw up other civil codes. Besides the 1967 Penal Code, little else was achieved by these commissions. Yet, there are in existence today a myriad of uniform national codes and laws such as the Labour Code, various land tenure laws, the Highway Code and a general Tax Code. What was remarkable about the Federal commissions was that they really looked like law reform commissions, having as members legal practitioners and academics versed in either the English common law or the French civil law. Their weakness was that the legal knowledge of the experts was confined to one or the other system and there was not sufficient intimate understanding of the other system. It was a handicap which was considerably minimised by their zeal and commitment to formulating genuinely unified laws. This perhaps explains why their only achievement, the Cameroonian Penal Code, is today the only law that comes close to reflecting the dual common-civil law heritage.

All other so-called harmonised laws have been formulated hastily through the normal legislative process or occasionally, through ad hoc commissions which, because of their composition and their procedures, hardly take account of the bi-jural background. For instance, there are presently two ad hoc commissions, one working on a draft Civil Code and the other on the harmonisation of commercial law. Their composition and working procedures provide a fascinating and illuminating insight on the bi-jural dilemma. As regards the Civil Code Commission, only two of the ten members are common law jurists. The Commission on Harmonisation of Commercial Law, for its part, has 15 members, only one of which is a common law jurist. Besides, the work in both commissions consists of discussing possible amendments to working drafts prepared in French by a group of French experts, some of whom are usually on hand to guide the discussions. In all, there is practically very little common law inspiration

in the drafts and the built-in bias with a symbolic and token presence of common law experts ensures that this remains so.

The Legislative Process

Under the amended 1972 Constitution, only Parliament (consisting of the National Assembly and Senate) can make laws, except on certain matters where it can empower the Executive to pass ordinances on its behalf subject to its ultimate approval.[21] Generally, the enacted laws are always initiated by the Executive who are under no Constitutional obligation to ensure that these laws reflect the bi-jural character of the country. This anomaly is not only reflected by, but is multiplied by subsidiary legislation such as Presidential and Ministerial decrees and orders as well as other minor rules and regulations. There is thus firmly in place a uni-jural legislative structure within which operates and co-exists apparently unified laws, and an ill-defined range of received foreign laws thereby resulting in an unwieldy legal system.

Bi-juralism and the Conflict of Laws

From the foregoing, it is obvious that Cameroon still remains by-and-large a country with two main legal systems, the territorial limits of each being the two Anglophone provinces for the English common law and the eight Francophone provinces for the French civil law. Despite the efforts at legal unification, there are many important areas such as contract, tort, succession and even marriage and matrimonial causes where the law that remains reflects either the common law, *or* the civil law. While the haphazard unification of laws has created its own problems, as we shall soon see, the continuous co-existence of the two legal districts has provided a fertile source for conflict of laws of such dimension that is yet to be fully appreciated.

It is to be noted that any Cameroonian, Anglophone or Francophone is not only free to settle and work in any part of the country, but may also be transferred to any part by his employer. As a result, it is possible that a status, right or obligation ascribed to him at one moment and in one legal district may under identical circumstances be denied in the other legal district. There might also be divergent legal principles applicable to the same aspect of socio-economic interaction in the two legal districts. How has the Cameroonian legal system coped with these problems?

21 See section 14(1) and ss 25-28 of the Constitution.

From the point of view of conflicts of laws, it is necessary to point out here that the Francophone provinces vis-a-vis the Anglophone provinces are as much a foreign country as is France and Britain, on account of the separate legal systems that operate there.[22] But in those areas where there are uniform laws, they are, from this perspective, one country.[23] Thus, for certain purposes of family law, and on account of the uniformly applicable Civil Status Registration Ordinance of 1981, Cameroon is one country, but for other matters not covered by this Ordinance, it is not. We can appropriately commence our examination of the conflict of laws problems with this area of the law

In marriage, the Anglophone courts follow the common law principle that it is governed by personal law, that is, the law of the domicile, while the Francophone courts adhere to the civil law rule that it is governed by a person's nationality. The 1981 Civil Status Registration Ordinance, an example of a half-hearted and partial harmonisation exercise, unifies only certain formal and procedural aspects of the received English and French law, leaving out important substantive issues such as divorce. Two examples will suffice to illustrate the difficulties that Cameroonian courts have faced in coming to grips with conflicts of laws in this area. In *Lelpou v Lelpou*,[24] a divorce suit was brought before the Buea High Court (in the Anglophone legal district) by two Francophones working within that court's jurisdiction, concerning a monogamous marriage contracted in accordance with the civil law in Yaounde (in the Francophone legal district). The husband asked the Court to dissolve the marriage on the ground that the parties had been living apart for five years. The Court, without taking into account the fact that the parties were Francophones and that their marriage was contracted according to the civil law, thus raising a problem of conflict of laws, mechanically applied the relevant sections of the *Matrimonial Causes Act* (1973), that is the *lex fori*, and not the *lex causae*. In the same way, the Douala High Court (in the Francophone legal district) in *Affaire Mme Neba nee Juliette Bih c. Neba Aaron Such*,[25] mechanically applied the French Civil Code to a divorce petition brought by two Anglophones concerning a marriage contracted under the English common law, without alluding to any possible conflict of laws.

22 See Morris, note 2 above, at p 4.

23 Ibid.

24 Suit No BHC/SW/73 (Unreported).

25 Judgement civil No 335 du 3 Avril 1989 de TGI Douala (Unreported).

Many similar problems have arisen in the area of contract law. In *Olabi Fayez v Compagnie Industriel d'Automobile du Cameroun*,[26] decided by the Buea High Court, the plaintiff, based in Kumba (in the Anglophone legal district) sued the defendant for breach of a contract made in, and to be performed in Douala (in the Francophone legal district). The Court ignored any possible conflict between English common law and French civil law and applied the former. Similarly, in *Upper Nun Valley Development Authority v Bitsong Yombo Mousa*[27] the Bamenda High Court (in the Anglophone legal district) entertained an action for breach of a contract between an Anglophone and a Francophone, which was supposed to be performed in the Francophone legal district. English law was applied without the Court adverting to any possible conflicts with the Civil Code.

In *SHO Cameroon and Afric Auto v Albert Nqafor*,[28] an action for the tort of detinue, there was a possible conflict between the French civil law which prevails where the tort occurred, and which was the place of residence of the defendant, and English common law, as the *lex fori* and the place of residence of the plaintiff; yet the Court mechanically applied English common law. Examples of such mechanical application of either English common or French civil law, by Cameroonian Judges in clear conflict of laws situations are too numerous to be enumerated here.[29] More conflict of laws problems are expected to arise as Cameroon struggles to get out of the economic recession by attracting and encouraging nation-wide investments. There is at present no evidence that economic operators are alive to these problems and may try to prevent arbitrary and mechanical application of either the English common or French civil law by express or implied choice of law clauses. Yet, a careful analysis of some of the cases discussed above will show that grave hardship and injustice may have resulted from this irrational and dogmatic application of one law without even due regard to the conflicts of laws rules that obtain within that law.

It is not entirely plausible to conclude from this that Cameroonian judges lack the expertise to recognise the conflict of laws issues raised.

26 Suite No BHC/SW/73 (Unreported).

27 Suit No BHC/ NW/79 (Unreported).

28 Suit No BCW/NW/74 (Unreported).

29 Some other examples include, *Atabonq Enterprises v SOCAMAT et Etablishement Jean Lebefuse SA*, Suit No BCA/SW/85 (Unreported); *Andreas Chefor v Societe Nouvelle d'Assurance*, Suit No BHC/NW/79 (Unreported); *Mutuelle Agricole v Alhaji Hamisa Garba*, Suit No BHC/NW/74 (Unreported).

A better explanation may lie in the pertinent remarks of the illustrious American judge, Cardozo, who on one occasion commented that 'the average judge, when confronted by a problem in the conflict of laws, feels almost completely lost, and, like a drowning man, will grasp at a straw'.[30] However, the real difficulty may often be caused by the technical nature of the subject itself and the level of our legal sophistication. In fact, it is a well settled rule, at least in English law, that a party who wishes to rely on a foreign law must plead it just like any other fact on which he relies.[31] Failing to do so, the court is bound to decide a case containing a foreign element as though it were a purely domestic case, or, in our context, as if it were governed exclusively by the received English common law as the *lex fori*.

Although the rules of conflict of laws remain an integral part of the received laws which our judges, at the risk of continuing to do injustice, must recognise and systematically apply for the technical reasons given above, it may be necessary, if not imperative, that the Cameroonian legislator takes the initiative. This, it is submitted, can be done, not by the unification of the various conflict rules but rather by the recognition of their existence and the sanctioning of their application whenever the circumstances or the justice of a case so warrant, without the need for this being specifically pleaded. This is possibly one of the best ways of facilitating the harmonious co-existence and consolidation of the bi-jural system.

Uniformity of Laws and the Legal Imbroglio

One of the fundamental criteria for the validity of any system of law is its ascertainability and predictability. Many are those who argued that the process of unification of laws in Cameroon will reduce the confusion inherent in the juxtapositioning of two potentially conflicting legal systems within an underdeveloped country. Unfortunately, because of the misguided philosophical orientation of this process noted above, and the obsequious replication of often obsolete French laws, with a few finishing sprinkles of English common law notions thrown in to give a semblance of harmonisation, the end product is rarely coherent and comprehensive. In fact, far more problems appear to have been created than resolved, and this has raised the spectre of an evolution towards legal anarchy. There are several manifestations of this phenomenon.

30 Cited by Morris, note 2 above, at p 9.

31 *Ascherberg v Casa Musicale Sonzoqno*, [1971] 1 WLR 173.

The Obscure Scope of the Application of the Received Laws

In rather simplistic language, the Cameroonian Constitution directs judges to recognise and apply all received laws, or to use the exact words, 'legislation', which is not repugnant to the Constitution or amended by subsequent laws and regulations. The Constitution does not define what is meant by 'legislation', thus leaving it to the judges to sift through all the Cameroonian and potentially applicable foreign legislation, to determine what the applicable law on any particular issue is. This appears to render the received laws automatically applicable in the absence of local legislation, on the false premise that the former is easily ascertainable.

In the Anglophone provinces, the quantum of applicable received English law, as stated earlier, is specified in section 11 of the *SCHL* 1955. It states:

> Subject to the provisions of any written law and in particular of this section ... (a) the common law; (b) the doctrines of equity; and (c) the statutes of general application which were in force in England on the 1st day of January 1900, shall insofar as the legislature of the Southern Cameroons is for the time being competent to make law, be in force within the jurisdiction of the court.[32]

Two persisting and vexing questions on the interpretation of this provision have locked academics and judges alike into two diametrically opposed camps. One is whether the limiting date of 1 January 1900 applies only to statutes of general application or also extends to the common law and doctrines of equity? The other, is whether the limitation date effectively excludes all post-1900 developments in the common law, equity and statutes of general application. Whatever be the correct answer to this question, which incidentally has also troubled legal minds in other former British colonies,[33] it is important to note the impact of this controversy on the English common law applied by Cameroonian courts. There are judges and judgments in which post-1900 English cases and statutes have been rejected as authority on the grounds of the wording of section 11, while in others, they have been cited with approval as if this section had ceased to exist.[34] There are indeed powerful legal and pragmatic arguments to

32 See also section 29 *Magistrates' Court (Southern Cameroons) Law* 1955.

33 For detailed discussion of this controversy, see A Allot, *New Essays in African Law*, (Butterworths, London, 1970) pp 13-21; CM Fombad, 'The Scope for Uniform National Laws in Cameroon', 29 *Journal of Modern African Studies* (1991) pp 450-453; and A Park, note 3 above , at pp 14-42.

34 Fombad, note 33 above, pp 451-452.

support either interpretation, but alas, the fate of a litigant depends on the particular judge's subjective interpretation of section 11. The direct consequence of this is that the Cameroonian legislator has needlessly allowed an avoidable confusion to persist and render the actual scope of the English common law applied in Cameroon to remain uncertain and whimsical.

As regards the received French civil law, we have noted that French legislative policy left its scope equally unpredictable as this depended on its being rendered executory by a decree of the French Head of State. There is therefore no automatic application of French laws in Cameroon in the absence of local legislation as section 68 of the 1972 Constitution assumes.

Ambiguity and Lacunae in the Uniform National Laws

Problems have arisen when there is an ambiguity or obscurity or even *casus omissus* in the unified and harmonised laws. This raises a serious jurisprudential issue. Do these unified laws and codes have an individuality which makes them completely independent of the sources from which they are derived? Or, are they bound to their various sources with regard to their elucidation and development in the sense that provisions originally derived from the French civil law are to be elucidated by reference to the French Civil Code on which they are based?

The Cameroonian legislator in his harmonisation zeal has never anticipated such difficulties, yet there exist numerous instances of these. An example of a lacuna is found in section 77 of the unified law relating to freedom of mass communication 1990,[35] which is entirely based on an old French law of 29 July 1881. This provision provides for criminal prosecution for abuse and defamation to be commenced only after a formal complaint has been lodged by the victim. It is not clear from its wording whether it refers exclusively to abuse and defamation as defined in Articles 305 and 307 of the Penal Code or includes other forms of these offences contemplated elsewhere in the Penal Code. In *Affaire Ministere Public c. Celestin Monga et Puis Njawe*[36] the Douala Court of First Instance preferred the first interpretation. An examination of Article 47 of the 1881 French law on which it is based, when read along with the other provisions of the Cameroonian law, show that there was no clear intention on the legislator's part to ex-

35 Law No 90/52 of 19 December 1990.

36 Judgement de 18 Janvier 1991 TGI Douala (Unreported).

clude all other forms of abuse and defamation covered by the Penal Code since these are directly linked to press activities. Again, this French law is needed to interpret section 77(2) of the Cameroonian law and show that the list of persons whose complaint may form the basis of criminal proceedings was not intended to be comprehensive, but includes all other possible victims mentioned elsewhere in the law. While a Francophone judge may have no difficulties in curing such ambiguity or *casus omissus*, it may be unreasonable to expect an Anglophone judge to go into such research. Even where the latter can overcome the language barrier, it is most unlikely that he will be able to easily obtain the text of this or any other French law.

It is submitted that an Anglophone judge faced with such a problem, and where there is a risk of miscarriage of justice, may be justified in having recourse to principles of the received English common law and probably general principles of law provided there was no deliberate intention by the legislator to depart from the source from which the law is derived. Recourse to these divergent sources inevitably deprives the uniform laws of the cohesion and coherence they should possess.

Differences Resulting from Divergent Interpretation and Application of Uniform National Laws

Uniformity of laws need necessarily be guaranteed by their uniform interpretation and application. The only concrete step taken in this direction was the adoption of a unified court structure which followed hard-on-the-heels of the institution of the unitary state in 1972.[37] This was marked by a harmonised and decentralised court structure consisting of a Court of First Instance for each sub-division, a High Court for each division and a Court of Appeal for each province, and a single Supreme Court for the entire country. This in many ways neither reinforced the bi-jural system nor enhanced the much needed cohesion, coherence and consistency in the interpretation and application of the uniform national laws.

First, only the composition and jurisdiction of courts was unified, the Anglophone courts continue substantially to follow received English common law procedural rules while Francophone courts follow received French civil law procedural rules. For instance, in spite of the uniformly applicable Penal Code, the Francophone criminal proce-

37 See Ordinance no 72/4 of August 1972 on judicial organisation and its subsequent amendments.

dure is inquisitorial, while that in the Anglophone courts is accusatorial. There are many similar subtle but significant differences. Again, an appeal to the Francophone Court of Appeal is essentially by way of retrial, while that before an Anglophone Court of Appeal is mainly by way of re-hearing.

Second, there has been a 'provincialisation' of the law. As such, provincial courts are not necessarily bound by the decisions taken by superior courts in other provinces, and even the decisions of the single Supreme Court are only of persuasive authority, though, in practice, they are followed unless there are some special reasons justifying the contrary. This practice represents an indirect superimposition of the civil law system where traditionally, the judges regard case law as of secondary importance in the decision-making process. Yet case law constitutes the very basis of the English doctrine of binding precedent which is one of the most important sources of the English common law, and it is doubtful that it could have been displaced in this indirect manner. What may in effect have occurred is that the 'provincialisation' of law has inhibited the growth of a rich Cameroonian case law in the two Anglophone provinces with each following and adapting the received English law along its own provincial parameters.[38] Thus, the level of development and quality of the English common law in these two provinces is in danger of evolving along different lines.

The third and probably most serious impediment to the uniform law process can be attributed to the differences in rules of interpretation in the two legal districts. For example, the Penal Code contains some explanatory notes which in principle are devoid of legal force as a guide to interpretation. Nevertheless, the Anglophone and Francophone judge are wont to differ on the weight to be given to them. Generally, to the Francophone judge accustomed to finding the law in codes, the true intent of the legislator will be discovered by recourse to the legislative history, academic writings, opinion of eminent jurists and even reasoning by analogy.[39] He is not inhibited by any fixed rules of interpretation nor is any relevant material outside his purview. These methods are alien to the Anglophone judge who cannot rely on any of these sources to discover the meaning or pur-

38 'The paradox is that one of the basic requisites for the operation of the doctrine of precedent, an efficient and prompt system of law reporting, is completely unknown in Cameroon.

39 See L Scarman, 'Law Reform - the New Pattern', in Lord Lloyd of Hampstead (ed), *Introduction to Jurisprudence*, (Steven & Sons, London, 1972) pp 842-844.

pose of obscurely worded enactments. While it would seem that he may sometimes seek guidance from the explanatory notes in the Penal Code, he does not do so with as much freedom as the Francophone judge. It is therefore not inconceivable that the same provision in a unified law can be interpreted and applied differently in the two legal districts. In this way, the legal certainty and consistency that many assumed will easily result from the enactment of uniform laws and codes is far from being absolute.

Uncertainty Caused by Poor Legal Draftsmanship

Another baffling aspect of the Cameroonian legal conundrum is the almost scandalous distortions and confusion caused by the sloppy formulation and shoddy translation of English versions of laws. It is as much due to the negligible input of common law principles as it is to the problems inherent in Cameroonian bilingualism. It must be remembered that the life of the law and its certainty and predictability is predicated upon its clarity.

The only legislation which can escape this criticism for reasons alluded to earlier, is the Penal Code where the draftsmen were reasonably successful in translating several legal notions either unknown or with no exact equivalents in one of the two official languages into the other language. Since then, most English versions of Cameroonian legislation, whether codes, laws or other subsidiary legislation are replete with approximate, shoddy and bizarre formulations which betray a failure to adequately involve common law jurists in the process. As examples are legion, a few illustrations selected at random will suffice.

In the 1990 law relating to freedom of mass communication, section 17 which authorises the seizure or banning of press organs states in subsection 2 of the French text.

> La decision de saisie ou d'interdiction est susceptible de recours. Dans ce cas, le directeur de publication saisit le juge competent en refere d'heure a heure ou suivant les dispositions legales anologues en vigueur dans les provinces du Nord Ouest et du Sud Ouest.

The official English version of this reads:

> The seizure or banning order may be appealed against. In such case, the publisher shall refer the matter to the competent judge sitting in chambers hour by hour or following similar legal provisions in force in the North West and South West provinces.

There are two glaring absurdities here. First, the phrase 'the competent judge sitting in chamber hour by hour', is a meaningless literary mis-translation of the civil law technical concept of 'le juge compe-

tent en refere d'heure a heure'. Second, the vacuous phrase 'following similar legal provisions in force in the North West and South West provinces' is evidence of a reckless dereliction of duty. Given that the phrase 'the competent judge sitting in chamber hour by hour' is vacuous, each Anglophone judge has been given legislative fiat to subjectively decide what the legislator quite clearly was incapable of doing, that is determine the analogous common law principles. The inescapable explanation for this anomaly is that no common law jurist was sufficiently associated with the drafting of this law, otherwise it would have been obvious that the equivalent to 'le juge en refere d'heure a heure' is 'interlocutory applications and applications in chambers'.

Even the mother of all laws, the Constitution has not escaped. In Article 47(1) 'le Conseil Constitutionnel statue souverainement sur ...', in the English version reads: 'The Constitutional Council shall give a final ruling on...' The phrase 'final ruling' is equivocal, and may indicate either the absence of any appeals or the absence of further appeals on the assumption in the latter case that the Council was acting in the last resort. A careful examination of this and other provisions shows that what it intended to state is that the Council has exclusive jurisdiction over the matters listed in that Article. Later, Article 50(2) states, 'une decision declaree unconstitutionelle ne peut etre ni promulguee ni mise en application', which in the English version becomes 'a provision that has been declared unconstitutional may not be enacted or implemented'. The use of the permissive 'may' neither accurately translates the French text nor does it appear to reflect the framer's intentions, since it renders optional, compliance with a decision declaring a proposed or enacted law unconstitutional.

One last example of this phenomenon must be drawn from another clumsily drafted law, the 1981 Ordinance unifying certain aspects of family law. Section 49(g) states that 'the marriage certificate shall specify ... where applicable, the mention of the existence of a marriage contract: co-ownership or separation of property'. Meanwhile, section 49(h) permits the parties to mention the type of marriage chosen, polygamy or monogamy. This section is clear and unambiguous, but a reading of the French text shows that the same question is posed twice. Section 49(g) of the French text reads, '...eventuellement la mention de l'existence d'un contrat du marriage, communaute ou separation des biens' while section 49(h) states 'la mention du regimematrimonial choisi; polygamie ou monogamie'. The second paragraph is a repetition of the first since 'regime matrimonial' refers to property rights which is already found in the first paragraph. The real confusion however, results from the fact that section 49(h) requires

the spouses-to-be to mention in their marriage certificate whether they opt for co-ownership or separation of property. Property rights are however governed by the received laws which in the Anglophone provinces are subject to the fundamental principle that English law knows no community of property.[40] The unhappy wording of these provisions makes it uncertain whether the Cameroonian legislator intended to alter the received English law principles on this point by requiring that the exact form of property rights be specified or this is just one of the numerous drafting flaws.

Be that as it may, in Cameroon's faltering bilingual experiment, a jargon, 'franglais' has been developed to express the common intrusion of French words and phrases into the English spoken language.[41] This poses a serious threat to the quality of English spoken language and as we have just seen, is steadily adulterating and undermining the inherited common law culture. One of the early constitutions of the re-unified Cameroon,[42] while providing that it be published in English and French declared the French text alone as being authentic for purposes of interpretation. In other words, an official publication in an official language produces a document which is deemed unauthentic in that official language for purposes of interpreting the very same document.[43] This absurdity may have been cured, but today the dubious wording of most English texts of official documents renders them difficult, or sometimes even impossible to understand without relying on the French texts. What seems clear is that most of this confusion and uncertainty has resulted from the consistent failure to fully involve common law jurists in the legal unification process.

Lessons and Future Prospects

The Legal Imbroglio in the Minority Context

It would have been obvious from the preceding analysis that the Cameroonian judicial dilemma is only part of a broader sensitive mi-

40 In general, see E Ngwafor, *Family law in Anglophone Cameroon*, (University of Regina Press, Saskatchewan, 1993) pp 177-180.

41 It is mostly the English language that has been corrupted through the intrusion of French words since most official documents and television and radio broadcasts are in French.

42 The Constitution of 1 October 1961

43 N Susungi, note 7 above, p 158.

nority issue, usually referred to as the 'Anglophone problem'.[44] Present and past politicians, especially those of Anglophone origin who have made headway in the system, maintain that either the problem does not exist or its dimensions have been exaggerated. It is not our intention to enter this polemical debate. Nevertheless, we can conclude from our findings that there does exist a deep mistrust of the Anglophone legal heritage and many Cameroonian civil law jurists and judges will be glad to see it disappear. The question is whether Cameroonians are prepared to wallow in legal anarchy out of sheer ethnocentrism?

Some lessons can be learned from the Canadian experience. The reassertion of the rights of French-speaking Quebec throughout the 1970s and 1980s is well known. In 1987, Quebec agreed to sign the 1982 Canadian Constitution under the terms of the Meech Lake Agreement which included an amendment to the Constitution recognising, inter alia, 'that Quebec constitutes within Canada a distinct society'.[45] It also recognised 'that the existence of French-speaking Canadians ... and English speaking Canadians ... constitute a fundamental characteristic of Canada'.[46] Under it, at least three of the nine justices of the Canadian Supreme Court are to be appointed from the civil, as opposed to the common law bar. [47]

There is generally a fear on the part of all countries that the recognition of minority rights may encourage fragmentation or separatism and undermine national unity and the requirements of national development. It is, however, submitted that there is more danger in refusing to recognise and protect minority rights and interests through effective and meaningful pluralism. In Cameroon, nothing could be more harmful to national unity and integration than laws which are perceived by one segment of the community as imposed. This may fuel the ugly flames of secession by extremists who feel that it is only in a separate state that they can ensure for themselves and their offspring, the way of life and system of justice which they cherish.

44 According to a 1987 official census, the Anglophones constitute more than 20% of the total population of Cameroon. See Demo 87 Cameroun/Fnuap, SOPECAM, Yaounde (1990).

45 Section 2(1)(b) *Constitutional Amendment Act* 1987.

46 Ibid.

47 See, in general, H Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*, (University of Pennsylvania Press, Philadelphia, 1996) pp 53-68.

The problem of how the majority Francophones and minority Anglophones can live in harmony and still retain their distinctive cultural identities is a complex one. What is called 'union' in a body politic, Montesquieu instructively wrote about the Roman Republic, is a very equivocal thing. The true kind, he rightly asserted, is a union of harmony, whereby all the parts, however opposed they may appear, cooperate for the general good of society—as dissonances in music cooperate in the producing of overall concord.[48] From many perspectives, the Anglophone Cameroonian has had a hard time being an Anglophone and a Cameroonian. It need not be so.

Conclusions and Future Prospects

Although the law should naturally reflect the ideals and orientation of the law-maker, it will fail if it appears to impose some abstract and alien justice that takes no account of the culture, traditions, fears and aspirations of those on whom it has to be administered. The on-going process of developing a typically Cameroonian legal system comes close to attempting to make a silk purse out of a sow's ear.

With no overall policy and structures to guarantee genuine harmonisation, consistency in formulation, style, content and presentation, and the overwhelming predominance of civil law over common law principles, the general picture is one of a poorly disguised one-sided invasion and assimilation. The resulting legal discordance and irrationality is one for which the Cameroonian legislator and jurists must accept full responsibility. Political expediency and parochialism rather than the dictates of a sound system of justice properly adjusted to reflect Cameroon's realities have been allowed to prevail. What now prevails is 'political' or 'administrative' justice and not justice according to the law. The inconveniences and absurdity of this situation has until now been concealed by the numbing effect of the long years of dictatorship during which everything was dictated by the President of the Republic and his party. The advent of democracy is expected to open up new vistas that can yield dividend only if there is a fundamental change in attitude—a willingness to objectively examine and consider all the available alternatives.

By and large, much as it is desirable and convenient that all Cameroonians should live and be subjected to the same laws, it must now be

48 Baron de Montesquieu, *Considerations on the Causes of the Greatness of the Romans and their Decline*, (translation by David Lowenthal, Cornell University Press, Ithaca, 1965) pp 93-94.

recognised and accepted that this goal is practically too idealistic and unobtainable. The imposition of a unitary system of government in 1972 as a measure of political brinkmanship did not necessarily render the ultimate unification and harmonisation of all laws logically or politically imperative, nor is the continuous operations of the bi-jural system incompatible with this. The plurality of laws within a single state is no longer regarded with quite the same abhorrence that was common many decades ago. Since the unification of England and Scotland in the seventeenth century, there exists one Crown, one legislative body and one court of final appellate jurisdiction, yet the Scottish Civil law and the English common law continue to develop and flourish as separate and distinct laws.

There is bound to be an inherent tension in any society that seeks to combine two such divergent legal systems as the English common law and the French civil law. The normal instinct to precipitously reject one in favour of the other must be resisted. There should be uniformity where you can have it, diversity where you must have it, but in all cases, the dictates of justice, fairness and certainty should be paramount. As Tom Paine said so many centuries ago, 'the more simple anything is, the less liable it is to be disordered, and the easier repaired when disordered'.[49]

The Cameroonian situation, with its numerous tribes and persistent ethnic loyalties, and the sharp differences in outlook between Anglophones and Francophones, is sufficiently complex. The future depends on how our laws and the legal system in general can be made to operate more efficiently and protect the rights of those segments of society which rightly or wrongly feel inadequately represented in the decision-making process. Future legal reforms must go through at least three stages. First, a comprehensive recording of all the applicable legislation. Second, a critical assessment of their relevance and operations. Third, a comprehensive policy outline for future legislation, taking into account all the past and future trends. Certain principles vital for the rule of law in any civilised democratic pluralistic society such as the Cameroons must be enshrined in the Constitution. The starting point must be the recognition and protection of the bi-jural legal system and the guaranteeing of liberty, equality, and broad participation in the law-making process. In the present Cameroonian context, a judicial system built on solid legal pluralism which reflects and takes account of our diversity is more viable than blindly

49 T Paine, 'Common Sense', in P Foner (ed), *The Complete Writings of Thomas Paine*, (vol 1, Citadel Press, New York, 1945) p 6.

pursing an elusive political doctrine of national unity and integration, which is verbally progressive, but pragmatically vacuous.